



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE NO. 73 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN KILONZO KULUNZU.....1ST ACCUSED

ANNE MUENI MUTEMI.....2ND ACCUSED

GEOFFREY MUTUKU MBUTA.....3RD ACCUSED

RULING

The three Accused persons in this criminal case were charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on the night of the 5th and 6th day of October 2014 at Kima village within Mashuru Sub-County within Kajiado County, jointly with others not before the Court, they murdered Pauline Mwendu Kithome. The Accused persons pleaded not guilty to the offence. The 2nd and 3rd Persons have now filed two applications that are before this Court for determination, which applications are the second by the said Accused persons for review of this Court's rulings denying them bond/bail.

The 2nd Accused person in her application by way of a Notice of Motion dated 27th April 2016 is seeking orders that the court exercises its judicial discretion to review its earlier orders refusing to release her on bail/bond upon reasonable terms, as no steps have been taken by the prosecution to avail witnesses related to the 2nd Accused on the hearing date or any other day since 17th March 2015.

It was also contended that the statements of the witnesses for the prosecution comprising Faith Kaluki Kithome, Eric Mwaka Ngei, James Sila Kinyili, Nicholus Mutemi Ikio (the 2nd Accused's husband), and Ibrahim Alio which were supplied to her by the office of the Director of Public Prosecutions Machakos, show that none of the witnesses were related to the 2nd Accused person save the husband. Further, that the witnesses said to be threatened have not recorded any statements or sworn any affidavit over the same.

The 2nd Accused filed an affidavit in support of her application which she swore on 27th April 2016 wherein she averred that she was not a flight risk if granted bail/bond pending hearing and determination of the case, and that the prosecution had failed to avail the witnesses who had purportedly been threatened.

The application by the 3rd Accused person is a Notice of Motion dated 14th March 2016 wherein he is seeking orders that:

1. This court reviews, relooks and reconsiders the ruling dated 17th March 2015
2. Upon granting the aforementioned prayer the Court releases the 3rd Accused Person on reasonable bond pending hearing and determination of the suit.

The 3rd Accused averred in a supporting affidavit he swore on 14th March 2016 that on 19th December 2014, he filed an application dated 18th December 2014 requesting the court to release him on bond pending trial. The said application was determined and a ruling delivered on 17th March 2015 where the application was declined, but the state was directed to avail all witnesses related to the accused on the hearing on 2.6.2015 and the application was to be reconsidered. However, that on the said 2.6.2015 the state did not avail any witness and he filed another application for his bond to be reconsidered. The state opposed the said application alleging that the court pronounced itself in its ruling on 17th March 2015, that for the sake of the safety of witnesses the evidence was to be taken prior to reconsidering the application for bond.

It was further averred that this Court in a ruling on 13th October 2015 held that in the interest of justice it would hear some of the key witnesses before reconsidering the application, and that the prosecution had failed to present its witnesses in court because a report had not been received from the Government chemist and his application had been declined. Further, on 3rd November 2015 key witnesses did not attend court during hearing and the report of the Government chemist was also not availed.

The 3rd Accused person claimed that the State was maliciously making sure he remained in custody, and that he has a young family and aged parents who depended on him. Further, that he was a respected member of the society and would abide by the bond terms that would be fixed by court and attend court.

The Prosecution responded to the 2nd and 3rd Accused persons' applications by a replying affidavit by Cpl Titus Munialo, the investigating officer in this case, dated 23rd May 2016. He relied on the averments made by PC Morris Muli in an earlier affidavit filed on 19th June 2015. The deponent noted that the court had already pronounced itself in the ruling of 17th March 2015 which was reaffirmed by the ruling on 13th October 2015, that for the sake of the safety of prosecution witnesses, their evidence to be taken prior to reconsidering the application for bond.

Further, that the prosecution witnesses were related and/or well known to the suspects especially since the defence had already been supplied with witness statements and are aware who will be testifying against them, hence the high chances of interference. In addition, that there were criminal records showing that the applicants were habitual offenders and their release may be detrimental to the case in that they may interfere with the witnesses.

