



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**TAITA TAVETA COUNTY**

**HIGH COURT CRIMINAL CASE (MURDER) NO 4 OF 2019**

**BETWEEN:**

**THE REPUBLIC**

**AND**

**DAVID MACK MAROBE GITAHU (alias Soldier Boy)**

**RULING ON APPLICATION FOR BAIL**

1. The Court has before it an application by the Defendant in *Criminal Case No 4 of 2019*. The Defendant Applicant has been charged with the Offence of Murder contrary to *Section 203* as read with *Section 204 of the Penal Code*.
2. There is now a renewed application. The Accused/Applicant was arrested and charged with Murder. He was brought before the Court on 9<sup>th</sup> April 2019 when he was sent to Port Reitz for an assessment of his capacity to plead. The Report was dated 17<sup>th</sup> April 2019 and received in Court the same day. On 26<sup>th</sup> June 2019 the Accused was required to plead to the offence. The Accused made an application to be released on bail pending the trial on 16<sup>th</sup> July 2019. The delay between the two dates was occasioned by the absence of a Probation Report. The Court delivered its ruling on 22<sup>nd</sup> July 2019. Bail was refused. For the reasons recorded therein, including the fact that the probation officer assigned to the case had neglected to interview the family of the Deceased victim and they were violently opposed to any form of release.
3. The Accused, as is his right, has renewed his application. The National Probation Service appointed an alternative officer to prepare the current report, which was filed on 29<sup>th</sup> January 2020. The Court was scheduled to hear the Bail Application on 16<sup>th</sup> March 2020. However, that was the advent of the Covid -19 Regulations and as a consequence the Court was not sitting.
4. Following upscaling of Court Operations, this Application was brought under a certificate of urgency on 12 May 2020. The Application was heard on-line on the MS-Teams Platform. The Accused, his Advocate and the Prosecutor were able to participate as the record shows. There were no concerns expressed as to the quality of transmission or reception.
5. In his Certificate of Urgency the Advocate for the Accused set out the urgency as; *“That it is in the interest of justice that the Court hears and grants bail to the accused person on priority basis as the accused is suffering from a chronic ailment and his health is deteriorating in prison. The Orders sought are:*

“1. THAT this Application be certified as urgent

2. THAT the accused be admitted to bail/bond pending the hearing of this case.”.

The Grounds relied upon are:

- “1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The accused was 1<sup>st</sup> presented to Court on 9<sup>th</sup> day of April 2019 but a plea was formally taken on 26<sup>th</sup> June 2019.
3. The accused applied for bond on 16<sup>th</sup> July 2019 and a ruling delivered on 22<sup>nd</sup> July 2019 denied him bond.

4. The Court however gave the defence to make a fresh application after pre-bail report is one by another probation officer.
5. The 2<sup>nd</sup> pre-bail report was presented to Court dated 29<sup>th</sup> January 2020.
6. The Court then directed the matter do come for bail application on the 16<sup>th</sup> March 2020.
7. Due to Covid-19 pandemic the application could not proceed hence this application.”.

6. The Supporting Affidavit is sworn by the Advocate with conduct, which means he has cast himself in two inconsistent roles which is demonstrated by the fact that the Affidavit contains statements of fact as well as legal submissions. The arguments put forward in submissions are that (1) The Accused is not a flight risk, (2) He can only stay at his home in Kirinyaga county and therefore not likely to interfere with witnesses as all are from Taita Taveta County; (3) The Accused is willing to abide by any terms the Court shall impose until the case is heard and determined; (4) The pre-bail report recommends that if bond is given the court should put protective measures and I believe than an order for the accused not to be present in Taita Taveta county unless during hearings or mentions will suffice, (5) The Accused is unwell, (6) Bail is a constitutional rights, (7) The Court is urged to grant the Accused favourable bond terms; (8) There are no compelling reasons for the Accused to remain incarcerated.

7. Notwithstanding that the Applicant/Accused has previously made an unsuccessful application to be released on bail or bond until the final outcome of his trial, this Court is required to assess the current application and exercise its discretion anew on the basis of the Application now before the Court. The Court must therefore take into consideration the Accused, the seriousness of the offence, the wishes and feelings of the victims/victim’s family. In addition, the Court must take into account the fair and transparent administration of the justice system.

8. The Matters that this Court will take into account are:

- a. The presumption of innocence, in other words every person is presumed to be innocent until he is found guilty;
- b. The particulars and the seriousness of the offence. The Applicant is charged with intentionally taking the life of another which is extremely serious.
- c. The rights of the victims including taking their wishes and feelings into account
- d. The character and circumstances of the Accused/Applicant
- e. Ensuring that the decision engenders respect for and confidence in the legal system within the community generally
- f. Guarding against community anger and unrest whether it is directed towards the Police in Voi and/or the Applicant and/or the Court.
- g. Setting conditions that are not debilitating
- h. Setting conditions that (a) prevent and/or restrict absconding, (b) prevent interference with the trial process and (c) prevent intimidation of witnesses.

9. The Particulars of the offence the Applicant is charged with is that on 29<sup>th</sup> day of March 2019, during the evening/night time the Accused killed Esau Juma Mwangeka by shooting him in a venue known as Rockland Bar in Taveta Township in Taita Taveta County.

10. At the time of the offence the Accused was a serving police officer stationed in Taveta. He had risen through the ranks to become a corporal in the crime section. It seems he was also an investigating officer appearing in the local courts. In the Second Probation Report, it is said the Applicant was previously of good conduct. In the submissions of State Counsel, the Applicant was said to have served as a court orderly in the Wundanyi Magistrates’ Courts. State Counsel submitted that the Applicant was well liked by everyone. It is said (in the Report) that his colleagues at Taveta Police Station described him as a social and diligent officer.

11. However, the Report goes on to say that; “However, the accused’s work mates at Taveta police station were concerned about their police-community relations which might be waned if the accused returns to Taveta police station. All interviewed were concerned on the interference of the case and witnesses. However, they opined that the court grants bond with protection measures to ensure the accused person does not interfere with the trial process. There was no report on the risks on the accused should he be granted bond/bail.”. There may have been no report but the violence of the reaction of the family of the Deceased was readily apparent. It seems that even now they are opposed to bail and feeling their loss keenly.

12. When the Applicant was remanded to Voi GK Prison on 22<sup>nd</sup> July 2019, the Prison Service requested his transfer because they considered his presence near the Court to be problematic. By contrast the National Police Service took the opposite view. By a letter dated 23<sup>rd</sup> December 2019 a John Kirigwi, OGW for the Inspector General NPS wrote the the Principal Secretary in the Ministry of Interior suggesting that there were absolutely no concerns about the Accused and he was moved from Taveta to Voi operational when the Court grants Bail/Bond.

13. It is unclear what information was shared at the time this letter was written but it demonstrates a shocking lack of judgment. From the perspective of interfering with witnesses, it offers the perfect opportunity. The High Court for the County of Taita Taveta is situated in Voi

Town and the Police Station is a five minute walk away. It is unlikely that the NPS command structure are ignorant of that fact of the Murder Charge. In fact, that Letter gives this Court the perfect reason to deny bail. It shows a complete lack of respect for the victims, the Court and the proceedings. Placing the Applicant in Voi Town will provide him with the perfect opportunity to interfere with witnesses and the Court processes exactly as feared by his direct colleagues. That presents a picture of the National Police Service allowing and facilitating the Applicant with unrestricted access to the investigation and the Court so that he could proceed unhindered if he was minded to interfere with witnesses and their appearance in Court. The bias in favour of the perpetrator has been clearly demonstrated.

14. What of the objectivity of the ODPP? We have heard in Court what a close knit community the police officers were. The Prosecutor submits he was well liked. The ODPP does not oppose bail, which itself is an extremely rare circumstance in this Court. The Officer in Charge applied for the Accused to be held in a Police Station. Later, a significantly more junior state counsel arranged, through the good offices of the Resident Magistrate to interfere with the order of the High Court and transfer the Accused. That raises serious concerns about the safety of the victims family and the Court while the Applicant remains in Voi. However, this Court does not believe that the Applicant should be punished for the lack of foresight of his superiors.

15. The Second Probation Report presents a much more plausible scenario and provides the Court with more information. It records that the Applicant is a trained boxer who represented Kenya in the Olympics once. Of the family of the Deceased it is recorded that “the death of the victim is still fresh in the mind of his family. The victim’s family is psychologically, socially and financially affected. When the appeared in Court it was clear that victims family were violently opposed to bail. That was exactly 12 months ago and time heals, somewhat.

16. The Applicant’s former colleagues’ views are recorded thus; “*The investigating officers and the supervisors at Taveta Police station and National Police Headquarters did not oppose accused’s bail/bond. They are, however, concerned about interference with the trial process, safety of witnesses, strained relations with Taveta community, and the accused’s presence in Taveta.*”. Although the risk to the Accused is not addressed in the Report, this Court takes judicial notice of more recent incidents around the Country where police officers have been physically attacked collectively for the conduct of one of them. If the Applicant was permitted to work in Voi that would exacerbate the threat and general mistrust of the Police and by association the administration of justice. The accused acknowledges his indulgence in alcohol. He however points out that the same cannot be a hinderance to his adherence to court orders if bail/bond is granted.

17. The probation officer was unable to make contact with any of the Applicant’s wives or children. However, his siblings are supportive and his brother-in-law has agreed to stand surety.

18. In relation to the seeking the views of the victim’s family, it has been a characteristic of this case that IPOA is taking an interest, yet the ODPP did not find it appropriate for the Probation Report to be shared with that organization. Therefore, the Court does not have the benefit of their input on the suggested transfer.

19. That brings us to the rights of the Applicant. He is innocent until proven guilty. He has the right to bail unless there are good reasons to refuse. The reason to refuse is provided by the conduct of his senior officers. Should he therefore suffer due to the reason of their unreasonable decision making processes? It should be recorded that this Court considers the intention to transfer an investigating officer to the neighbourhood of the Court where he will be tried to be unreasonable to the point of irrationality. It also jeopardises the Applicant’s release on bail.

20. In the circumstances, this Court orders as follows:

1. That the Applicant to be released on bond for the duration of his murder trial on the following conditions

- a. Bond is set at KShs. 1,000,000/= with surety of like amount(KShs.1,000,000/=) being the standard rate applied in this Court
- b. During the period of the trial the Accused is not permitted to come into the County of Taita Taveta save for the dates when the trial is heard and then under police escort
- c. When he attends for the Hearing of the Murder Trial, the Accused will be permitted to enter the County of Taita Taveta for the day before the Hearing date(s) and the date after;
- d. The Accused shall not enter into any part of the County of Taita Taveta save with the express permission of this Court
- e. During the period of his trial the Accused shall reside in his family home in Kirinyaga
- f. During the period on which he is subject to the bail conditions, the Accused shall remain in reside in Kahiro Village, Gacharu Such Location in Kirinyaga County save for the periods when he appears in Court in Voi.

21. As stated above, the Letter dated 23<sup>rd</sup> December 2019 from the NPS to the PS is an unreasonable infringement of the rights of the Applicant. In the circumstances, the Court has decided suo motto that the decision contained is stayed and suspended for being unreasonable and an improper infringement of the right of the Accused to bail. It is therefore Ordered that the Inspector General of Police whether by himself, his servants, agents or howsoever is forbidden and prohibited from directing and/or authorising and/or encouraging and/or allowing the transfer of the Accused to Voi Town during the duration of the Murder Trial in which he is the Defendant. The Inspector General is also forbidden from directing and/or permitting and/or encouraging any other action and/or outcome which interferes with the trial of this matter by the High Court in Voi.

22. A breach of the above Order will be deemed to amount to (a) contempt of court and (b) misfeasance in public office and as a consequence will be liable to punishment accordingly.

Order accordingly,

**Farah S. M. Amin**

**JUDGE**

**Dated 21st July 2020**

**Signed and Delivered in Voi this the 22<sup>nd</sup> day of July 2020**

**In the Presence of**

Court Assistant: Josephat Mavu

Applicant/Accused: Mr. Muthami

Prosecutor: Ms Mukangu