REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 3 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

GERALD NJERU M'IBUA .....1ST ACCUSED PERSON

JULIUS MBURU KINANGA ..... 2ND ACCUSED PERSON

JOHN NTHIGA KIREMA ..... 3RD ACCUSED PERSON

SISIRIA KATORA ROCHIANGA ..... 4TH ACCUSED PERSON

LEAH MUTHONI NGIGI ..... 5TH ACCUSED PERSON

JULIUS NJERU KIMENYE ..... 6TH ACCUSED PERSON

JORNARD NJAGI KIBIUBI ..... 7TH ACCUSED PERSON

GEDIEL MUNYUA MUNUGU ..... 8TH ACCUSED PERSON

TOM KINYUA NJOKA ..... 9TH ACCUSED PERSON

R U L I N G

1. The nine (9) accused persons herein are facing a murder charge under **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63 of the Laws of Kenya**. The accused persons pleaded not guilty and the trial commenced with the prosecution calling a total of nine (9) witnesses before it closed its case on 30th September 2021.

There are two rulings pending before this court

THE FIRST RULING

2. This ruling thus seeks to determine whether or not the prosecution has made out a *prima facie* case against the accused persons that would warrant this court to call upon the said accused persons to give their defence. In other words, do the accused persons have a case to answer?

3. The law is well settled by a line of authorities as to what constitutes a prima facie case. The leading authority is the case of **Ramanlal T. Bhatt -v- Republic [1957] E.A. 332** where the court defined a prima facie case as one which a reasonable tribunal properly addressing its mind to the law and evidence, could convict if no explanation is offered by the defence.

4. This court has the duty to evaluate the testimony of each of the nine (9) prosecution witnesses against the charge of murder that the accused persons are facing. In the instant, it is my view that the evidence presented by the prosecution before this court meets the threshold in the case of **Bhatt -v- R** which I have cited above.

5. At this stage, no reasons need to be given for this finding as this court is yet to hear the side of the story of the accused persons and

giving reasons would amount to determining the case without giving them an opportunity to be heard (See: **Republic -v- Samuel Karanja Kiria [2009] eKLR**).

6. It is sufficient at this juncture to inform the accused persons whether they have a case to answer and give them a chance to be heard. It is my finding that based on the evidence tendered by the prosecution upto the close of their case there is sufficient evidence to warrant the accused persons to be put on their defence as charged. The accused will therefore proceed as provided under **Section 306 (2) and (3) of the Criminal Procedure Code (Cap 75** Laws of Kenya) which provides:-

> ***"(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his rightto address the court, either personally or by his advocate (if any), togive evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.***
> ***(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the courts hall call upon him to enter upon his defence."***

2nd Ruling

Whether the accused persons should be released on bail/bond terms

7. Vide a ruling dated 7th May 2020, this court (although differently constituted) found compelling reasons to deny the accused persons bail by holding as follows:

> **"It is true that this court vide a ruling dated 24th July 2019 found some compelling reasons to deny the accused persons bail. The reasons were hinged on the probation report and the objection raised by the State. The reasons were based on the fact that the situation in the locality where the accused persons came from is still fluid and given that the most witnesses are from the same locality and the manner in which the murder was executed, the civilian witnesses were likely to be intimidated and shy away from coming to court to testify. Those reasons and/or fears are still valid because so far none has testified in court. In the premises this court finds that nothing much has changed to persuade this court to review its position taken on 24th July 2019. For now the application dated 16th April 2020 is disallowed. The Applicants can apply for review after at least majority of the civilian witnesses have testified."**

8. Noting that the prosecution has now closed its case, the accused persons, through their advocates on record, have seized the opportunity to revisit the issue of the accused persons being released bail/bond terms pending the final determination of the case.

9. Apart from the likelihood of interfering with witnesses, other compelling reasons that a court can base its finding to disallow such an application are highlighted under **Clause 4.26 of the** Judiciary's **Bail and Bond Policy Guidelines, March 2015. These include the following**:

> **a. That the accused person is likely to fail to attend court proceedings; or**
>
> **b. That the accused person is likely to commit, or abet the commission of, a serious offence; or**
>
> **c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or**
>
> **d. That the accused person is likely to endanger the safety of victims, individuals or the public; or**
>
> **e. That the accused person is likely to endanger national security; or**
>
> **f. That it is in the public interest to detain the accused person in custody.**

10. In the instant case, the accused persons contend that each of them has a fixed abode and rely heavily on the favourable pre-bail probation reports prepared for each of them. They further contend that their release on bail/bond will enable them to acquire all the resources to map out and/or prepare their defences.

