



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE E004 OF 2021**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JONATHAN MUEMA MUTUNE ..... 1<sup>ST</sup> ACCUSED**

**BERNARD MUTIE MUTHIANI .....2<sup>ND</sup> ACCUSED**

**KELVIN EMOJONG .....3<sup>RD</sup> ACCUSED**

**BWAYO MOHAMMED .....4<sup>TH</sup> ACCUSED**

**RULING**

The 4 accused have applied to be released on bail pending the hearing and determination of this case. Whereas accused 2, 3 and 4 made oral application, accused 2 filed a formal application for bail dated 16.6.2021. The submissions were made in court on 22.6.2021. For accused 2, 3 and 4 it was submitted by Mr. Barongo, that there are no compelling reasons herein that would justify a denial of the right to bail. Counsel relied on the case of ***Republic Versus Robert Nzivo Nzilu (2018)eKLR***, that the court must find a compelling reason for the right to bail to be denied. Counsel went on that there is no evidence that the accuseds would abscond nor interfere with the prosecution witnesses. Lastly that the accuseds have stable employment, families and places of abode. Counsel also cited ***Ramadhan Iddi Ramadhan and others Versus Republic (2019)eKLR***, and ***Republic Versus William Kipkorir (2018)eKLR***, that the main consideration is whether the accused will turn up for his trial.

Mr. Kamau, submitted on behalf of the 2<sup>nd</sup> accused that all offences are bailable. That there is no evidence that accused will interfere with any witnesses. He is also one with a fixed abode and a family.

Mr. Kitheka, learned counsel for the family of the victims, opposed the release of the accuseds on bail. It was submitted that the accuseds and the deceased are neighbours who were well known to each other. That the witnesses are vulnerable and cannot afford an alternative accommodation. It was pleaded that the accuseds be remanded in custody.

The state Respondent, also opposed this application. It was submitted by learned counsel, Ms. Maina, that the family of the deceased still experiences trauma as the still live in the same neighbourhood as the accused. That there is reasonable apprehension that they will be intimidated.

For accused 4, it was submitted that he is Ugandan, and that the court ought to balance the interest of the accused, the deceased and the victims who lost a breadwinner. Also public interest.

I have considered the submissions made herein by the 4 learned counsel for the parties. Articles 49(1)(h) guarantees the right to bail to all persons accused. And this right extends to all accuseds irrespective of the nature of the charges that they face. However, the said right to bail is not absolute. Same may be denied should there be in existence compelling reasons.

The Judiciary Bail and Bond Policy Guidelines have given guides on what would constitute compelling reasons. Amongst these are:-

- ***The nature of the charges and the seriousness of the punishment in case of conviction.***
- ***The strength of the prosecution's case.***

- *Character and antecedents of the accused*
- *Failure of the accused to observe terms of bail in the past.*
- *Likelihood of interference with witnesses.*
- *Need to protect the victims.*
- *Relationship between the accused and the witnesses.*
- *Whether the accused is a flight risk.*
- *Protection of the accused.*
- *Public order, peace or security.*

It must be noted from the onset that the rationale of grant of bail is to enable the accused attend court while he is out of remand custody. It is not a licence for the accused to escape and fail to face his accusers in court. In the words of the Hon. Justice E. C. Mwita, in the case of *Republic Versus Godfrey Madegwa and 6 others (2016)eKLR*:

*“the primary purpose for bail is to secure the accused’s attendance to court to answer the charge at the specified time”*

I fully associate myself with this finding of the learned Judge. It is therefore incumbent upon the prosecution to convince this court that the accused are likely to abscond never to turn up for their trial if they are released on bail. With utmost respect, the prosecution did not satisfy this requirement.

On the issue of likelihood of interference with the witnesses, again the prosecution has not pointed out any incident of interference. It has however come out clearly that accused 2 and the deceased were well known to each other and that their families stay in the same neighbourhood. In support of this application, the 2<sup>nd</sup> accused has appreciated the genuine fears of the family of the deceased who have established a permanent residence in the neighbourhood. Accused 2 has given the undertaking to move out from the location so as to minimize possibilities of contact with the family of the deceased. I find this undertaking reasonable in the circumstances.

As for the grounds of public peace, security and order, the prosecution alleged the same. No evidence was however placed before the court, sufficient enough to convince this court that release of the accused on bail would lead to any breach of public peace and order.

In the circumstances, I am not convinced that the prosecution has quite proved the existence of any compelling reasons good enough to make this court deny the accused the right to pre-trial bail. On the contrary, I am persuaded to hold that it would be proper and just to grant the accused bail, albeit on appropriate conditions.

I accordingly order that each of the accused may be released on bond on the following terms;

- i) Each accused may be released on a bond of Kshs.2 million with 1 Kenyan surety of a similar amount.*
- ii) For accused 2, before his release on bond, he must show proof that he has vacated the current premises that his family occupies. He must also indicate specifically where he shall henceforth reside, which in any case must not be within a radius of 1 Kilometer from the residence of the family of the deceased.*
- iii) The accuseds are ordered never to interfere with and or contact any of the prosecution witnesses, directly or by proxy, till the determination of this case.*
- iv) The accused are, upon release on bail, ordered to attend court at all times as shall be ordered by the court till this case is determined.*
- v) Failure to comply with any of the above set terms herein could attract the cancellation of the bond granted to the accuseds.*

Ordered accordingly.

**D. O. OGEMBO**

**JUDGE**

**30.8.2021.**

**Court:**

Ruling read out in court (on-line) in presence of the accuseds, Mr. Barongo, (also holding brief for Mr. Kamau, and also Mr. Kitheka. Ms.

Kimani is present for the state.

**D. O. OGEMBO**

**JUDGE**

**30.8.2021.**