REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 55 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MUSA YEGO KIBET.....1ST ACCUSED

GIDEON KIPRUTO KISANG.....2ND ACCUSED

NICHOLAS CHEBOI CHEMLELA.....3RD ACCUSED

RULING

[1] This is a matter in which the accused persons were arraigned in court on **3 August 2016** for murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. They denied the charge and so far, four Prosecution Witnesses have testified. In the course of time, the 3rd accused was released on bond. Thus, on **30 January 2020** when the 2nd accused renewed his bail application, an order was made that a fresh pre-bail report be filed, fear having been expressed by **Ms. Mokua** for the State that the 1st and 2nd accused persons were a flight risk; and that they would likely interfere with the Prosecution witnesses. So far, no such report has been filed and it is manifest that the challenges posed by the ongoing Corona Virus pandemic have much to blame for this state of affairs.

[2] Be that as it may, **Mr. Tororei**, learned counsel for the 2nd accused, urged the Court to nevertheless proceed and make a determination on the matter. He submitted that bond is a right and that the burden is on the Prosecution to demonstrate the existence of compelling reasons to warrant the denial of bond. He pointed out that the accused persons enjoy the presumption of innocence until their guilt is proved; and therefore are entitled to freedom pending the conclusion of their trial. **Mr. Tororei** further submitted that even where it is justifiably feared that the accused persons may interfere with witnesses, there are less restrictive options available to the State, such as placement of the witnesses on Witness Protection Programme. He accordingly urged for the immediate release of the 1st and 2nd accused on such terms as the Court may deem reasonable. He premised his arguments on the following authorities:

[a] Sudi Oscar Kipchumba vs. Republic [2020] eKLR (whose facts were somewhat different as it concerned pre-charge detention)

[b] Republic vs. Danson Mgunya & Another [2010] eKLR; and,

[c] Republic vs. Kassim Kibwana Mohamed [2008] eKLR.

[3] On behalf of the State, **Ms. Kegehi** opposed the application. She relied on the affidavit sworn on **25 January 2021** by the investigating officer, **Cpl. Richard Muthee**, in which it was averred, *inter alia*, that the 1st and 2nd accused persons have been intimidating the Prosecution witnesses through their relatives. **Ms. Kegehi** also pointed out that the views of the victims were not taken into account when the initial pre-bail report was made; and therefore that the provisions of **Section 6** of the **Victim Protection Act, No. 17 of 2014** were not adhered to. She accordingly opposed the admission of the 1st and 2nd accused persons to bail.

[4] There is no gainsaying that bail is a constitutional right. The right is founded on **Article 50(2)** of the Constitution, which stipulates that every accused person is entitled to the presumption of innocence. Consequently, **Article 49(1)(h)** of the Constitution is explicit that, unless there is a compelling reason, an accused person, ought to be released on bail, as a matter of right, pending the hearing and determination of his case. It 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."**

[5] Accordingly, **Section 123A** of the ***Criminal Procedure Code, Chapter 75 of the Laws of Kenya,*** stipulates that:

> ***(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 fulfilment of obligations under previous grants of bail; and;***
>
> ***(d) the strength of the evidence of his having committed the offence;***
>
> ***(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—***
>
> ***(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;***
>
> ***(b) should be kept in custody for his own protection.***

[6] And, in the **Bail and Bond Policy Guidelines**, it is restated as a general guideline in Paragraph 4.9 that:

> **"In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences."**

[7] The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

> **[a]** The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
>
> **[b]** The strength of the prosecution case.
>
> **[c]** The character and antecedents of the accused person.
>
> **[d]** The failure of the accused person to observe bail or bond terms.
>
> **[e]** The likelihood of interfering with witnesses.
>
> **[f]** The need to protect the victim or victims of the crime.
>
> **[g]** The relationship between the accused person and the potential witnesses.
>
> **[h]** The best interest of child offenders.
>
> **[i]** The accused person is a flight risk.
>
> **[j]** Whether the accused person is gainfully employed.
>
> **[k]** Public order, peace and security.
>
> **[l]** Protection of the accused persons.

[8] Thus, having perused and considered the application in the light of the averments set out by the investigating officer in the aforementioned affidavit, it becomes plain that the Prosecution is relying on the following grounds as the compelling reasons for the continued incarceration of the 1st and 2nd accused persons:

> **[a]** That they are a flight risk and therefore are likely not to turn up for the remaining sessions of their trial;
>
> **[b]** That they are likely to interfere with the Prosecution witnesses;

[9] To that end, it was the averment of **Cpl. Muthee** that the accused persons are a flight risk, having disappeared from their village after the offence was committed. The State is therefore apprehensive that they are likely to disappear should they be released on bond; and that tracing them would be near impossible due to their nomadic lifestyle. He further deposed, at paragraph 5 of the said affidavit, that three of the suspects are still at large and are yet to be traced in spite of the diligent efforts made by the police.

[10] I have given the foregoing careful thought and having perused the documents on the file, it is manifest, as rightly pointed out by **Mr. Tororei**, that in the pre-bail reports filed herein on **16 July 2018**, it was established that the 1st and 2nd accused persons were residents of Embolot Location in Elgeyo Marakwet County; and that they were farmers in the area. It is a contradiction therefore for the investigating officer to now aver that the accused persons are pastoralists with no known place of abode. In **Republic vs. Danson Mgunya & Another** (supra) in which the accused persons, persons of known fixed abode, were arrested over two years from the date of the offence, the court held that:

> "**From the facts and circumstances of the case, they do not appear that they are the type to people who are likely to abscond and leave the jurisdiction of the court. Where would they run to? What resources do they have to run away? These are relatively senior citizens who are approaching retirement age…"**

[11] It was, thus, incumbent on the prosecution to prove their allegations to the satisfaction of the Court, which I cannot say has not been done herein. Additionally, a perusal of those reports further show that the averment, at paragraph 10 of the affidavit of **Cpl. Muthee** cannot be true; for the two reports in respect of the 1st and 2nd accused took into account the views of the victim's family. I note that reference was made specifically to a pre-bail report filed on **5 June 2017**. That report is in respect of **Gideon Kipruto Kisang**, who is already out on bond and therefore has nothing to do with either the 1st or 2nd accused persons.

[12] Further to the foregoing, it cannot be gainsaid that the Prosecution has had more than sufficient time to trace and apprehend the remaining suspects. It was expected then that a clear demonstration be made as to what efforts, if any, have been made to apprehend the other suspects who are still at large. This, too, has not been done. In the same vein, I find the assertion that the accused persons have been intimidating witnesses implausible. This is because they are in custody and therefore unable to personally threaten or intimidate witnesses; and whereas particulars of OB entries were mentioned in the investigating officer's affidavit, there is absolutely nothing to show the nature of the complaints, by whom they were made or against whom they were registered. Hence, the names of the susceptible witnesses were not supplied. This is significant, taking into account that 4 key witnesses have already testified.

[13] Moreover, the question that must invariably be posed, given the constitutional safeguards on the right to bail, is whether there are no less restrictive means to achieve the same objective of ensuring protection of the remaining Prosecution witnesses other than denial of bond. As was rightly stated by counsel for the accused persons, it is not unusual for the courts, in such circumstances, to impose such conditions as are necessary with a view of striking the proper balance between the accused persons' constitutional right to bail and the interests of justice; including the requirement that the accused persons keep off certain localities. I therefore would agree with the position taken by **Odunga, J**. in **Republic vs. Robert Zippor Nzilu [2018] eKLR** that:

> **. "...in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to *Thesaurus English Dictionary* is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons."**

[14] In the light of the foregoing, I am not satisfied that compelling reasons have been given herein to warrant the continued incarceration of the 1st and 2nd accused. Accordingly, it is hereby ordered that they be released on bond of **Kshs. 250,000/=** each with a surety standing for them in like sum; and that they steer clear of the remaining civilian prosecution witnesses and not intimidate, threaten or in any other way interfere with them, pending the hearing and determination of this case.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF FEBRUARY 2021

OLGA SEWE

JUDGE