11. On the other hand, the prosecution has opposed the said application contending vide the Replying Affidavit sworn by one P.C. Joseph Nampaso on 19th October 2021. He depones that the accused persons are likely to abscond if released on bail/bond given the strength of the prosecution's case against them. He further depones that the land issues that led to the commission of the present offence are still persistent on the ground and may lead to the commission of more offences if the accused persons are released on bond/bail. In addition, he has deponed that the victim's family is apprehensive that if the accused persons are released, their safety will be at stake given that deceased's widow has been severally accosted by family members of the accused persons and the matter reported to the police.

12. Considering the facts of the case, it is my view that the reasons deponed in the aforesaid affidavit are not compelling to deny the accused persons bail at this stage. My view is that there can be no room for negative inferences or speculation without adequate and proper basis

where the liberty of a person is at stake. As per the pre-bail probation reports, the current home environment is not tense to expose the accused persons to danger and they have been recommended by their family members, the community members and the area administrator are not to be in a position to jeopardize justice. The contention that the accused are likely to abscond due to the strength of the case is in my view not a compelling reason. The question is, does the prosecution suggest that if one is out on bail and at the close of the case the evidence is cogent, bail should be cancelled. This is not a good reason for denying bail to accused persons. The intention of Parliament is that bail can only be denied where there exists a compelling reason.

13. Article 49 (h) of the Constitution entrenches the right of the arrested person to be released on bail pending a charge or trial unless there are compelling reasons for refusing bail. This means that the accused person is constitutionally entitled to bail until and unless compelling reasons are demonstrated. This right is available to an accused person at any time while he is in custody or at any stage of the proceedings, a court has the discretion to grant bail. The term compelling reason has not been defined but it must be one which is capable of convincing the court not to grant bail.

A judicial determination of what amounts to a compelling reason entails determining the constitutional rights of a citizen and interests of the state. It therefore calls for the courts to apply a strict scrutiny of standard of the compelling reason. In ***Republic –v- Danfound Kabage Mwangi (2016) eKLR*** the court while dealing with a similar matter, held that, ***" To pass a strict scrutiny, the law or policy must satisfy three tests, the compelling interest refers to something necessary or crucial as opposed to merely preferred. The law of policy must be narrowly tailored to achieve that goal or interest and finally the law or policy must be the least restrictive means for achieving that interest."***

In determining the issue of right to bail the consideration must be that the liberty of an individual is precious and is to be protected by the court as desired by the Constitution. The court has to strike a balance between the rights of the individual and the public interest. The Principal consideration is whether the accused person will appear for his trial. As stated in the case of ***Republic –v- Danford Kabage (supra)*** the general rule is for the court to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused person before conviction and the need to bear in mind the circumstances of the case. This +means in determining bail, public good as well as the rights of the accused should be kept in mind. The court has discretion after considering the circumstances of the case, to grant or to deny bail. Each case will therefor depend on its own merits.

In this case bail was denied due to the risk of the accused interfering with witnesses. The risk is no longer there as the prosecution has closed its case. The tension and hatred will always be there. The risk of absconding can be checked by imposing stringent terms and condition to ensure that accused attend court.

I find that at this stage the prosecution has not laid before this court a compelling reason to deny the accused persons bail. The issues raised in the affidavit sworn by the investigating officer are mere allegations which have failed to disclose compelling reasons. I find that the application for bail is merited. I order as follows: -

1)Each accused will be realized on a bond of 2,000,000/- (Two million) plus one like surety each.

2)The surety to be approved by the Deputy Registrar.

3) The accused will upon signing bond, be required to attend court once in a month for mention until the case is finalized. This is in addition to attending court for hearing or as may be ordered by this court.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF NOVEMBER 2021.

L.W. GITARI

JUDGE