



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR. NO. E 002 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MBOGO NYAGAH.....1ST ACCUSED

PETER MWANGAGI KILONZO.....2ND ACCUSED

ANDREW KIANIA NYAGA.....3RD ACCUSED

RULING

INTRODUCTION

1. The accused persons face the charge of Murder contrary to **section 203 as read with section 204 of the Penal Code** (Cap 63) Laws of Kenya for which a plea of not guilty was entered.
2. The particulars of offence being that,1. John Mbogo Nyagah 2. Peter Mwangangi Kilonzo 3. Andrew Kiana Nyagah on the 17th day of May, 2020 at Muga wa Mutanka Village, Murinda Sub location, Tharaka South sub County within Tharaka Nithi County, jointly with others not before court, unlawfully murdered Julius Majira Joseph.
3. By an application dated 28th.01.2021, the accused person pray for release on bail/bond citing various reasons as enumerated in the supporting affidavit as below:
 - i. That all the accused person were residents of the county hence not a flight risk.
 - ii. That the 3rd accused person is a student at Kajimpau Secondary School.
 - iii. That there is no hostility towards them in the local community to warrant their continued incarceration.
 - iv. That there are no compelling reasons why they should be denied bail/bond.
4. On the 17th.02.2021, No.61452 Cpl. Benard Muli filed a replying affidavit stating among others that:
 - i. That he is the investigating officer and thus seized of the facts.
 - ii. That during his investigations, he got information that one of the key witnesses by the name of Benard Mungati Nyagah had been threatened by the 1st and 2nd accused persons and as a result, he has since relocated from his home for his security.
 - iii. That he made efforts and the same threats was recorded via OB 11/1/21 and an extract of the same attached to the said affidavit.
 - iv. That during his investigations, he interacted with the local administration and got information that there is a lot of tension in the area and there is a high risk of revenge if the applicants are released on bond at this time.
 - v. That most of the witnesses are people who are well known by the accused persons and from his investigations if the 1st and 2nd accused persons are released before they testify, there are high chances that they will be intimidated.

vi. That he is not opposed to the 3rd accused person being released on bond since he is a student and has not been mentioned among those threatening witnesses.

5. On the 16th.02.2021, the probation officer filed a report before the court and among other things indicated that:

i. As much as it's the 1st and 2nd accused persons' constitutional rights to be released on reasonable bond/bail terms, releasing them at this time may be a risk to their security and or that of the witnesses.

ii. With regard to the 3rd accused person, the probation officer recommended that he be released on bond but with a surety. This is due to the fact that he is a student who was in school at the time of his arrest.

6. On the 24th.02.2021, the accused persons filed a supplementary affidavit informing the court that the said threatened witness is a brother to the 1st and 3rd accused persons. That he is the architect behind their arrest since he had hired assassins who were overpowered by the members of the public when an alarm was raised leading to the death of the deceased herein.

7. On the 19th.05.2021, the application dated 28th.01.2021 was argued by both parties and the court made an order that the 3rd accused person be admitted to a bond of Kshs. 500,000.00 plus one like surety.

8. It was equally brought to the attention of the court that the 1st accused person was sick and so needed to undergo a surgery on the 25th.05.2021 at Chuka Hospital; the court therefore made an order that the in charge prison to have the accused person escorted to the hospital to undergo the medical procedure at the Chuka General Hospital.

ANALYSIS AND DETERMINATION

I have considered the application.

9. The issue for determination is whether to admit the accused persons to bond or bail terms.

10. The right to bail or bond is a fundamental right enshrined in the Bill of Rights. Article 49 (1) (h) of the Constitution 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 be compelling reasons not to be released.

11. Article 49 of the constitution stipulates that: An arrested person has the right to:

a)

h) 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. The Court is enjoined under Article 20 (3) of the Constitution to act such as to give effect to the constitutional rights in the Bill of Rights as follows:

“20. (3) In applying a provision of the Bill of Rights, a court shall —

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

13. Further, **section 123 A(1)** of the **Criminal Procedure Code** which is to be read with **section 123** thereof provides as follows:

“123A(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 and 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 having committed the offence.”

14. Subsection (2) thereof stipulates that 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.”

15. In **Michael Juma Oyamo & another v Republic [2019] eKLR**, the Court of Appeal pronounced itself as follows in respect to compelling reasons that can justify denial of bail/bond:

“Article 49(1) (h) of the Constitution states 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”. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person.....what amounts to compelling reasons as defined by the High Court in R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 as follows:

“... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.”

16. In **Dominic Karanja v Republic (1986) KLR 612**, the Court of Appeal stated in alia:

“(a) The most important issue was that if the appeal had such overwhelming chances of success, there is no justification for depriving the applicant of his liberty and the minor relevant considerations would be whether there were exceptional or unusual circumstances;

(b) The previous good character of the applicant and the hardships if any facing his family were not exceptional or unusual factors. Ill health per se would also not constitute an exceptional circumstance where there existed medical facilities for prisoners;

(c) A solemn assertion by an applicant that he will not abscond if released, even if it is supported by sureties, is not sufficient ground for releasing a convicted person on bail pending appeal;

(d)”

17. In **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR** where the Court stated,

inter alia:

“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”

18. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation.

19. In this case, this court has been called upon to weigh the accused persons’ right to bail under Article 49(h) against the compelling reasons given by the prosecution (in this case, the investigations officer) for denial of the same.

20. It is important to point out that the grant of bail and bond is based on the presumption of innocence until proved guilty which is also a constitutional right. There must be compelling reasons if it has to be denied.

21. Turning to the case at hand, the investigation’s officer stated that the appellants were flight risk and were likely to disturb public peace, order and security. Although the circumstances of each of the Defendants are similar, they are also different in some respects and therefore the Court has to consider the issues separately treating each of them individually. However, there is a central core which is consistent. The Offence alleged is a serious offence which involves unlawful murder.

22. In the circumstances, it is a fair deduction that the 1st and the 2nd accused persons having threatened a key witness and further that the key witness is a brother to the 1st and 3rd accused persons; the aspect of proximity can never be ignored. This is equally confirmed by the Probation Officer.

23. That gives rise to a strong indication that they can and will influence potential witnesses. In addition, the Court is informed that there is still strong feeling of tension in the area. Taken with threats of retribution issued by the Victim’s family, that again give rise to a very real and strong risk of public disorder, or similar incidents being witnessed.

24. As much as the accused persons - more so the 3rd accused person - have presented a surety in the form of a person who can ensure his attendance, the other two lack sureties. In the same breadth, the only asset is mainly unregistered land. This also demonstrates that the accused persons have nothing to hold them to this area should there be enough incentive for them to leave.

25. As for the 3rd accused person; in the case of **A M K and M K** – the Probation Officer filed a report dated 16th .02.2021 that the accused person is aged 22 though still a student. He is said to be school going. The investigation officer is equally not opposed to his release and the head teacher committed that he would be release him to attend court whenever he is required.

26. For these reasons:

i. The affidavit by the investigating officer and the social inquiry report demonstrates compelling reasons not to release 1st and 2nd accused on bail at this stage. The application for release on bail/bond is dismissed. The 1st and the 2nd accused persons are at liberty to renew the application after the threatened witnesses have testified.

ii. I allow the application with regard to the 3rd accused person as earlier ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF JUNE 2021.

L.W. GITARI

JUDGE

29/6/2021

Ruling has been red out in open court.

L.W. GITARI

JUDGE

29/6/2021