



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 31 OF 2012

REPUBLICPROSECUTOR

VERSUS

JAMOCK KAMKYA MBUVI.....1ST APPLICANT

FRANCIS NZIOKA PETER.....2ND APPLICANT

RULING

1. The applicants, **Jamock Kamkya Mbuvi and Francis Nzioka Peter** were arraigned before this court on a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap. 63) Laws of Kenya.

The Applicant pleaded not guilty.

2. The applicants have applied for bail pending the determination of case. The applicants undertake to abide by the terms of bail and not to interfere with witnesses.
3. The application is opposed. It is stated in the replying affidavit that the applicants and the prosecution witnesses hail from the same location in Makueni District. The prosecution is apprehensive that the applicants who are aware of the evidence against them and the weight of the same are likely to interfere with the witnesses and pose a security threat to them. That the seriousness of the offence and the severity of the sentence it attracts will be an incentive for the applicants to abscond. It is further deponed that the 2nd applicant Francis Nzioka Peter was on the run following the commission of the offence and was arrested a year later.
4. I have considered the application, the reply to the same and the pre-bail report by the probation office. The said reports are favourable.
5. **Under Article 49 (1) of the Constitution** provides as follows:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending the charge or trial unless there are compelling reasons not to be released.”

6. However, the court has discretion to grant or refuse bail depending on the circumstances of each case. The court is required to take into consideration settled principles of the law when determining whether or not to grant bail pending the hearing of a criminal case or pending the hearing of an appeal. The principles to be considered by this court in determining whether or not to grant bail were set out in **Mwaura v Republic (1986) KLR 600**. The said principles include the following; the nature of the offence, the strength of the evidence, the character or behavior of an accused and the seriousness of the punishment to be meted if the accused is found guilty. The primary underlying consideration is whether the accused will turn up at the appointed place and

time for his trial. The court further held that in the exercise of its discretion, if certain exceptional circumstances personal to the accused exist which when weighed against the risk of the accused absconding, the balance will tilt in favour of granting bail. Another factor that the court will consider is whether the accused will interfere with witnesses if he is released on bond.

7. The State has not given any compelling reasons why the Applicants should not be released on bond. Compelling reasons should not be a matter of conjecture, guesswork or speculation. Being supplied with statements of prosecution witnesses is a matter of right guaranteed by the Constitution under Article 50(2)(j). The provision for death sentence cannot be used against the Applicants as that would negate the Constitutional guarantee for bail in capital offences.
8. There are no reasons given in support of the assertion that the Applicants are likely to interfere with witnesses e.g. have the Applicants threatened or accosted any witness or tried to dissuade or compromise any witness against testifying? There is no such evidence.
9. On the issue that the 2nd applicant was on the run following the commission of the offence, there are no details given in the replying affidavit in regard to where the Investigating Officer looked for the 2nd applicant, where the 2nd Applicant was arrested from *etc.*

10. With the foregoing, I allow the application on condition that the Applicants should not either directly or indirectly contact any of the prosecution's witnesses. Each Applicant may be released on a **Kshs. 1 Million** personal bond with one surety of a like sum.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 12th day of May 2015

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B. THURANIRA JADEN

JUDGE