



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.74 OF 2012

BONIFACE MUTUKU MUTISYA..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**RULING**

1. The application before me seeks orders for the release of the accused on bail pending the conclusion of his on-going trial. The accused is facing trial for the murder of Francis Maingi Mutiso. He is alleged to have committed the offence on 2<sup>nd</sup> September 2012 at Mathare BH in Starehe District.
2. In his application filed in court on 28<sup>th</sup> May 2015, the accused relies on the grounds that the court has jurisdiction to admit him to bail and that there were no compelling reasons to warrant denial of bail. In his supporting affidavit sworn on 25<sup>th</sup> May 2015 he deposes *inter alia* that he was ready and willing to abide by any bond terms and that no prejudice will be suffered by the respondent should the application be granted.
3. When the application came up for hearing on 1<sup>st</sup> July 2015 **Mr. Okeyo** for the respondent told the court that the State had not filed a Replying Affidavit for reason that the application had just been brought to his attention. He however conceded that the office of the Director Public Prosecutions (ODPP) had been served with the application on 28<sup>th</sup> May 2015. He asked to be allowed to reply orally.
4. The record shows that the court had issued directions on 28<sup>th</sup> May 2015 that the application be served upon the DPP and that the DPP and that a replying affidavit be filed within 7 days of service. Both the prosecution and defence admit that service was effected on the ODPP the same day. With that, the court found no reason not to proceed with the hearing of the application.
5. At the hearing of the application on 1<sup>st</sup> July 2015, I heard submissions from **Mr. Opollo** and **Mr. Okeyo** for the applicant and respondent respectively. Mr. Opollo contended that since there was no replying affidavit, then the application should be deemed unopposed. He urged the court to grant reasonable bond terms. Mr. Okeyo on his part opposed the application on the grounds that the case was already at an advanced stage and had only four technical witnesses to go; and further that the release of the accused would heighten tension and animosity between the families of the accused and the deceased as the two resided in the same neighbourhood. **Mr. Okeyo** urged the court not to admit the accused to bail stating that the prosecution would undertake to finalize the prosecution expeditiously.
6. In considering this application, I am guided by the **Article 49(1) h of the Constitution** which allows an accused person bail unless there are compelling reasons, and that it is the duty of the State to demonstrate to the court the compelling reasons. I am equally guided by the principle that an accused can be released on bail at any stage of the proceedings. **See Republic Vs. Danson**

**Mgunya & another 2010 eKLR.**

7. In the present application the State has raised two grounds in opposition. I will first deal with the ground that the matter is at an advanced stage. The record shows that so far four prosecution witnesses have testified. According to prosecution counsel, there are four more witnesses to call. That means that the prosecution is half way through its case. The record also shows that the matter was adjourned previously when the prosecution failed to avail witnesses. The prosecution’s undertaking to finalize the case expeditiously is therefore not supported by the record. In any case, as I have stated above, an accused may be granted bail at any stage of the trial. Consequently, I do not find the ground that the matter is at an advanced stage compelling enough to warrant denying the accused bail.
8. The second ground raised by the prosecution is the likelihood that the release of the accused would heighten tension in the community. This ground was opposed by the defence for reason that no affidavit evidence had been brought to court to support the allegation. The defence indeed pointed out that contrary to the allegation of animosity between the families of the accused and deceased, there were attempts by the accused and the deceased’s families at reconciliation which had earlier prompted the accused to make a plea offer to the Director Public Prosecutions. The submission on attempts at plea negotiation is borne by the record.
9. On the issue of likely tension on the ground, I am of the considered view that the submission by the prosecution counsel is of little evidential value as no evidence has been laid before the court. Further the incident occurred on 2<sup>nd</sup> September 2012. Any tension that may have existed then must have eased with the passage of time. I am not persuaded that the accused would be exposed to danger in any way or that the community would take the law into its hands knowing that the trial of the accused was on course.
10. The upshot of the above is that I find no compelling reason to deny the accused bail. He shall be released on condition that:-

- i. He makes a cash bail of Kshs.500,000/- and provides one surety of similar amount.
- ii. He does not contact or in any manner whatsoever communicate or interfere with the prosecution witnesses.
- iii. He attends his trial on the scheduled dates i.e., 30<sup>th</sup> September, and 1<sup>st</sup> October, 2015.

Orders accordingly.

**Ruling delivered, dated and signed at Nairobi this 14th day of July, 2015**

**R. LAGAT - KORIR**

**JUDGE**

**In the presence of:**

.....:	Court clerk
.....:	Accused/Applicant
.....:	For State
.....:	For Accused /Applicant