



**Republic v Nyamai & 11 others (Criminal Case 25 of 2020)  
[2022] KEHC 10376 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10376 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 25 OF 2020  
MW MUIGAI, J  
JUNE 23, 2022**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**ANTHONY MBINDYO NYAMAI ..... 1<sup>ST</sup> ACCUSED  
FREDRICK MUNYUNZU MUSYOKI ..... 2<sup>ND</sup> ACCUSED  
WILFRED MUTISYA MUNYAO ..... 3<sup>RD</sup> ACCUSED  
FREDRICK MUASA MUNYAO..... 4<sup>TH</sup> ACCUSED  
ANTHONY MUTUA MUTISO ..... 5<sup>TH</sup> ACCUSED  
PAUL MUVENGEI ZACHARIA ..... 6<sup>TH</sup> ACCUSED  
FREDRICK MUTISO MUTUA ..... 7<sup>TH</sup> ACCUSED  
BENSON MWANZA MUNYAO ..... 8<sup>TH</sup> ACCUSED  
NOAH MUTISO MUVENGEI ..... 9<sup>TH</sup> ACCUSED  
SHADRACK MUTIE MUVENGEI ..... 10<sup>TH</sup> ACCUSED  
SHADRACK MUTIE MUVENGEI ..... 11<sup>TH</sup> ACCUSED  
FELIX MUSEMBI MUVENGEI ..... 12<sup>TH</sup> ACCUSED**

**RULING**

1. The accused persons, Anthony Mbindyo Nyamai, Fredrick Munyunzu Musyoki, Wilfred Mutisya Munyao, Fredrick Muasya Munyao, Anthony Mutua Mutiso, Paul Muvengi Zacharia, Fredrick Mutiso Mutua, Benson Mwanza Munyao, Noah Mutiso Muvengi, Shadrack Mutio Muvengi,



Jackson Mutinda John and Felix Musembi Muvengi were jointly charged with the offence of murder contrary to sections 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 1<sup>st</sup> day of August, 2020 at Kathuma Village, Misakwani Sub-location, Mumbuni Location in Machakos Sub-county within Machakos County they jointly murdered Juliana Mwikali Ngui.

2. Mr. Uvyu Advocate is on record for the Accused persons while the Victim's family is represented by Mr. Mwinzi Advocate. The ODPP is represented by Mr. Mwongera.
3. Mental Assessment Reports were presented in court and pleas taken on October 7, 2020 in respect of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 12<sup>th</sup> accused persons. They denied the charges and a plea of not guilty was entered. The plea in respect of the 6<sup>th</sup> and 11<sup>th</sup> accused person was taken on 16/10/2020 and they also denied the charges hence a plea of not guilty was entered on their behalf.

### **Notice of Motion**

4. The application dated December 9, 2021 the victim's family sought the following orders:
  - (a) That pending the hearing of this application interpartes the bond for the 5<sup>th</sup> Accused person be suspended.
  - (b) That the bond for the 5<sup>th</sup> accused person be cancelled.
  - (c) That this court makes any further and/or better orders to ensure the safety of the witnesses/ victims and that the ends of justice are met.
5. The application is supported by the affidavit of Timothy Mutiso Ngui he deposed as follows: -
  - (a) That he is a prosecution witness in this matter and recorded a statement on 5<sup>th</sup> August, 2020.
  - (b) Due to their safety their Advocate on record wrote to the director of witness protection agency on August 31, 2020 requesting the Agency to place the witnesses under their Protection program.
  - (c) That later on some of the family members were placed under the witness protection program in undisclosed locations and even the rest of the family members were not allowed to access or contact them.
  - (d) That there have been emissaries sent out to the witnesses telling them to abandon the case, and they always say they have been sent by Anthony Mutua Mutiso (5<sup>th</sup> accused person herein).
  - (e) That sometimes around September 20, 2021, he received information from concerned members of the extended family that his father, Nelson Ngui who is in undisclosed location under the Witness Protection Agency had been spotted in Mtito Andei Area in the company of Anthony Mutua Mutiso and other people.
  - (f) That further to that the 5<sup>th</sup> Accused person has been trying to reach him directly and the latest was a call he made on 28<sup>th</sup> day of November, 2021 at 3.00 p.m. from cellphone number 0722XXXXXX which is known for they had communicated severally before the murder incident.

