

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 28 OF 2012

CHARLES MBATHA NTHIWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on the 17th August 2012 in Kituluni Sub-location, Mbuvo Location, Kathonzwani District within Makeni County, he murdered Annah Mutindi Kimathi. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of a Notice of Motion dated 8th April 2016 seeking to be admitted to bond/bail pending trial.

The Applicant urged his grounds for the application in the said Notice of Motion, and a supporting affidavit he swore on 8th April 2016. The grounds are that there are no compelling reasons not to release him on bond, and that he is presumed innocent until proven guilty. Further, that he is the sole bread winner of his family which has continued to suffer since his arrest in 2012, and he undertook to abide with the terms and conditions set by the Court. The learned counsel for the Applicant, Ms. Nyaata submitted that she would rely on the pleadings filed by the Applicant.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 11th May 2016 by PC Joshua Wambua, currently attached to Kavumbu Police Post, and one of the investigating officers in this criminal case. The deponent stated that if the Applicant is released he may target the witnesses, since some of the witnesses are his relatives and there is the likelihood that he may interfere with them. It was further argued by the prosecution that considering the severity of the sentence provided by law for the offence of murder, which is the death penalty, this may be an incentive for the Applicant to abscond and is thus a compelling reason to deny him bail. The learned Prosecution counsel, Ms. Rita Rono, relied on the said replying affidavit, and a bundle of witness statements that she availed to the Court and the Defence counsel.

Article 49 (1) (h) of the Constitution permits the release of any arrested person including persons charged with a capital offence on bail/bond pending trial, unless there are compelling reasons not to do so. The issue in this application therefore is whether there are compelling reasons why the Applicant should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons.

In **Republic –vs- Danson Ngunya & Another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

I am of the opinion after perusing the witnesses statements that the arguments presented by the Prosecution merit consideration. I note in this regard that four of the witnesses namely Kimanthi Nthiwa, Esther Mutete Nthiwa, Veronica Mwangeli Nthiwa and Josephine Wavinya Mathuva are the Applicant's close relatives, and two of them are that Applicant's brother and wife. There is thus the possibility that the Applicant may interfere with the witnesses for reason of their familial proximity and physical and emotional closeness.

I therefore find that a compelling reason exists to deny the Applicant bail at this stage, and that it is in the interests of justice that the said witnesses first testify before the Applicant is considered for release on bail and/or bond. The said witnesses shall be called as the first set of prosecution witnesses, and the Applicant is thereafter at liberty renew his application for bail and/or bond.

The Applicant's Notice of Motion dated 8th April 2016 is accordingly denied for the foregoing reasons.

It is so ordered.

DATED AT MACHAKOS THIS 11TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE