



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO.28 OF 2014

REPUBLIC.....PROSECUTOR

VS

MARK MUNGATHIA.....1ST ACCUSED

DAVID MAKENDA MURIIRA.....2ND ACCUSED

RULING

By a Notice of Motion Application dated 6th March 2015, the accused persons have sought to be admitted to bail pending the hearing and determination of this suit. This is the second application in respect to accused 1.

The gist of the application is that the accused persons are currently in remand awaiting trial for murder; that they have a Constitutional right to bail and are presumed innocent till proved guilty. It was also contended in an affidavit deposed by the 1st accused that the accused persons have a fixed abode within Mbaraga Sub-location, Tigania East District within Meru County; that they will abide by any bond terms given by the court and maintain peace in their society and if need be, report to the local police station regularly. He further deposed that the reason why he was not arrested is not because he had gone into hiding but because the community elders were negotiating with the deceased's family.

When the application came up for hearing on 18th March 2015, Ms. Thibaru Learned Counsel for the accused persons reiterated the contents of the affidavit sworn by the 1st accused on 6th March 2015. Mr. Mungai Learned State Counsel did not seem to oppose the application. He however urged the court to note that this was a second application for bail and urged the court to consider the seriousness of the offence and that if the court is inclined to admit the accused persons to bail/bond, an order be made for the accused persons to be reporting regularly to the nearest police station.

This court is aware that this a second application where the 1st accused is seeking to be admitted to bail pending trial the 1st one having been rejected by Lesiit J on 2nd October 2014. Among the reasons why that application was rejected was that the 1st accused had escaped from the scene and had left the area in order to avoid arrest soon after the incident. Consequently, the Learned Judge came to the conclusion that the likelihood of the 1st accused failing to turn up for his trial could not be ruled out and found this to be a compelling reason to decline bail.

Before the court considered this instant application, the court called for pre bail reports in respect of the

accused persons. According to the reports filed in court on 12th September 2014, with respect to the 1st accused, the local community was not opposed to the 1st accused being released on bond but the family members of the deceased were on the other hand totally against the release of the 1st accused until the matter was finalized. It was also observed that 1st accused was arrested in April 2014, whereas the offence had been committed in July 2013. This was eight months down the line since the offence was committed. However no explanation was given for the delay in arresting the 1st accused.

With regard to the 2nd accused, similar sentiments were expressed by the probation officers report. However no mention was made of his arrest.

In an application for bond, the court has to consider the following principles:

1. Whether the accused will turn up for his trial and this is the primary consideration;
2. Whether the accused will interfere with witnesses;
3. The character and antecedents of accused;
4. The severity of the sentence;
5. There may be other considerations depending on the special circumstances of each case. see **Ng'ang'a vs. Republic 1985 KLR 451**

Even though an arrested person has a Constitutional right to bail/bond pursuant to Article 49 (1) (h) of the Constitution, the said right is not absolute since the same provision states that an arrested person shall not be released if there are compelling reasons to deny him bond. The Constitution does not define what compelling reasons are, and each case would depend on its own circumstances taking into account the general principles considered before grant of bond.

One of the primary considerations in deciding whether or not to admit an accused person to bail/bond is whether an accused person will turn up for his trial as was enunciated in the **Nga'nga case (supra)**.

In the instant case, it is not in dispute that the 1st accused person had sought to be admitted on bail/bond, which application was rejected. One of the reasons why the 1st accused person's application was rejected was because the court found him to be a flight risk having escaped from the scene of crime to evade arrest. Even though the 1st accused deposed in his supporting affidavit that the reason as to why he was not arrested was because the community elders were negotiating with the deceased's family, this court finds it hard to believe that the 1st accused was negotiating with the deceased's family for such a serious offence. In addition the 1st accused did not tender any evidence to show where these negotiations were taking place and with whom. Indeed from the probation officers report, the 1st accused was arrested in April 2014, whereas the offence was committed in July 2013. This was a period of about 8 months and the 1st accused did not state where he was during this period. In any event J. Lesiit having found that he is a flight risk, this court cannot interfere with that finding because it is not sitting on appeal.

With regard to the 2nd accused, I have carefully examined the additional witness statement of PC Kipkurui Serem dated 27th April 2014. From his last sentence he stated as follows: **"...while his co-accused who is his brother Mukenda Murila is still at large and efforts to arrest him on course..."**

From the above statement, it is evident that the 2nd accused had not been arrested as at 27th April 2014, and efforts to arrest him were still on course. The only logical inference that can be drawn is that the 2nd accused had also disappeared from the area soon after the crime was allegedly committed. This would probably explain the reason why he had not sought to be admitted to bail/bond in the initial application since he had probably not been apprehended.

In the end, I am satisfied that the accused persons are a flight risk and the likelihood of them not showing up for trial is very high and that is a compelling reason not to admit the accused persons to bond/bail. In the circumstances, I decline to grant accused persons bail/bond in this case. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF MAY, 2015.

R. P. V. WENDOH

JUDGE.

In the presence of;

Mr. Mureithi Holding Brief for Ms. Thibaru for accused

Mr. Mulochi for State

Faith, Court Assistant

Accused.