### **Replying Affidavit**

6. Anthony Mutua Mutiso (5<sup>th</sup> Accused person herein) filed Replying affidavit dated December 14, 2021 and deposed as follows: -



- (a) That he did not know where the witnesses in this matter who are under witness protection program are being kept/or housed and he is not even aware that some witnesses have fled their family home and that they have been hiding in undisclosed locations as alleged by Timothy Mutiso Ngui.
- (b) That he has never sent any emissaries to Timothy Mutiso Ngui or any other person; that he did not meet or see Nelson Ngui on September 20, 2021 as alleged by Timothy Mutiso Ngui.
- (c) That Timothy Mutiso Ngui did not disclose the names of the concerned members of the extended family who allegedly informed him that his father Nelson Ngui was seen at Mito Andei and neither have those family members sworn any affidavit to that effect. Also, he did not disclose which officer in the witness protection program informed him that one of the subjects under the program had left their premises to meet the 5<sup>th</sup> Accused.
- (d) That he did not contact Timothy Mutiso Ngui on November 28, 2021 at 3.00 p.m. as alleged and no evidence have been shown to him from safaricom call data.
- (e) That the said Timothy Mutiso Ngui has never lodged any formal complaint against him at any police station or any other relevant authority.
- (f) That the application is actuated by malice and bad faith due to bad blood between the family of Timothy Mutiso Ngui and himself hence seeking to have his bond only cancelled among the twelve accused persons.

**Further Replying Affidavit:**

- 7. Anthony Mutua Mutiso (5<sup>th</sup> Accused person herein) filed his further affidavit dated February 3, 2022 and stated as follows: -
  - (a) That the letter dated December 20, 2021 by the Witness protection agency addressed to one Nelson Ngui Mutiso did not state that he met him, it only stated that Nelson Ngui Mutiso visited Mito Andei and Machakos areas to meet unauthorized persons hence the allegations by Timothy Mutiso Ngui are not true.
  - (b) That he has not made any efforts to dissuade the witness Mr. Nelson Ngui Mutiso from giving evidence or giving skewed evidence as alleged by Timothy Mutiso Ngui in his affidavit.
  - (c) That one Timothy Mutiso Ngui is the one fuelling animosity among the family members by making wild allegations without any proof thereof.

**Further Affidavit**

- 8. Timothy Mutiso Ngui (a prosecution witness herein) filed his further affidavit dated January 25, 2022 and stated as follows: -
  - (a) That the investigations conducted by the Agency resting with their letter dated December 20, 2021 further indicated that on or about September 19, 2021, the 5<sup>th</sup> Accused person made contact and met Mr. Nelson Ngui Mutiso, who is a crucial witness in the matter herein and under the witness protection program.

**ODPP/Prosecution's Replying Affidavit**

- 9. The State filed their Replying Affidavit sworn by ODPP/Prosecutor, Martin Mwongera on 7<sup>th</sup> February stated as follows: -



- (a) That Nelson Ngui sneaked out of Witness protection agency and travelled to Voi. On his way back, he stopped at Mtito Andei on his own accord and visited the mother of the 5<sup>th</sup> accused person since she was ailing.
- (b) That the 5<sup>th</sup> Accused herein has not violated in any way, his bond terms that were imposed by this court.
- (c) That upon close scrutiny of the application, he avers that this application lacks merit and should be dismissed entirely.

**Further Replying Affidavit:-**

10. Anthony Mutua Mutiso (5<sup>th</sup> Accused person herein) filed his further Affidavit dated May 12, 2022 and stated as follows: -

- (a) That the victims counsel Mr. Mwendwa Mwinzi has a personal vendetta against the accused persons for reasons known by himself because on March 23, 2022 he wrote a letter to Area Chief, Mumbuni location and copied the same to the accused persons' Advocate M. M. Uvyu and he stated inter alia;

“Finally, as you are aware some of the family members are accused persons in the above matter and there are orders barring them from interfering with witnesses. You should therefore warn the following persons from attending the funeral failure to which we shall lodge a formal complaint for witness interference and move the court to cancel their bond”

- (b) That he has been informed by his brother the 6<sup>th</sup> Accused person Mr. Paul Muvengei Zacharia that he did not threaten his son, the 10<sup>th</sup> Accused person Mr. Shadrack Mutie Muvengei; that the 10<sup>th</sup> accused person has been known to suffer from mental disorders as clearly indicated by doctors in various reports dated September 16, 2020, October 21, 2020, November 25, 2020 and July 16, 2021 all which have been annexed herewith.

**Hearing**

- 11. The matter commenced hearing before Hon. D. K.Kemei J on 10/9/2020, this Court took over the matter on 1/12/2021 with the hearing and took the evidence of PW1, Jackson Makau Ngui.
- 12. Thereafter, counsel watching brief for victims/family, Mr Mwinzi, informed the court that 5<sup>th</sup> Accused person, Anthony Mutua Mutiso made calls to a Witness and a member of the family, the latest call was on 28/11/2021 at 3 pm.
- 13. Counsel also informed the court, that he received report from an officer from the witness protection program that one of the witnesses left their custody and on follow up with family members, he went to meet the 5<sup>th</sup> accused at Makindu. Counsel sought the 5<sup>th</sup> Accused person's bond be cancelled and the Court directs the Sub County Criminal Investigation Officer, Machakos to investigate the matter.
- 14. Défense Counsel, Mr Uvyu, opposed the application to cancel 5<sup>th</sup> Accused person's bond on grounds that Watching Brief Counsel was speaking from the Bar and had not been presented an application before Court. There was no formal application filed in court and/or a formal complaint lodged with the Police to investigate the matter. Counsel asserted that the right to bond is a constitutional right unless there are compelling circumstances which are proved by prosecution. Counsel took the view that watching brief counsel was usurping the powers of the ODPP.



15. The ODPP represented by Mr. Mwongera addressed the court and stated that he heard of the complaint that 5<sup>th</sup> accused and Timothy Ngui were in contact. He stated that DCI Machakos was/is to investigate the matter and forward the report to their office.
16. With regard to the 2<sup>nd</sup> issue, he was aware that there were gaps within the witness protection program with regard to a witness who left for Kambu/Makindu/Mtito Andei. He was appalled and asked the witness protection program to compile a report and present it to court. The report was not produced and if the same was availed he would action it.
17. In response, watching brief counsel reiterated that it would be negligent on his part if he obtained information that his clients were threatened and he did not raise it in court. He stated that the protection of witnesses in an active case remains within the jurisdiction of the court. The allegations of interference with witnesses are related to a particular party the 5<sup>th</sup> accused person and his bond should be cancelled.
18. The court granted watching brief counsel leave to file an application on the issues raised in court. In the meantime, the Court ordered the 5<sup>th</sup> accused to report weekly to OCS Machakos Police Station to ensure tracking of his whereabouts. The court also ordered investigations to commence on allegations made by parties to the proceedings and reports to be availed.
19. On 5/5/2022, Paul Muvengei 6<sup>th</sup> Accused person informed the court that he could not trace his son Shadrack Mutei 10<sup>th</sup> Accused. The 10<sup>th</sup> Accused person informed the court that he was hiding from his father 6<sup>th</sup> Accused person as his life was/is in danger.
20. Watching Brief Counsel Mr Mwinzi informed the court that the issues of security of the witnesses was/is to be taken seriously as PW1 Jackson Makau Ngui died under mysterious circumstances and the matter was/is under investigations. He stated that the application for cancellation of bond was suspended by this court without Counsel being given a chance to argue the said application and one of the witnesses was now killed. The Witness died under witness protection program and counsel referred the court to the probation/pre-bail reports that had raised the issue of interference with witnesses.
21. The court on disclosure of the death of PW1 who testified online on 1/12/2021 while in the witness protection program ordered investigations to commence and the ODPP called Deputy DCIO to court who took the accused persons to the Police Station for recording of Statements and finding out and recording each of their fixed abodes.
22. At 2 pm of the same day, the Deputy DCIO Chief Inspector Charles Wanjohi confirmed details of the accused persons fixed abode to the court. He informed the court that investigations regarding PW1's Death were ongoing at Kyuso Police Station.
23. ODPP, Mr Mwongera indicated to court that the witnesses under the Witness Protection Program were key/eye witnesses and their safety was guaranteed and when needed would be availed in court. The witness protection program agency was to avail their report on circumstances surrounding PW1's death. The Police were to investigate 10<sup>th</sup> accused's claim that his father the 6<sup>th</sup> accused threatened him and his life was in danger.
24. The Watching Brief Counsel, Mr Mwinzi reiterated as follows; the pre-bail reports strongly indicated that the witnesses and accused persons were not safe. The Family of victims opposed bond, the Investigation Officer Deputy DCIO filed Affidavit and opposed bond, the ODPP filed Affidavit and opposed bond and all these reports and affidavits culminated to the Ruling of the court that the accused persons were denied release on bond. the trial court considered these reports and denied the accused persons bond vide ruling of 8/2/2020.



25. On 4/2/2021, officers from witness protection program confirmed that the vulnerable witnesses were now in the witness protection and the court granted all accused persons bond.
26. Counsel stated that after that a number of issues arose; there were threats brought to the attention of the court as follows; 10<sup>th</sup> Accused person raised the issue that his life was in danger as he was threatened by Co accused 6<sup>th</sup> accused his father; one of the witnesses Nelson Ngui under the witness protection program left in unexplained circumstances the program and was spotted in Mtito Andei in the company of 5<sup>th</sup> accused person; Anthony Mutua Mutiso; from the follow up at the Witness Protection Program, they prepared a Report that confirmed that Nelson Ngui Mutiso while in the Program, he was in contact with some of the Accused persons. The Witness Protection Program Officers were apprehensive that the contact of Nelson Ngui might have led the Accused person(s) to the where they hid PW1 who is now deceased, his wife and their children of tender age who are witnesses in this matter.
27. Counsel further informed Court, when Nelson Ngui Mutiso was kicked out of the Witness Protection Program after several warnings. Nelson Ngui wrote to the DPP that this case be withdrawn from Court, PW1 Jackson Makau Ngui wrote to The DPP and stated he was not party to the withdrawal of the matter from Court. The letter was produced in Court on 8/2/2022. He stated it was suspicious that after Nelson Ngui met with Accused persons, 5<sup>th</sup> Accused Person & 1<sup>st</sup> Accused person, they went together to Assistant Director, ODPP office.
28. Counsel stated the above outlined instances confirm witness interference by the 5<sup>th</sup> Accused person among others. PW1 lost his life after testifying in the 2 cases in Court and refusal of withdrawal of the case in Court. There are more than 10 witnesses remaining and some are employees of 5<sup>th</sup> Accused person. As of now there is no assurance of security of witnesses. The deceased has 7 children and due to fear none of them can come to Court.
29. The Court granted interim orders as follows; the Accused persons to report to Deputy DCIO MHC once each week until investigations of PW1's death are completed and/or hearing and determination of the bail application; the 10<sup>th</sup> Accused person to be allocated a separate Counsel through Pro Bono Committee, investigations into allegations made to be conducted by Deputy DCIO MHC and the report availed; the witnesses and 10<sup>th</sup> Accused person to be protected and the Court file to be kept by DR MHC in safe custody.
30. On 19/5/2022, Defense Counsel, Mr Uvyu submitted that the matters raised by Watching Brief Counsel were not part of the Application of 9/5/2021 which he sought to amend and did not. The Application is based on the Affidavit of Timothy Mutiso Ngui that 5<sup>th</sup> Accused person called him and sought that the case is withdrawn from Court. Counsel asserted that emissaries who were alleged to have been sent to Timothy by the 5<sup>th</sup> Accused person, were not disclosed and 5<sup>th</sup> Accused denied contacting the witness or that he was with the deceased's husband and his brother, Nelson Mutiso Ngui.
31. The letter of 8/2/2022 of Tilson Mugera from Witness Protection Agency is that Nelson Ngui was found with unspecified persons and it did not mention 5<sup>th</sup> Accused person. The DPP indicated that the said Nelson Ngui sneaked out of the Witness Protection Program and travelled to Voi and on his way back stopped at Mtito-Andei and saw the 5<sup>th</sup> Accused person's ailing mother, the 5<sup>th</sup> Accused has not violated any bond terms.



