



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HIGH COURT CRIMINAL CASE NO 27 OF 2021

STATE.....PROSECUTOR

VERSUS

AMOS NYAKUNDI ONDIEKI *alias* SONKO.....1ST RESPONDENT

CHRISPINE MAKWARO OGETO.....2ND RESPONDENT

PETER ANGWENYI GWANGA.....3RD RESPONDENT

BRIAN MECHA NYAKUNDI.....4TH RESPONDENT

RONALD OMBATI ONYONKA.....5TH RESPONDENT

JUSTINE MORARA.....6TH RESPONDENT

JUSTINE AKIYA TUMBO.....7TH RESPONDENT

RULING ON BAIL PENDING TRIAL

1. Amos Nyakundi Ondieki alias Sonko, Chrispine Makwaro Ogeto, Peter Angwenyi Gwanga, Brian Mecha Nyakundi, Ronald Ombati Onyonka and Justine Moraa (*the accused persons*) herein face four (4) counts of murder **contrary to section 203 as read with section 204 of the Penal code**. The particulars of the offence are that on 17th October 2021 at Mbanda sub location, Marani sub county within Kisii county, jointly with others not before the court murdered **Sindege Mayaka** (in count 1), **Rael Sigara Onkware** (in count 2), **Agnes Moraa Ototo** (in count 3) and **Jemimah Nyangate Mironga** (in count 4).

2. The accused persons were arraigned in court on 29th October 2021 and each of them pleaded not guilty to all the four counts and a plea of not guilty entered against each of them in relation to each of the counts.

3. Their Counsel, **Mr. Kaba**, made an oral application on behalf of the accused persons seeking that the accused persons be granted reasonable bond terms.

4. The prosecution opposed the bail application and an affidavit by Corporal Zebedayo Wawire No 50917 dated 8th November 2021 was filed. Corporal Zebedayo Wawire in his affidavit deponed as follows:

5. *That it is for the safety of the respondents that I pray that this honourable court do deny the respondents bond due to the magnitude of the offence committed and the impact it had to the family and the general public.*

6. *That the pain of the killings has not yet subsided especially to the victim's families and this could cause a lot of damages if the respondents were given bond to join the general public as the tensions on the ground is still high.*

7. *That if they are released on bond they may interfere with the witnesses and some of the respondents might not appear on the hearing date thus causing delay on the administration of justice.*

8. *That the respondents committed a series of violent offences against humanity therefore should serve as an example to others who might have the same notion.*

5. State Counsel, **Miss Kibungi**, submitted that the social inquiry reports indicate that the security of the accused persons is not guaranteed. She urged the court to deny the accused persons bond terms.

6. **Dr. Khaminwa and Mr. Ndubi** are on record representing the families of the victims. Mr. Khaminwa in opposing the bail application submitted that if the accused persons were to be released on bail then there is a likelihood of the accused persons being killed.

DETERMINATION

7. The protection of the rights of accused persons is enshrined in the **Constitution of Kenya 2010** to safeguard their rights and secure their protection against abuse from any state agency within the criminal justice system.

8. An accused person shall be presumed innocent until the contrary is proved (*see Article 50 (2) (a) of the Constitution*). It therefore follows that they have a right to be released on bond or bail on such conditions that will ensure their attendance in court. However, the right to be released on bail is not absolute as the Constitution further provides that if the prosecution were to demonstrate any compelling reason why an accused person ought not to be released, then in such circumstances the court will not grant bail. **Article 49 (1) (h) of the Constitution** guarantees the right to be released on bond by providing as follows:

“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.”

9. **Section 123A of the Criminal Procedure Code** highlights some of the essential factors to be considered by courts when arriving at its decision on whether or not bail should be granted. It provides as follows:

“(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;

(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.”

10. The main ground raised by the prosecution for the denial of bail to the accused persons was that the safety of the accused persons cannot be guaranteed in the event that they are released because of the high tension in the community following the murders of the deceased persons.

11. I have considered the Probation Officer’s Report filed in regard to the 1st, 2nd, 3rd, 4th and 5th accused persons. The 1st - 5th accused persons hail from Mwangichana East location. According to the report there is apprehension from their families that if they are released on bond, the accused persons may face retaliatory attacks from members of the community following the brutal death of the deceased persons. The accused persons have not provided an alternative area/place of abode upon their release on bail. Clearly, it will not be safe for the accused persons to go back and live in the same locality in which the murders were committed.

12. The prosecution was also of the view that the accused persons may interfere with witnesses and abscond the hearing of the matter if granted bail and urged the court to consider that the accused persons have been charged with a serious offence. In **R .V. Jackton Mayende & 3 Others Bungoma HCCRC No. 55 of 2009 (2012) eKLR** the court while discussing what is meant by witness interference stated:

“.....(22) All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with the witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

13. In **Republic v David Ochieng Ajwang Alias Daudi & 11 others (2013) eKLR** where Sitati, J. pronounced herself on this issue as follows:

“In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the

situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all 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 persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.”

14. Although the Probation Officer’s Report was not availed in regard to the 6th accused person, this court notes that the deceased persons come from the same locality as all the 6 accused persons. The Probation Officer’s report reveals that there is still a lot of tension in the locality and the community is still outraged by the death of the 4 deceased persons.

15. There is also a great likelihood that most of the potential witnesses are from the same community as the accused persons. Therefore, if the accused persons are released on bond back to the same community that they share with the witnesses, the witnesses may have genuine fear and eventually fail to appear/testify against the accused persons. The accused persons have been charged of very serious offences and it would be in the interest of justice that they should face trial having taken plea. Their security within the very agitated community is not guaranteed and there is real danger that the witnesses may perceive the 6 witnesses as a threat to their safety and they may altogether fail to testify.

16. Accordingly, I decline to grant the release of the accused persons Amos Nyakundi Ondieki *alias* Sonko, Chrispine Makwaro Ogeto, Peter Angwenyi Gwanya, Brian Mecha Nyakundi, Ronald Ombati Onyonka and Justine Morara on bail/bond pending trial and dismiss their application.

17. The accused persons shall remain in custody as was directed by this court on 29th October 2021 until the hearing of the prosecution case which shall commence on 1st March 2022.

DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF DECEMBER, 2021.

R. E. OUGO

JUDGE

IN THE PRESENCE OF:

ACCUSED PERSON NO’S 1, 2, 3, 4, 5 & 6 - PRESENT

MR. KABA FOR THE 1ST TO 5TH ACCUSED PERSONS

MR. NDUBI FOR THE VICTIMS

MR. KAINO STATE COUNSEL ODPP

KELVIN ISINDU COURT ASSISTANT