



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCR.C. NO. 4 OF 2016

REPUBLIC APPLICANT

-VERSUS—

PAUL NDUNGU WAHOMEACCUSED

RULING

1. **PAUL NdunguWahome** is facing before this court a charge for murder **Contrary to Section 203** as read with **Section 204** of the Penal Code, Cap 63. He pleaded not guilty.He is awaiting trial.
2. It is alleged that the alleged murder occurred at Wangwaci areas in Sipili Location within Laikipia County.
3. Learned Counsel Mr. Bwonwonga, for the accused in support of the application for bail pending trial submitted that accused was not a flight risk because it was he who presented himself to the police when he was arrested. Further that his mother and brother are willing to stand surety for him.
4. The Probation Officer's bail assessment report stated that accused is a permanent resident of Wangawaci village. He is married and is a father of four children who ages range between 3 to 14 years old.
5. Whereas, according to that report, accused family is willing to receive him back, the family of deceased and the community were said to be bitter towards accused in view of the criminal charges he now faces.
6. The probation officer, by that report recommended the release of accused on bail should be on condition that accused should be re-locate from Wangwaci village because of the community's sentiments.
7. The investigating officer of the case swore an affidavit opposing accused's released on bail and gave the following reasons.

a. The accused is highly likely to interfere with prosecution's witnesses because he resides in the same area as the witnesses;

b. accused is believed to belong to the unlawfully gang (sect)called Mungiki;

c. the community at Wangwaci village may harm the accused;

d. the accused committed the offence jointly with others before court and if he is released would he likely interfere with witnesses; and

e. if the accused is released on bail he would interfere with the land dispute he had with the deceased.

8. Learned Counsel for the accused in response to those depositions in the investigating officer's affidavit responded by saying that what was stated by that officer were wild allegations. He was also critical of that affidavit for failing to give sufficient material information of why the accused should be denied bail

ANALYSIS AND DETERMINATION

9. The Constitution, Article 49(1)(h) provides an arrested person shall ***“be release on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”***

10. The purpose for which bail is granted pending trial is to avoid inflicting punishment to those who are innocent and who, after trial, may be acquitted. That principle was captured in a Botswana case **MOGOTSI and another V THE STATE 1990 BLR 142 (HC)** where it was stated:

“The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons, in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongfully accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.”

11. The Constitution, under Article 49 (1) (h) provides that an arrested person should only be denied bond or bail if there are compelling reasons. The Oxford advance Learners dictionary, 7th edition defines the word ***“compelling”*** as something so strong that you must do something about it.

12. The investigating officer, by his affidavit, gave various reasons why this court should not release the accused on bond or bail. Do those grounds show compelling reasons why the accused should be denied bond or bail?

13. The investigating officer simply stated that the accused was highly likely to interfere with the prosecutions witnesses. There was no basis laid for the officer holding that point of view

14. The investigating officer also stated that accused belongs to an unlawful gang. Again there was no basis laid why the officer made that allegation.

15. I got the impression that the investigating officer copied the reasons he advanced in his affidavit, why accused should not be released on bail, from another affidavit. There is no material to support the reasons he gave. I got that impression from the statement he made because they did not fit the case before court. He stated that accused is charged with others before court with whom he could interfere with prosecution's witnesses. The fact, however, is inaccurate since the accused is solely charged in this case with a charge of murder.

16. It is because of that inconsistency I am unable to entertain the investigating officer's objection.

17. Further in my view, looking at the totality of the objections raised by the investigating officer why the accused should be denied bail they do not meet the Constitutional standard. That being so

there is no reason to deny the accused bail, subject to the caution raised by the Probation Officer that the Wangwaci villagers are not, at present, willing to receive the accused back.

18. Bearing the above in mind I grant the following orders:

- a. PAUL NDUNGUWAHOME shall be released on cash bail of Ksh. 500,000/= and two sureties of similar amount.

- b. It shall be a condition of his release that he shall not, without the leave of the court, during the pendency of this trial, reside or visit Wangwaci village.

Dated and Delivered at Nanyuki this 14th April, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state

For Appellant

Appellant

COURT

Ruling delivered in open court

MARY KASANGO

JUDGE