32. Defense Counsel took issue with W/B Counsel's assertion that PW1 was killed yet investigations are ongoing. The Copy of Post Mortem shows the cause of death is inconclusive. The bond of 5<sup>th</sup> Accused person cannot be cancelled.
33. Defense Counsel, Mr Uvyu indicated to Court that on 23/3/2022 Mr Mwinzi Watching Brief Counsel wrote to the Chief and indicated that if the Accused persons attended funeral of PW, he would apply for their bond to be cancelled. This amounted to a vendetta by Counsel towards the 5<sup>th</sup> Accused person. The application to cancel the 5<sup>th</sup> Accused's bond should be dismissed.
34. On 14/6/2022, in camera, Officer from Witness Protection Agency Mr. Armstrong Rotich informed the Court in response to Witness Summons issued by the Court for the Witness Protection Program to explain the circumstances surrounding the death of PW1; he said that PW1, Jackson Makau Ngui was admitted into the program 23/10/2021 with his father, Nelson Ngui, his wife and 2 children.
35. PW1 testified in 2 cases, the instant case & MHC CM CT CR 244 of 2020 on conspiracy to murder.
36. On 11/3/2022, the wife of PW1 called the officers that PW1 locked himself in the house. They called Police. On opening the door, they found PW1's body he died. They moved the rest of the family to another location. PW1's father, husband to the deceased in this case Nelson Mutiso Ngui, failed to adhere to the MOU he signed with the Witness Protection Program. He was counselled and despite warnings he compromised the integrity of the Program and safety of other witnesses. The Witness Protection Program terminated his stay under the Program.
37. Chief Inspector Charles Wanjohi Deputy DCIO MHC on 15/6/2022 informed the Court on progress of investigations with regard to PW1's death. The report was made to DCI-Thika. They wrote letter of 20/5/2022 seeking feedback and the report on the death of PW1 whose report they received on 11/3/2022.  
He sought from DCI Kyuso the progress/status report highlighting events leading to PW1's death while he was in the Witness Protection Program. The Police File was compiled and forwarded to ODPP Kyuso. He stated the Accused persons complied with reporting to the Police Station and the 10<sup>th</sup> Accused reported too but refused to disclose his hideout. He could not investigate allegations of threat to his life.
37. Defense Counsel sought the reporting to the Police Station orders be vacated.

### **Determination**

38. The court has considered pleadings and oral submissions of parties in this matter. The court outlined the chronology of events that led to hearing and determination of the instant application among other recent developments on the question /issue if the 5<sup>th</sup> accused person's bond ought to be cancelled or not.

Legal basis

Article 50 (1) & 2 (a) provides a fair hearing to the Accused person.

Article 49 1(h) CoK 2010 provides; [the accused person]

to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

123A. CPC outlines Right of exception to right to bail



- (1) Subject to Article 49(1)(h) of *the Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
    - (a) the nature or seriousness of the offence;
    - (b) the character, antecedents, associations and community ties of the accused person;
    - (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;
    - (d) the strength of the evidence of his having committed the offence;
39. The Bail & Bond Guidelines 2015 Clause 4.9 prescribes factors that the Courts consider on whether there are compelling reasons that justify denial [cancellation of bond];
- a) Nature and seriousness of the offence
  - b) Strength of the Prosecution Case
  - c) Character and antecedents of Accused person
  - d) Failure of the Accused person to observe bail terms
  - e) Likelihood of interfering with witnesses
  - f) The need to protect the victim(s) of crime
  - g) The relationship between the Accused person and potential witnesses
  - h) Child Offenders
  - i) The Accused person is a flight risk
  - j) Whether the Accused is gainfully employed
  - k) Public Order, peace or security
  - l) Protection of the Accused person.

Clause 104 of The Judiciary Criminal Procedure Bench Book 2018 provides;

The Prosecution has to discharge the burden of proof to establish existence of compelling reasons that would justify the denial of bail and cogent, tangible and/or specific evidence is required to justify denial of bail/bond. Mere allegations or suspicion objections and insinuations are sufficient to discharge the burden of proof to deny bail/bond.

Once bond /bail is granted, the Accused person(s) is/are bound to comply with Bond/Bail Conditions.

The right of the accused to bond or bail pending the hearing of a criminal charge against him is provided for under article 49(h) of *the Constitution* of Kenya.

This right is premised on two key principles.

- (a) The right of accused to be presumed innocent until proved guilty under Article 50(2) of *the Constitution*.



- (b) The accused person right to liberty and pre-trial detention should be a measure of last resort, and only where there are compelling reasons.

An accused who has been released on bond does so, with conditions or obligations as follows;

1. The accused person's obligation to attend court for trial as and when needed.
2. Undertaking not to commit further offences while on bond.
3. Undertaking not to interfere with the integrity of the criminal justice system This in view include.
  - (a) Not interfering with or intimidating witnesses.
  - (b) Interfering with the evidence.
  - (c) Engaging in acts which endanger individuals of society in particular victims of his crime or the public at large.

