



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 62 OF 2013**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**JAPHETH MUNENE ..... APPLICANT**

**RULING**

The accused **Japheth Munene** is charged with the murder of **Solomon Mwawaya Ngari**. He is said to alleged to have committed the offence on the 25<sup>th</sup> May, 2011 at **Handy Estate** in **Nairobi County**. He denied the charge in court on 13<sup>th</sup> June 2013 and was remanded in custody. He now seeks to be released on bail pending their trial which is set to start on 16<sup>th</sup> September, 2014

In his application dated 8<sup>th</sup> August 2013 he states that he has a right under **Article 49 (i) h of the Constitution** to be released on bail; that there were no compelling reasons to deny him bail; that he is a resident of Nairobi and has never left Nairobi since the date of the incident; that he has co-operated fully with the police in the investigations of this matter; and that he will not escape the jurisdiction of the court or abscond trial since he is confident of his defence.

The application is opposed by the state through the replying affidavit of **No.84717 PC Hannington Chumba** who is the investigating officer in the case. He depones that a total of 28 witnesses have recorded statements which show that the accused shot the deceased; that the deceased's right to life was taken away and the family and public are seeking for justice from the court; that the court should not grant the applicant bail until the evidence of all the witnesses is secured; and, that although the offence of murder is now bailable the grant of bail is not absolute but is a matter of discretion on the part of the court.

At the hearing of the application on 26th June, 2014, **Mr. Gisemba** for the accused told the court that the accused was a former police officer and was unlikely to abscond trial. He submitted that the averment by the State that the accused was likely to interfere with prosecution witnesses was not true because the accused was arrested on the 6<sup>th</sup> of June 2013 long after the incident which took place in 2012. He said that any investigations must therefore have been completed. The delay in charging the accused, he explained, was as a result of the police not deciding whether or not to charge the accused.

In opposing submissions **Ms Matiru** for the State relied on the replying affidavit of **PC Hannington Chumba**. She submitted that the delay in charging the accused was caused by sympathy from fellow police officers who were unwilling to press the case until directed by the Director of Public Prosecutions (DPP). She further submitted that most of the prosecution witnesses were police officers and were likely

to be influenced or intimidated by the applicant if released.

**Article 49 (i) (h) of the Constitution** on which the application is grounded provides that “*an arrested person has a 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.....*” No doubt the Constitution has made all offences bailable where there are no compelling reasons. It is, however the duty of the prosecution to demonstrate to the court any compelling reasons why an accused should be denied bail.

In the instant case, the replying affidavit of **PC Hannington Chumba** merely states that the accused committed the offence in the presence of witnesses who have recorded their statements with the police. In submissions before court, **Ms. Matiru** for the State underscored that the witnesses were likely to be influenced or intimidated. Whereas it is possible to expect a flow of sympathy from such witnesses on account of collegial relationship, it has not been demonstrated to the court whether such witnesses were in a vulnerable position *vis-à-vis* the applicant so as to be intimidated. **PC Hannington Chumba** states categorically in his replying affidavit that 28 witnesses have recorded their statements. In **Ms. Matiru’s** submission, the majority of those witnesses are said to be police officers. Other than that, no further information or material has been placed before the court to show the likelihood of interference. Similarly, although the prosecution counsel has stated in her submissions that the police were initially unwilling to charge the accused, the court takes judicial notice that the mandate and power to mount prosecution rests with the Director of Public Prosecutions (DPP). It has not been demonstrated to the court that there was any obstruction of justice in this case. If that was the case, the prosecution counsel ought to have filed an affidavit and presented the necessary evidence before court. As it is, the court has only been called upon to speculate as to why it took the Director of Public Prosecutions so long to charge the accused.

In the premises and for the foregoing reasons, I find no compelling reason to deny the applicant bail. He shall be released on the following conditions:-

- i. Accused shall pay cash bail of One million shillings (Kshs.1,000,000./-) and two sureties of like amount.
- ii. The accused shall not interfere with prosecution witnesses.
- iii. The accused shall not communicate with the witnesses whether directly or indirectly.
- iv. Attend the monthly mention of his case before the Deputy Registrar of the Court. The first such mention shall be on 13<sup>th</sup> August, 2014.
- v. Not leave the jurisdiction of the court without leave of the court.

Any violation to lead to automatic cancellation of the bail.

**Ruling delivered, dated and signed at Nairobi this 17<sup>th</sup> day of July, 2014**

**R. LAGAT - KORIR**

**JUDGE**

In the presence of:

.....: Court clerk

.....: Applicant/Accused

.....: For applicant/accused

.....: For State