



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CRIMINAL CASE (MURDER)

NO 5 OF 2018

BETWEEN:

THE REPUBLIC

AND

(1) NJULU MWAKIO NJULU

(2) ANOLD MWANGACHE

(3) GIDEON MENZA

(4) DELIUS MCHARO MAGHANGA

(5) BERNARD ROVAL MWABILI MAIGHACHO

RULING ON APPLICATION FOR BAIL

1. The Court has before it an application by each of the Defendants in ***Criminal Case No 5 of 2018 and Criminal Case No. 1 of 2019***. The Defendant Applicants have been charged with the Offence of Murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. The particulars of the Offence are that Njulu Mwakio Njulu, Arnold Mwangache, Gideon Menza Mighulo, Delius Mcharo Maganga and Bernard Roval Maigacho did "On the 11th day of July, 2018 at Kесе Shopping Centre in Werugha sub-location within Wundanyi sub-county in Taita Taveta County jointly with others not before the court beat up and burnt Delilah Wawunda Jumwa who suffered injuries resulting in her death on 6/8/2018."

2. The First to Fourth Defendant were first brought before the Court on 19th September 2018 when they were referred to Port Reitz Hospital for assessment on fitness to plead. They have remained in custody since then. The Fifth Defendant was brought before the Court much later, on 14th January 2019. It was alleged that he had been evading arrest for the period of 5 months that intervened.

3. The First to Fourth Defendant were declared fit to plead by Reports dated 1st October 2018 and filed on 24th October 2018. The First to Fourth Defendant were allocated an Advocate, namely Ms Monyari. By a Report filed on 23rd January 2019 the Fifth Defendant was deemed fit to plead. Thereafter the two files were consolidated.

4. The First to Fourth Defendants were brought before the Court to take plea on 24th October 2018. Unfortunately, Defence Counsel did not attend. The matter was re-listed for taking plea on 22nd January 2019, on that occasion the Third Defendant was not brought to Court. The prison officer who accompanied the Defendants was unable to confirm his whereabouts. By that time the Fifth Defendant had been arrested. When all the Defendants were brought to Court to take plea on 26th February 2019, Counsel for the Defendants did not attend Court. At the next date, Defence Counsel was similarly not present in Court.

5. On 25th June 2019 all five Defendants were brought to Court. Counsel for the Defence again did not attend however Mr Ogeto was present and holding her Brief. He applied for another adjournment. The Prosecution objected on the basis that this was the ninth time the matter had come before the Court and Ms Monyari was not ready to proceed. The Defendant also expressed their displeasure at being held for more than 9 months without plea. In the circumstances, and at the request of the First to Fourth Defendants, the Court directed that Defence Counsel be discharged and new counsel be appointed for each of the Defendant.

6. On 17th September 2019 the Defendants were all present in Court. Mr Mosioma represented the First to Fourth Defendants. Mrs Isika had been appointed for the Fifth Defendant, however, she had sadly been bereaved so Mr Mutinda was sent to hold her brief. Each of the Defendants pleaded not guilty on that day (17th September 2019). On the same day, at the start of the proceedings, Counsel made an oral application and submissions for the Defendants to be released on bail and/or bond pending trial before the Plea was taken. The Application was postponed to after the taking of plea (on the same morning) and submissions were made and recorded. The Court ordered pre-bail reports to be prepared by the National Probation Service.

7. In relation to the First to Fourth Defendants, the arguments put forward are that they are family men and the sole breadwinners and since their incarceration their families have been suffering. They have had difficulty getting their children to school and difficulties putting food on the table. It is also argued that the Defendants are not a flight risk. They are residents of Wundanyi and in particular Werugha. They have been very co-operative with the Police and are praying for lenient bond terms to allow them to go back to their families. They promise to abide by any terms set by the Court.

8. In relation to the Fifth Defendant it is argued that he is a family man. He is the sole provider. He is willing to abide by all conditions set upon grant of bail. The Court was told that he is a resident of Wundanyi particularly Werugha. The Fifth Defendant asks the Court for "favourable" bond terms. What the submissions on his behalf mean by "favourable" was not explained. The Fifth Defendant is said to be a family man who is the sole provider for his family which he does through casual labour. Those Submissions are expressly contradicted by the Pre-sentence Report. The Fifth Defendant is single and has not had much of a family life because his father was married to someone other than his mother and as a consequence he was brought up by his maternal grandfather, seemingly away from both parents. He is trained as a mechanic and worked as such.

9. Following the above submissions, the Court directed that Counsel address the Court further after receipt of the Pre-Bail Report. The Pre-Bail Report was filed on 16th October 2019. The Matter came back before the Court on 9th December 2019 when copies of the Reports were made available to Counsel and they were given an opportunity to address the Court further.

10. On behalf of the Fifth Defendant it was said that he has a fixed abode in Werugha Sub-location. He has family and his parents are there. The Defendant undertakes to attend Court if he is granted bail. His Father is willing to stand surety and make sure that the Defendant will attend Court as and when required. It is said that Community Members in Kese are not opposed to bail. He has no previous criminal history and is working in Kese as a mechanic for which he has trained. The Fifth Defendant would like to be released on bail for the life of the trial.

11. The Defendants have applied to be released on bail and/or bond until trial is concluded. It is well established that under the Constitution of Kenya an Accused person is entitled to bail and/or bond unless there is good reason for refusing the bail. An Accused person is innocent until proven guilty. As such he is entitled to the benefit of the presumption of innocence until proven guilty. The function or purpose of the bail or bond is to ensure that the Defendant will appear before the Court to be tried. Before coming to a decision the Court must consider the following:

- (a) The Antecedents of the Defendants
- (b) The likelihood of absconding
- (c) The likelihood of committing other offences while out on bail
- (d) The seriousness of the offence
- (e) The gravity of the punishment
- (f) The safety of the Defendants
- (g) Any health conditions of the Defendants
- (h) The approval of the sureties
- (i) The wishes and feelings of the victims.

12. Dealing first with the seriousness of the offence and the likely penalty if the Defendant is found guilty. The Defendants are charged with murder which carries the death penalty at its worst. In the circumstances, the Court must consider the possibility of absconding. In the circumstances of this case, the Defendants are residents of Kese Village/Werugha Location and as such are likely to frequent Kese Trading Centre. They clearly have the sympathy of the village headman and other "members of the community," who notably took no steps to assist the victim. The Prosecution argues that was out of fear. Further, the area where the Defendants frequent is the scene of crime. They have casual jobs and therefore are unlikely to be fully engaged in the circumstances of work and a routine lifestyle. In the circumstances, if they are returned to the same environment, the likelihood of re-offending is increased. Further, they themselves will be at risk from the family of the Deceased who believe they are the perpetrators. Neither the Report nor the submissions demonstrate an authority figure who will ensure attendance in Court.

13. In coming to a decision on whether or not to release the Defendants on bail at this juncture, the Court must consider the rights and needs of the Defendants. The Court also must consider the needs of the State in the sense of the administration of justice. Thirdly, the Court must take into account the wishes and feelings of the victims and the community at large.

14. The Probation Report states that if he is released the Defendants persons will be living in the family home. The Report omits to state

where exactly those family homes are situated.

15. Moving onto the specifics of each individual; It is submitted on behalf of the First Defendant that he is the father of two children and has a fixed abode. He lives in Kese Village. He was co-operative with the Police before his arrest. His family is said to be suffering because he is the sole breadwinner and his wife is a person living with a disability in one of her arms. He is not a flight risk. It is said that the community is not opposed. His Father is willing to stand surety and he owns a piece of land. His Father did attend Court and stated that he has two titles but he left the titles at home.

16. The Pre-Bail Report contradicts those submissions to some extent. It is said that the Defendant is married to Regina Manga who has physical challenges but that they have only one child not two. He has no previous record. The Pre-sentence report is vague in the sense that it sets out two conflicting views but does not attribute them to the persons named. Obviously, the weight attributed to the views of a chief will be different to the weight attributed to the views of a village headman (who may or may not have been in the vicinity of the alleged crime) would be different. It is not clear if there is an intention to mislead or whether that is an oversight. The negative view expressed, can therefore be fairly attributed to the Chief. It is clear that he opposes release. The reason given is that it would be likely to pose unrest and danger to the community. In addition, it is recorded that "All the Community" in Kese shopping centre support the Defendant. That clearly poses a risk for the victim's family who also live in the area. There is also the risk of the Deceased's family avenging her death. The Probation Officer's Report makes no recommendation. That is repeated for each.

17. In relation to the Second Defendant it is said that he is the Father of two children who depend upon him. That he is law abiding and that he is not a flight risk as he has a permanent place of abode. According to the Probation Officer's Report, the Defendant got married in 2001. He has three children. At the time of his arrest he was separated from his wife. It is said he was living with the children but the wife has been doing so by taking casual jobs which is an uphill struggle now. However, it is not clear if the Defendant did actually provide any maintenance for the Children since he did not have a job. He was separated from his wife and it is asserted he looked after the children. Given the circumstances, that is an implausible scenario. The siblings agreed to look for a surety. However, at the hearing, the person who attended was a brother, Daudi Cheremani who said they have no shamba but the Defendant can live with him. That does not amount to a surety. It also suggests that he has no home of his own to go back to and therefore has no attachment to the area.

18. The Third Defendant is aged 43 years. He is said to have a family, that is a wife and three children. Also that he has a fixed abode in Kese Village. He earns a subsistence living by casual jobs and is said to own a small property in Werugha. The details of that property were not put before the Court. He has an issue with his left eye. Neither Counsel nor the probation officer could tell the Court what that issue entails nor how serious it was. It was also submitted that he is entitled to family land and that 4 families live on the land. Those Submissions are contradicted by the Pre-Sentence Report which states that "the family is close knit with most of the members living far apart. None has a history of any deviant behavior". The family members were going to look for someone to stand surety but no-one attended Court on either day.

19. The Fourth Defendant is 41 years of age. He has two children. He has a previous record. He was convicted for a minor offence involving theft and was subsequently acquitted of a public order offence (incitement). His intended surety has appeared as an investigating officer before this Court on several occasions. He has the support of the village/community. The Defendant has no assets and the family land is small and jointly owned according to the Probation Officer. That may be incentive for him to attend Court but the land is not being put forward as security. The Pre-Sentence Report does not mention any medical issues although the Court was told that he failed to attend Court on an earlier occasion because he was being provided with medical attention. There was no family member who attended to stand surety for the Fourth Defendant. The Court was informed that his relative is a Police Officer who was attending an identification parade. There seems to be no asset which can be used as a surety.

20. In relation to the Fifth Defendant, he was arrested in January 2019 and brought before the Court for plea on 19th January 2019. It is submitted on his behalf that he is a family man and the sole provider for his family. Also that he is engaged in casual work. He is a resident of Wundanyi in particular Werugha. In fact, after filing of the pre-bail reports by the probation officer, the Court learns that the Fifth Defendant is single. He lives with his maternal grandfather in Kese Village in Wundanyi Sub-County. Werugha Location is in Wundanyi Sub-County. It is argued that he is not a flight risk and he will attend Court when required. It is said (by the Probation Officer) that he has a member of his family willing to stand security. In fact, no member of the family attended the hearing to confirm what was said.

21. In each report the Probation Officer has reiterated that the Victim's family are still feeling aggrieved and are opposed to any of the Defendants being released. One member of the family has vowed to avenge the death of the Deceased. The Provincial Administration in the form of the Chief is opposed to release on bail. All the Defendants are described by the Chief as rogues who should stay in custody pending hearing of this trial.

22. The Prosecution opposes the release of the Defendant but in particular the release of the Fifth Defendant on bail. It is argued that it took a long time for the Fifth Defendant to be arrested. It is said that the Defendant went into hiding for almost 6 months. The suggestion being that he was evading arrest. The other four Defendants had presented themselves to the Police when required to do so. The Prosecution also raises a further concern that the Defendants could very probably instill fear into the people of Kese Village thereby intimidating witnesses and interfering with the prosecution of this case. In support of that conclusion it is said that the offence took place in a public place. There were other people present but no-one intervened because they were frightened of the Defendant persons. Therefore it can be concluded that the Defendants will similarly be able to intimidate witnesses.

23. From the above, it is clear that the Fifth Defendant is a flight risk. Also that he himself would be at risk if he returned to Kese. He has also demonstrated an inclination to avoid arrest giving rise to a high risk of absconding and avoiding re-arrest. The Fifth Defendant lives and works in Kese Village and Trading Centre and therefore if he were released he would inevitably return to the scene of the crime. The crime occurred in a public place and therefore the risk of retribution is great.

24. Although the circumstances of each of the Defendants are similar, they are also different in some respects and therefore the Court has considered the issues separately treating each as an individual. However, there is a central core which is consistent. The Offence alleged is a serious offence which involves the beating to death of an elderly woman. The Prosecution's case is that each one and all the Defendant

together were complicit in the crime. The crime occurred in a public place. There were members of the public present but they were helpless to assist the Deceased against the Defendants. In the circumstances, it is a fair deduction that the Defendants hold some sway in Kese Market. This is confirmed by the Probation Officer. 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 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 as the concerns of the Chief reflect.

25. None of the Defendants has presented a surety in the form of a person who can ensure the attendance of the Defendant with the risk of losing an asset. Given the seriousness of the alleged crime, this is not a situation where the Court can order release without a bond and/or bail. This also demonstrates that the Defendant persons have nothing to hold them to this area should there be enough incentive for them to leave.

26. The Court cannot ignore nor discount the seriousness of threats of retribution. The Defendant and the family of the victim come from a very small place. Also it is said by the Prosecution that there is still tension on the ground following the offence. In addition there are real and direct threats against each of the Defendants of retribution because certain members of the family of the Deceased have threatened to take revenge against the Defendants. That places the Defendants at risk if they are released. It also puts the other members of the community at real risk. The safety of the Defendants and the community at large militates against release.

27. For those reasons the application for release on bail/bond is dismissed. The Defendant are a liberty to renew the application should their circumstances change.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated Delivered and Signed at Voi, this the 28th day of January 2020

In the Presence of

Court Assistant - Josephat

Prosecution – Ms Mukangu

First Defendant

Second Defendant No appearance by Counsel

Third Defendant in person

Fourth Defendant

Fifth Defendant – Mr Mutinda holding brief Isika

Probation Officer – Mr Riungu