40. If the Accused Person Is In Breach of these obligations, the interest of justice will demand that the accused bond may be cancelled or denied to protect the criminal process from interference or hindrance by the accused person.

[James Wanjala Lusaka v Prosecution](#) [2021] eKLR

41. The applicant was charged with offence of threatening to kill contrary to section 233 of the [Penal Code](#). He was released on bond. The complainant in the case was the father of the accused. On being released, the appellant threatened a witness his step mother. The stepmother reported the same to police vide OB No. 34/20/9/2020.

It is on this ground that this bond was cancelled.

42. Upon considering this application, the court considered the breach of bond terms as follows;

It is in evidence that applicant contravened one of the main conditions attached to his release on bond that he will not interfere with witnesses. Interference with witnesses is a serious offence as it is not only exposes the witness to fear but also compromises the judicial process; and undermines the rule of law. This being a serious breach of the conditions for release of bond, the trial court was right in cancelling the applicant's bond.

43. Once bond is granted, the Accused person is required to adhere to the conditions. It was observed under the bail & bond policy guidelines by NCAJ 2015 that in Kenya, a bail/bond comprehensive supervision system is not in place and for the time being, the Courts in conjunction with Law Enforcement institutions supervise compliance. They include Chiefs, Police Officers, Probation / Children Officers where appropriate.
44. If it is brought to the attention of the Court that an Accused person failed to adhere to the terms of bail/bond then he ought to give an account and/or reasonable explanation why bond /bail should not be cancelled.
45. Applying the above outlined principles to the instant case in determination of the application, this Court has considered the evidence adduced by parties to determine whether the 5<sup>th</sup> Accused person's bond should be cancelled or not.



46. The court record confirms by the Ruling of 8/12/2020, the trial court found considering all factors presented to Court, rejected the bail applications of all accused persons until the vulnerable persons had/have testified.
47. On 4/2/2021 the trial court was informed by officers from witness protection program that the vulnerable witnesses were now under the witness protection program. It is thereafter, on that basis that the Trial court granted bond to all Accused persons. Since grant of bond various issues have arisen with regard to the witnesses and victims safety and security.
48. This court has considered the following circumstances;
- a) When this court heard the evidence of PW1 Jackson Makau Ngui on 1/12/2021 thereafter it was revealed that he died while in the witness protection program facility under unclear and mysterious circumstances on 11/3/2022. Investigations are ongoing and the cause of death is inconclusive.
  - b) It was also revealed that Nelson Ngui, the husband of the deceased subject of the hearing of the instant case, who was /is a witness and housed in the Program, sneaked out of the Witness Protection Program contrary to the MOU and met with the 5<sup>th</sup> Accused person in Mtito Andei. How and why they met there are conflicting versions; one; the witness Nelson Ngui went to Voi and on his way back veered off to Mtito Andei to see 5<sup>th</sup> accused's ailing mother. The other version is that they, 5<sup>th</sup> accused and co -accused and Nelson Ngui met in Mtito Andei after he left the witness protection program. The truth is that 5<sup>th</sup> Accused and Nelson Ngui a witness under the witness protection program met contrary to the terms of bond/bail. Nelson Ngui was/is one of the witnesses who was to testify in this case and he left the Witness Protection Program in unclear circumstances and he had not testified.
  - c) It was also brought to the attention of the court that Nelson Ngui, 5<sup>th</sup> Accused and Co Accused were seen visiting the ODDP Assistant Director's office to withdraw the case from Court. Earlier, Nelson Ngui wrote to ODPP seeking to withdraw this case, the ongoing murder case of his late wife. PW1, Jackson Makau Ngui refused to withdraw the case from Court.
  - d) The 10<sup>th</sup> Accused asserted that his life was threatened by 6<sup>th</sup> Accused his father and withheld details of his whereabouts from this Court, Investigation Officer of the case and the new Counsel on record for fear of his life. The Court ordered a separate Counsel to represent him who is on record. It has been stated that he is mentally handicapped and doctors reports produced but the Court finds that he was found fit to plead.
  - e) The thrust of the application, is that one of the witnesses Timothy Mutiso Ngui, son of the deceased in this case and has not testified yet, was contacted by the 5<sup>th</sup> Accused person through emissaries and on call to withdraw the case.
49. The 5<sup>th</sup> accused persons affidavits are mainly denial of the allegations and putting the claimants on strict proof thereof. No evidence on record controverts the evidence of 5<sup>th</sup> accused person interference with witnesses and evidence.
50. Of importance to note is that the 12 accused persons and victims and/or vulnerable witnesses are relatives and are 1 family, they consist of fathers, sons, cousins, step- brothers in-laws etc. It is curious that each allegation by different and various parties is levelled at 5<sup>th</sup> accused person only and not the other Accused persons by people of same family who know each other well.



