

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 8 OF 2013

REPUBLIC

VERSUS

1. **JOHNSON NZAU MUTUA**
2. **JOHN KIAMBA MUTUA**
3. **BENSON MWANZIA NYELE ACCUSED**

RULING

1. The 1st accused, **Johnson Nzau Mutua**, the 2nd accused **John Kiamba Mutua** and the 3rd accused **Benson Mwanzia Nyele** were on the 13th March 2013 charged with the offence of murder contrary to **section 203** as read with section **204** of the **Penal Code (Cap 63), Laws of Kenya**.
2. The accused subsequently applied for bail being the hearing and determination of their case.
3. Their applications are generally premised on the grounds that there are no compelling reasons why the accused should not be admitted to bail. That the accused are persons of fixed abode who are not a flight risk. The accused are ready to abide by any terms of bail set by the court.
4. The application is opposed by the State. The Investigating Officer, **Bernard Mashinga** swore an affidavit in opposition to the application. It is contended that the 2nd accused are cousins to the deceased and the 3rd accused a close neighbour. That there was a long standing feud between the deceased and the accused persons. It was further argued that the accused are likely to interfere with witnesses since the accused persons have already been supplied with statements. That the accused persons are likely to abscond due to the serious nature of the offence and the severity of the sentence imposed by the law.
5. I have considered both the application and the reply to the same. **Section 49 (1)** of the **Constitution** states 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 they are 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)**. There are no cogent reasons given in support of the

assertion that the Applicants are likely to interfere with witnesses. The provision for death sentence cannot be used against the Applicants as that would negate the Constitutional guarantee for bail in capital offences.

8. With the foregoing, I allow the application. The Applicants may be released on a **Kshs. 1 Million** a personal bond each with one surety of a like sum.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 8th day of October 2013.

B. THURANIRA JADEN

JUDGE