



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO.103 OF 2011

REPUBLICPROSECUTOR

VERSUS

SOSTHENES MATWERE NYANGAU)

JOSEPH NYANCHONGI NYANGU)..... ACCUSED

RULING

1. The accused persons herein Sosthenes Matwere Nyangau and Joseph Nyanchongi Nyangau were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 8th day of November 2011 at Kirumi village in Nyamira District within Nyamira County in the Republic of Kenya jointly murdered John Kebaso Nyangau. Their case is fixed for hearing on 22nd October 2014.

2. By a notice of motion dated 23rd January 2013, the accused persons through their counsel, Ochoki & Co. Advocates have applied for bond/bail pending their trial on reasonable terms and conditions the court may deem fit and just in the circumstances of this case.

3. The application was premised on the supporting affidavit sworn by the 1st applicant with authority from the 2nd applicant averring that:-

- *They were arrested on allegations of having been involved in the murder of John Kebaso Nyangau;*
- *That they are both married and are sole bread winners of their families;*
- *That this matter may take a long time to be determined and they are suffering in prison;*
- *That no compelling reasons exist that go against their release on bond which is their constitutional right;*
- *That it is in the interest of justice that they be released on bond;*
- *That the 1st accused and his co-accused are Kenyan citizens with known and fixed places of abode and cannot abscond from court.*

4. The application is premised on 4 grounds namely:-

- *The applicants were arrested and charged with the offence of murder;*
- *The applicants were ordered to be remanded in custody;*
- *The applicants are the sole bread winners for their families;*
- *It is the applicants' Constitutional right to be released on bond.*

5. The respondent on their part filed a replying affidavit through No.80123 PC Anderson Kithi attached to Nyamira police station which is the investigating officer in this case opposing the application on grounds:-

- *That the accused persons brutally murdered the deceased;*
- *That there is a high possibility that the applicants would be in contact with the witnesses most of whom are their relatives. The applicants might therefore interfere with oral evidence to be tendered against them leading to miscarriage of justice;*
- *That after the heinous act, the 2nd accused/applicant, Joseph Nyanhongiri Nyangau escaped and was arrested days later on 29th November 2011;*
- *That though the offence of murder is now bailable, the grant of bail is not absolute but a matter of discretion on the part of the court;*
- *That there are compelling reasons as to why the applicants should not be released on bail.*

6. In addition to the Replying Affidavit, the Probation Service also filed a Bail Assessment Report at the request of the court regarding both accused persons. As concerns the 2nd applicant, Joseph Nyanhongiri Nyangau, the report states that he is aged 22 years and a standard 5 drop out accused of killing his own brother. The accused was arrested after the burial of the deceased and according to the local administration, the accused has never been associated with any acts of lawlessness before the incident. The chief and assistant chief also do not object to him benefiting from bond.

7. Furthermore, that the family members do not object to the accused benefiting from bond both as a constitutional right and a belief that there is no form of threat to his life. They also do not find him to be a threat to the peace of other members of the society. Moreover, the father wishes that the accused could be awarded bond since he is getting old and no one is taking care of him since his wife has since passed away.

8. The 2nd applicant has also promised to obey court orders at all times, respect the bail terms if granted bond, avail himself whenever required, and adhere to all terms that may be pronounced by the court and not to interfere with witnesses if he is granted bond. The family members are also willing to commit a land title deed as surety.

9. As regards the 1st applicant herein Sosthenes Matwere Nyangau who is aged 27 years old and a class 8 leaver, he does not concede having committed the offence but pleads to be admitted to bond so that he may continue undertaking family responsibility coupled with pursuing personal development. On social inquiry, the Probation Officer did not get any incriminating records about him. Furthermore, the family members are positive about the offender, are willing to support him during his trial and ensure he attends court as and when required.

10. The 1st applicant though unmarried, is described as one who is not fond of criminal tendencies and he is considered a threat to general peace, security and as such the Community is not opposed to him being admitted to bond. The local administration shares the same sentiments as area chief Machuma Nyaenda informed the probation officer that accused is unlikely to abscond court sessions and if he were to be accorded bond he would closely monitor him. The area chief also assured the probation officer that the 1st applicant does not risk being lynched by the community members for the current offence. The accused's family members are willing and ready to welcome him home and collectively assist where necessary to ensure he is available when required by the court.

11. **Article 49 (1) (h)** provides that an arrested person has the 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.

12. In **Republic -vs- Erick Masege alias Madiaba [2013] e KLR**, I observed as follows:-

“The issue of bond is now a constant constitutional question that the courts have to deal with on a very regular basis especially after the promulgation of the constitution of Kenya on 27th August

2010. Before then, offences punishable by death namely murder and robbery with violence, were not bailable. Under the old law, as it is now, the courts are under a duty when considering applications for bail/bond to satisfy themselves that an accused person who is granted bond will avail himself to the court as and whenever he is required in connection with the offence of which he stands charged. This is particularly critical since the constitution does not define what is meant by “compelling reasons.”

13. In **Republic -vs- Dorine Aoko – NKR HCCRC Case No.36 of 2010 (UR)** Emukule J stated the following:-

“..... to my mind again, those compelling reasons are very same ones spelt out in section 72 (5) of the repealed constitution and elaborated in section 323 of the Criminal Procedure Code, namely that the accused person as the applicant in this case is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (taking away another person's life, disloyalty to the state of one's nationality or grievous assault and injury to another person or his property) are offences which are by their reprehensibility not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice and more so the kin or kin of the victim to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence, (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.”

14. I have fully considered the accused persons' application, the report of the probation officer on the accused persons suitability for bail vis-a-vis the affidavit filed by the state in opposing the accused's release on bail.

15. In **Republic -vs- David Nyasora Nyamongo – criminal case No.90 of 2010** (unreported) in the High Court sitting in Kisii, Makhandia J (as he then was) stated:-

“At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court, to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses”

16. The main reason why the accused persons according to the state should be denied bail is the fact that the 2nd accused Joseph Nyanchongi Nyangau escaped and was only arrested on 29th November 2011. Furthermore that there would be a high risk that the applicants will be in contact with the witnesses who are relatives and it is the fear of the prosecution that the accused persons would interfere with the oral evidence they intend to adduce thus leading to a miscarriage of justice.

17. In my humble view, as was clearly stated in **David Nyasora Nyamongo** (supra), the fact that the 2nd accused escaped and was apprehended on a later date to me suggests that there is nothing to prevent him from escaping once bail/bond has been given to him. Secondly the concerns by the prosecution on the fact that the prosecution witnesses are relatives to the accused persons and once released accused persons can interfere with their testimony to me is genuine enough since that possibility cannot be overlooked especially taking into account the fact that the community according to the bail assessment report seems to be more than ready and willing to accept the accused persons back once bond is given to them.

18. Lastly, this case has now been set for hearing on 22nd October 2014, thus the fear that the case will take a long time to determine is now no longer real.

19. Consequently, the application for bail/bond by accused persons is denied for the above reasons. Both accused shall be remanded in custody and wait for their trial scheduled for 22nd October 2014.

Dated, signed and delivered at Kisii this 02nd day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Shabola (present) for State

Mr. C.A. Okenye (present) for Accused persons

Mr. Bibu - Court Assistant