51. In *Republic vs Joktan Mayende & 3 others* [2012] eKLR Hon Gikonyo J described interference of witnesses as follows;

Threats and improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not give evidence, or to give eschewed evidence amounts to interference of witnesses; an impediment to or perversion of the course of justice

52. The cumulative effect of the outlined incidents is that there has been interference and intimidation aimed at influencing and compromising, inducing or terrifying the witness(s) and/or the case itself.

53. These allegations are grave and serious to safety and security of witnesses and amount to interference with witnesses and evidence by causing fear and intimidation and with the possibility of the witnesses abandoning testifying.

54. The 5<sup>th</sup> accused levelled accusations at the Watching Brief Counsel that he maliciously threatened to apply for cancellation of bond and it is because has a vendetta against him. The issue was based on the letter of March 23, 2022 that he wrote a letter to Area Chief, Mumbuni location and copied Defense Counsel Mr Uvyu. In the said letter, the 5<sup>th</sup> Accused person alleged that watching brief counsel threatened to apply for cancellation of 5<sup>th</sup> accused person's bond.

55. Watching/Brief Counsel replied that family members went to the Area Chief to discuss burial arrangements of PW1. The Area Chief called him and stated that PW1's wife was /is in the Witness Protection Program. He contacted the Officer of Witness Protection Program and thereafter wrote the Formal Letter to the Chief as the Chief had intimated that the Accused persons wanted to participate the funeral of PW1 and had gone to his office to give their opinion where PW1 would be buried.

56. The Watching Brief Counsel, then wrote the impugned letter and informed the Chief that attendance of the Accused persons to the funeral would be in breach of bond terms and Court orders. He copied the letter to their Advocates, OCS, ODPP, DCIO Machakos. The letter reads in part;

‘You should therefore warn the following persons from attending the funeral failure to which we shall lodge a formal complaint for witness interference and move the Court to cancel their bond’

57. The Watching Brief Counsel stated that he was concerned about the wife of PW1, a witness in this case under Witness Protection Program who was/is yet to testify and who was/is to attend and bury PW1 who died in mysterious circumstances and the Accused persons were/are to attend the funeral.

58. This Court on 4/5/2022 granted orders that the Accused persons shall remain at their area of livelihood as stated by the Deputy DCIO [today] and shall not contact, interfere or engage other Accused persons family members or Witnesses. Watching Brief Counsel was safeguarding safety and security of PW1's wife's life during the burial arrangements and/or funeral of PW1 in compliance with the Court orders and bond terms.

59. The Court gleaned through the Court record and found that allegations of interference, apprehension, fear and intimidation of witnesses and family were made throughout the proceedings before the Trial Court then Hon. D. K. Kemei J by Watching Brief Counsel, Mr Mwinzi, the Deputy DCIO and Investigation Officer of the Case, Probation Officer(s) who prepared Pre Bail Reports and OB extracts of complaints made to the Police on threat to life by family members some who fled their homes to undisclosed areas. That is why bond was denied to all accused persons. When the Accused persons were granted bond, and antecedents were disclosed; Watching Brief Counsel had/has a duty to inform



the Court and the Défense had/have the right of reply. If it was only Watching Brief Counsel making allegations alone and/or with no affidavits by those affected then it would disclose vendetta.

60. Going by the case of *Joseph Lendrix Waswa vs Republic* Supreme Court Petition 23 of 2019 it sets out the role and scope of Watching Brief/Victims Counsel as follows;

While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the Trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP.....

When victims present their views and concerns in accordance with section 9(2) (a) of the VPA, victims are assisting the Trial Judge to obtain a clear picture of what happened (to them)

61. Although the ODPP deposed in the replying affidavit that 5<sup>th</sup> accused person had not breached bond terms, Watching Brief Counsel who initiated the vulnerable witnesses to be placed in the Witness Protection Program received information from the Witnesses /victims, Witness Protection Officers and the Area Chief on safety and security of witnesses and was under a duty to present views and concerns of the victims without usurping the DPP role.

In *Republic vs Fredrick Ole Leliman & 4 others* (High Court Criminal Case No 57 of 2016) [2016] eKLR, where the Court denied.

62. Accused persons bail/bond on murder charges on the basis that there was real likelihood of interference with witnesses. The facts were that the deceased persons were found dead after attending a trial involving one of the accused persons. The court also noted that some witnesses had been placed under witness protection program and those who had not expressed fear of imminent danger. The circumstances are almost similar to the instant case; the Court observed as follows;

It has been shown through various depositions filed in opposition to bail that the potential witnesses in this case come from the same area as the applicants. It is not disputed by the defense that the accused persons hail from the same locality as the potential witnesses and this being the case, the danger of such witnesses being driven into a corner by the presence of the Accused persons so soon after the ghastly death of the deceased's persons is a real possibility.....the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and drive them into resolving not to appear in court during the hearing of the case even if the Accused persons turn up.

63. The Bail/Bond terms were granted by the trial court after Officers from the witness protection program confirmed to the Trial court that the vulnerable witnesses were safely housed in the witness protection program. Since, then I witness, Nelson Nguai sneaked out of the Program contrary to MOU and compromised safety and security of other witnesses. After PW1 refused to withdraw the matter from Court and he testified in 2 criminal cases while in the Witness Protection Program, he died in unclear and yet to be determined circumstances as investigations are ongoing to determine the cause of death.

64. Clearly, these circumstances depict that the reason advanced to allow the Trial Court grant bail/bond to accused persons, that the vulnerable witnesses were/are safe in the witness protection program is not borne out by the recent developments and is no longer viable . More so, there has been interference with witnesses and possibly evidence by dissuading witnesses not to testify and/or withdraw the matter from Court.



65. From the totality of evidence adduced and submissions made by respective Counsel, this Court is satisfied that 5<sup>th</sup> accused person interfered with Nelson Nguui and Timothy Nguui both witnesses in this case waiting to testify in Court. The action by 5<sup>th</sup> Accused person was contrary to terms of bond/ bail granted and orders of this Court. The 5<sup>th</sup> Accused person failed to observe bail /bond terms by interfering with witnesses and victims of crime especially as they are family members.
66. Secondly, this Court finds there is compelling evidence to deny by reviewing the earlier order of grant of bail/bond with regard to the 5<sup>th</sup> Accused person in light of the evidence on record.
67. Thirdly, it is the court's duty to protect lives of witnesses, suspects officers of the court and the court itself and staff. Under the prevailing circumstances and environment, I have soul searched and I cannot in good conscience call /take evidence of any other witness without risk to their lives while the underlying issues have not been resolved.
68. PW1 died after testifying in court in 2 criminal cases and his refusal to withdraw the case from court. In the absence of proof of comprehensive protection measures of especially vulnerable witnesses in the Witness protection program which from all indications is now compromised on safety and security of witnesses;  
  
I am convinced that protection measures by this court include hearing and determination of this matter to be conducted outside this jurisdiction.
69. By virtue of section 81 of CPC which prescribes the Power of High Court to change venue where such an order is expedient for the ends of justice. The matter is hereby transferred to Criminal Division High Court of Kenya for hearing and determination to ensure safety and security of witnesses.

### **Disposition**

1. The application of 9/12/2021 is granted, the 5<sup>th</sup> accused person, Anthony Mutua Mutiso's Bond is hereby cancelled until vulnerable witnesses testify or by order of the next trial court.
2. The other accused persons save for 10<sup>th</sup> accused person to continue reporting to the Deputy DCIO until the matter is placed before the next trial court in High Court Criminal Division Nairobi.
3. This case is hereby transferred to Criminal Division High Court for hearing out of jurisdiction for purposes of ensuring safety and security of vulnerable witnesses.
4. The court file to be kept by Deputy Registrar Machakos High Court and after proceedings are typed & proofread to be handed over to Deputy Registrar Criminal Division High Court of Kenya Nairobi for onward placement before Head of Division Criminal Division for further advise and/or action.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 23<sup>RD</sup> JUNE 2022. (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

IN THE PRESENCE OF;

MR. MWONGERA FOR ODPP/PROSECUTION

MR. UVYU - FOR DEFENSE

MR. MWINZI - FOR APPLICANT

GEOFFREY – COURT ASSISTANT

