



KTL.NO.143/2017

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 77 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT ZIPPOR NZILU MULINGE.....ACUSED

R U L I N G

1. The Applicant herein sought to be released on bail pending trial. The application was opposed by the State. This court considered the application and reached a finding that there was a likelihood of the Accused interfering with witnesses who are close relatives of both the Deceased and the Accused before their testimony is recorded by the court. In the result the application was rejected at that stage.

2. Thereafter Counsel for the Accused sought review of bail basing the oral application on the same grounds relied upon in the application. He stated that he was in possession of a statement made by the son of the Deceased and one **Rodgers**, a taxi driver which clearly showed that neither the Accused nor a person akin/related to him ever made threats either physically or through formal writing or telephone to the witnesses. Therefore reasons raised by the State could not pass the test under **Article 49(1)(h)** of the **Constitution**.

3. The State reiterated what was stated in the affidavit deponed by **Inspector Omar** and added that the two (2) key witnesses would be interfered with.

4. I have perused authorities cited by the Applicant and the argument raised by his Counsel.

5. I do reiterate the fact that in my earlier ruling I did appreciate the provisions of **Article 49(1)(h)** of the **Constitution**, which provides thus:

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

I do recognize the full worth of the provision and its implications. Murder as an offence is bailable, a person accused of such an offence is entitled to bail unless there are reasons that tend to compel the court to order his continued incarceration. The decision of the **Supreme Court of Nigeria Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria SC 20A/2006** was considered in the case of **Republic vs. Danson Mgonya and another MSA HCCR.C NO. 26 of 2008** that was cited by the Applicant. The essential criteria on granting of bail pending trial of an Accused was stated by **Justice Ibrahim Tanko Muhammed J**, (as he then was). He held thus:

“.....the criteria include among others, the following:-

- (i) The nature of the charges.*
- (ii) The strength of the evidence which supports the charge.*
- (iii) The gravity of the punishment in the event of conviction.*
- (iv) The previous criminal record of the accused if any.*
- (v) The probability that the accused may not surrender himself for trial.*

- (vi) *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.*
- (vii) *The likelihood of further charges being brought against the accused.*
- (viii) *The probability of guilty.*
- (ix) *Detention for the protection of the accused.*
- (x) *The necessity to procure medical or social report pending final disposal of the case.*

6. In the affidavit sworn by **I P Omar** he averred that:

“(3).....Applicant/Accused is charged with murder in HCCR No. 77 of 2015 whereby the deceased was the Applicant/Accused person’s wife and could further interfere with other family members specifically, Erick Ilako Wambua, Florian Syombai Mwanzia who are his son and sister respectively and witnesses in the aforementioned matter.

(4) That further the Accused person has also issued threats to one Rodgers Ndulu Nduva who are intended witnesses in HCCR No. 77 of 2015.”

7. The allegation that the Applicant has threatened **Rodgers Nduva** was not supported by any evidence therefore would not justify the Applicant’s continued incarceration (**Also see the cases cited: Republic vs. Charles Ndambuki Nthiwa Machakos HCCRC No. 46 of 2013; Republic vs. Jacob Ngucia Mwenda Machakos HCCRC No. 18/2013**).

8. However, there is an important consideration that cannot be overlooked. Even before the defence were furnished with witness statements, the Accused was aware of witnesses who are lined up to testify. Amongst them are key witnesses, his son and sister respectively. Prior to the stated witnesses testifying there is a possibility of the Accused interfering with them if released to go back to the same abode that they reside. He may take steps to ensure their evidence is prevented from being adduced at trial.

9. In the result I find that reason to be compelling enough to warrant the Applicant being incarcerated until they testify in court. Consequently I reject the application for Review at this point in time.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of January, 2017.

L. N. MUTENDE

JUDGE