In the meantime the deponent averred that they were pursuing two more suspects who were at large, hence the likelihood that they may be prejudiced if either of the accused persons is released. Finally, they requested that the matter be transferred to Kajiado High Court in the county where the crime was committed. They prayed that the court decline granting the prayers sought in the application.

The respective arguments in the forgoing were reiterated by Mr. Konya, the learned counsel for the 2nd Accused; Mr. Kimeu, the learned counsel for the 3rd Accused; and Ms Rono, the learned prosecution counsel; in oral submissions they made during the hearing of the applications on 24th May 2016.

I have considered the pleadings and arguments made by the parties. The issue in this application is whether there are any reasons to merit a review of the rulings delivered by Mutende J. on 17th March 2015 and 13th October 2015 as the release of the 2nd and 3rd Accused persons on bail/bond.

It is a cardinal principle of criminal law that an accused person is presumed innocent until found guilty. In Kenya, this principle has been elevated to a constitutional right in Article 50(2)(a) that provides that every accused person has a right to a fair trial which included the right to be presumed innocent until the

contrary is proved. It is for this reason that one of the rights of an accused person in Article 49 (1) (h) of the Constitution is the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. 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 have perused the ruling by J. Mutende J delivered on 17th March 2015 wherein she declined to grant the 2nd and 3rd Accused persons bail for reasons of the safety of the witnesses, particularly Nicholas Mutemi, who is husband to the 2nd Accused person, and directed the state to provide all witnesses at the hearing date on 2nd June 2015. In the ruling dated 13th October 2015, the learned Judge while noting that the state had failed to produce its witnesses, found that the reason given that a report had not been received from the Government Chemist was acceptable, and dismissed the Accused persons' application for review of the earlier ruling.

I have also perused the witness statements on the Court record, and it is noted, and admitted by the 2nd Accused that one of the accused persons is indeed her husband. However, no familial or geographical proximity between the 2nd Accused and the other witnesses has been demonstrated, and no relationship between the 3rd Accused and all the witnesses has been shown.

The possibility that the 2nd Accused may interfere with her husband who is a witness is real, and has been recognized by this Court in its previous rulings. However, no reasons have been given by the Prosecution in its response to the instant applications as to why it has not produced the 2nd Accused's husband to give evidence as ordered by his Court, for over one year down the line after the first ruling on the applications for bond /bail was delivered herein on 17th March 2015. This is not only an infringement of the Accused persons' constitutional rights enunciated in the foregoing, but is also in total disregard of the orders given by this Court.

The prosecution can therefore no longer rely on the safety of witnesses as a compelling reason, as they have failed to comply with the orders of this Court as to the timely production of the said witnesses to give evidence, that were given in deference to this reason while also trying to balance the rights of the Accused persons. In any event there now exists a law and mechanisms for the protection of witnesses which the Prosecution can apply and utilize if they are apprehensive that any of the witnesses are threatened or at risk.

I therefore find that it is in the interests of justice that the 2nd and 3rd Accused persons be released on bail and/or bond. The 2nd and 3rd Accused persons Notices of Motion dated 27th April 2016 and 14th March 2016 respectively are accordingly allowed, and the rulings delivered herein on 17th March 2015 and 17th October 2015 by Mutende J. are reviewed to the extent of the following orders:

1. The 2nd and 3rd Accused Persons shall each execute a bond of Kshs. 500,000/= with two sureties of similar sum.
2. The sureties for the 2nd and 3rd Accused Persons will be approved by the Deputy Registrar of this Court.
3. The 2nd and 3rd Accused Persons will attend mentions before the Deputy Registrar of the High Court where their criminal case shall be heard, once every month until the case is heard and determined.
4. The 2nd and 3rd Accused Persons shall be required to attend court for the remainder of the trial without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

It is so ordered.

DATED AT MACHAKOS THIS 19TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE