



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 19 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DAVID KURIA1ST ACCUSED

SHADRACK OTIENO.....2ND ACCUSED

KENNEDY MURIMI NJOROGE.....3RD ACCUSED

JAMES BAHATI NYAMOLA.....4TH ACCUSED

KENNEDY MUNGAI FELISTER.....5TH ACCUSED

JAMES MAKORI SABERA.....6TH ACCUSED

RULING

The Accused, David Kuria, Shadrack Otieno, Kennedy Murimi Njoroge, James Bahati Nyamola, Kennedy Mungai Felister and James Makori Sabera are facing three counts of the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. According to the information, the accused, jointly and severally, on 20th February 2019 at Total Petrol Station along Racecourse Road in Nairobi County murdered David Nena Saitoti, Sidio Lusioki and Justus Omenyo Arita. When they were arraigned before court, they pleaded not guilty to the charges. The trial is yet to commence. Pending the trial, the accused have applied to be released on bail. Pre-bail reports in respect of each accused person has been prepared and is on record.

According to the accused’s advocate Mr. Mosioma, the accused are entitled to their constitutional guaranteed right to be released on bail pending trial. The accused have places of fixed abode. They are not a flight risk. They will attend court during trial when they will be so required. Learned counsel urged the court to take into account the fact that none of the accused went underground even when they were aware that they were suspects. Prior to their arrest, the accused were breadwinners for their respective families; their continued incarceration has occasioned suffering to the said families. The families of the accused are willing stand surety. They will ensure that the accused persons attend court without fail. Learned counsel submitted that the prosecution had not established compelling reasons to persuade this court to deny the accused persons bail pending trial. He urged the court to favorably consider the accused persons’ application for bail pending trial.

The Application is opposed. The investigating officer swore an affidavit in opposition to the application. The averments made in the said affidavit were amplified in the submission made by Ms. Maina on behalf of the State. She submitted that there was indeed compelling reasons that militate against the accused being released on bail pending trial. The accused had no fixed place of abode. They lived on the streets. They would therefore be a flight risk if they were released on bail pending trial. They did not have any income that would guarantee that they would be in a position to attend trial when they will be so required. She was of the view that if the accused persons are released on bail pending trial, they will intimidate and interfere with the prosecution witnesses, some whom are well known to them. Learned prosecutor was apprehensive that if the accused persons are released on bail pending trial, the relatives of the deceased may take revenge upon them. Ms. Maina contended that it would be safe for the accused persons to remain in custody pending trial for their own safety. She urged the court to disallow the application.

This court in **Paul Ongili Babu Owino vs. Republic [2020] eKLR** held that:

“The Constitution under Article 49 (1) (h) grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. It provides that:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reason not to be released.”

The Constitution does not define what constitutes “compelling reasons”. However, Section 123A of the Criminal Procedure Code provides...”

The section sets out the grounds constituting compelling reasons to include; the nature and seriousness of the offence, the character, antecedents, association and communities of the accused persons, the defendant’s record in respect of the fulfilment of obligations under previous grant of bail and the strength of the evidence of having committed the offence.

In the present application, the main grounds that the prosecution oppose the accused persons being released on bail pending trial is that the accused are persons of no fixed abode, and further, that they would likely interfere with prosecution witnesses if they are released on bail pending trial. This court has carefully considered the submission made on behalf of the accused persons and the pre-bail reports filed in court in respect of each accused person. It was clear to this court that indeed the accused persons appear to be persons of no fixed abode. At the time of their arrest, they were living on the streets. They survived by doing odd jobs. This court agrees with the prosecution that if the accused persons are released on bail pending trial, the likelihood that they will abscond is very high. In the event of abscondment, authorities will not be able to trace them on account of the fact that they are persons of no fixed abode.

A more serious compelling reason is the threat to crucial eye witnesses who happened to have been with the accused persons at the time the offences are alleged to have been committed. This court, while noting that the accused persons are presumed innocent until found guilty by a court of law, takes cognisance of the circumstances in which the offence is said to have been committed. It was evident to this court that the said prosecution witnesses’ will likely to be intimidated if the accused persons are released on bail pending trial. It will be inimical to the interest of justice if prosecution witnesses are frightened not to appear in court to offer their testimony before court.

In the premises therefore, this court holds that the prosecution did establish compelling reasons to deny the accused persons bail pending trial. They shall remain in custody until the conclusion of the trial. It is so ordered.

DATED AT NAIROBI THIS 30TH OF SEPTEMBER 2020.

HON. L. KIMARU

JUDGE.