



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 19 OF 2016**

**SHADRACK KYALO NDAMBUKI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant is the Accused Person herein and was charged with murder jointly with two other accused persons contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on the night of 8<sup>th</sup> and 9<sup>th</sup> April 2016 at Munathi village, Kituluni sub-location of Kathonzweni Sub-County in Makueni County, jointly with others not before the Court murdered Mutinda Ndambuki. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of a Notice of Motion filed in Court on 22<sup>nd</sup> June 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 in a supporting affidavit filed in Court on 22<sup>nd</sup> June 2016. The grounds are that the Applicant has young family and is the sole breadwinner for his family. Furthermore that he has a permanent place of abode at Kathonzweni and is therefore not a flight risk. The Applicant also averred that he is a law abiding citizen with good antecedents and high moral standing, and undertook to abide with the terms and conditions set by the Court. He also stated that he is ready and willing to provide security.

The learned counsel for the Applicant, Muthama T. Advocate, filed written submissions on the application dated 21<sup>st</sup> July 2016, wherein reliance was placed on Article 49(1)(h) of the Constitution for the right to bail/bond and on the decisions in **R vs William Mwangi wa Mwangi, (2014) e KLR** and **R. vs Gerald Mutuku Nyalita & Another, (2015) e KLR**, for the position that the prosecution had failed to discharge its onus of demonstrating that there are compelling reasons to deny the Applicant bail, and in particular that the Applicant will interfere with the witnesses.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 20<sup>th</sup> July 2016 by PC Lucy Ashikhongo, the investigating officer in this criminal case. The deponent stated that the Applicant is accused of murdering his brother, and if released on bail he may target key witnesses who are his relatives, namely Benard Muema who is his nephew, and David Ndambuki Nzioki who is his father, who were both at the scene of the crime. Further, 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. The learned Prosecution counsel, Ms. Rita Rono relied on the said replying affidavit and witnesses statements.

I have considered the pleadings and arguments made by the Applicant and Prosecution. The applicable law on bail/bond pending trial is Article 49 (1) (h) of the Constitution, which 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 availed to the Court that the arguments presented by the Prosecution merit consideration. It is not disputed that some of the key witnesses include the Applicant's father, mother and nephew. There is thus the possibility that the Applicant may interfere with these witnesses for reason of their familial proximity, and physical and emotional closeness with the Applicant.

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 witness 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 22<sup>nd</sup> June 2016 is accordingly denied for the foregoing reasons.

It is so ordered.

**DATED AT MACHAKOS THIS 1<sup>ST</sup> SEPTEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**