



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**CRIMINAL CASE NO. 3 OF 2019**

**GERALD NJERUM'IBUA.....1<sup>ST</sup> ACCUSED/APPLICANT**  
**JULIUS MBURU KINANGA.....2<sup>ND</sup> ACCUSED/APPLICANT**  
**JOHN NTHIGA KIREMA.....3<sup>RD</sup> ACCUSED/APPLICANT**  
**SISIRIA KATORA ROCHIANGA.....4<sup>TH</sup> ACCUSED/APPLICANT**  
**LEAH MUTHONI NGIGI.....5<sup>TH</sup> ACCUSED/APPLICANT**  
**JULIUS NJERU KIMENYE.....6<sup>TH</sup> ACCUSED/APPLICANT**  
**JORNARD NJAGI KIBIUBI.....7<sup>TH</sup> ACCUSED/APPLICANT**  
**GEDIAL MUNYUA MUNUGU.....8<sup>TH</sup> ACCUSED/APPLICANT**  
**TOM KINYUA NJOKA.....9<sup>TH</sup> ACCUSED/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The accused persons herein are charged with the offence of murder. The issue presently before the court is an application dated 16/10/2020 by the 5<sup>th</sup> accused, Leah Muthoni Ngigi, for review of the court's ruling on bail delivered on 24/7/2019 and for release of the 5<sup>th</sup> accused on reasonable bail and bond terms. The application also seeks the court to make any other orders it sees fit.

The grounds on which the application is based are that the 5<sup>th</sup> accused and her husband, the 3<sup>rd</sup> accused, were arrested in May 2019 and they had 4 children who depended on them for their survival. They state that the children were forced to flee to Nairobi for safety after the arrest of their parents and they have been living in a bedsitter in Kariobangi South where they have now exhausted the food and generosity of well-wishers and are behind in payment of rent and are on the verge of being evicted from the house. The Applicant says that the children are at further risk from the Covid 19 pandemic and the Applicants requests to be released on bail in order to take care of the children. The Applicant emphasizes that the offence they are charged with is bailable and that she is not a flight risk and she is also willing to abide by

any conditional release the court may order. They urge that the court had earlier stated that their bail application may be considered if circumstances change and the Applicant is of the view that the circumstances warrant grant of the order.

The applicant swore an affidavit on 16/10/2020 in support of her application and she reiterated the grounds relied upon. She stated that she and the 3<sup>rd</sup> accused have 5 children named Sonia Murugi Kirema aged 25 years, Diana Mukami Nthiga aged 22 years, June Karimi Nthiga aged 19 years and Kelvin Munene Nthiga aged 11 years. The applicant swore that her children have no source of income and even the closest relatives that would have assisted them are accused in this matter. The applicant states that she is especially worried for her 11 year old son who she is told is on the verge of a psychological breakdown due to lack of parental care and on account of the children sleeping on empty stomachs from time to time. She said that investigations in this matter had been concluded and she would not interfere with witnesses and would attend court as required and abide by the conditions of release the court may give.

### **RESPONDENT'S REPLYING AFFIDAVIT**

The Respondent filed a Replying Affidavit on 28/10/2020 and the same is sworn on even date by PC Joseph Nampaso who introduces himself as the investigating officer in this case.

The respondents state that the court had earlier determined that the vulnerable witnesses in these matters should testify before an application for bail is considered and none of the vulnerable witnesses have testified yet. They also point out that the accused persons have applied before for bail unsuccessfully and the court had observed that even the security of the accused persons was not guaranteed. The Respondent also states that the children of the Applicant are adults save for Kelvin Munene who is 11 years and his care should be addressed by the Children's court. They take the view that the Chief's letter was misplaced as it should have not been addressed to the court. They also point out that the letter by the eldest daughter seeking release of her parents show witness interference as she is a prosecution witness.

### **ORAL SUBMISSIONS**

#### **APPLICANT'S ORAL SUBMISSIONS**

The Applicant's counsel reiterated the content of her application and her supporting affidavit. The Applicant submitted that the application was properly before the court as there was no prohibition on periodical application for bail. The Applicant urged the court to consider that the applicant is innocent until proven guilty and that her children need her care and attention. They pleaded that the children's officer had confirmed the state the children were in and asked for the court's mercy and stated that the children are about to be destitute. They also stated that the children's maternal grandmother is aged and cannot take care of them. The Applicant also stated that the children's education has suffered since their parents were incarcerated. They submitted that the situation has changed since the children are now in dire need of a parent.

The applicant in rejoinder also submitted that the situation on the ground has changed and is not as hostile. The Applicant further stated that the children were able to apply for extension of parental responsibility despite their age. They also state that the 3<sup>rd</sup> and 5<sup>th</sup> accused persons will prove during the case that they were framed and their children will have suffered for nothing. They welcomed the court to issue stringent conditions attached to the bail as it may see fit. They also submitted that if the applicant was to breach the terms, the prosecution would be able to apply for cancellation of the bond and bail.

#### **RESPONDENT'S ORAL SUBMISSIONS**

The prosecution opposes the application. They cite that this matter attracted a lot of public interest more so as the persons who were killed were government officers. They submitted that the community were fearful and the homes in the area were deserted after the murders and that witnesses turned up after the accused persons were denied bail. The prosecution urges that the fact that the Chief, who is a prosecution

witness, has written a letter in aid of the Applicant's case, is a sign of witness interference. They also stated that the letter should have been served to the probation office and not the court. The respondent also asked the court to consider that the deceased persons also had family members that are affected by their deaths. The State also stated that all the accused persons have their personal home troubles after incarceration and to allow the application will open a Pandora's box of applications from the other accused persons.

### **Analysis and determination**

It is established that this is the third time that an application for bail is being made in this matter. However, this is not a bar for consideration of the application. I take the same view with **Mutuku J** (Garissa HC) in **FARAH MOHAMUD HIRSI & 2 OTHERS V REPUBLIC [2013] EKLR** denied the Applicants therein bail but opined as below in the court's consideration on bail applications;

**“From the outset I wish to state that there is no bar to a fresh application for bail for an applicant who has presented an earlier similar application. Courts have pronounced themselves on the applicable principles in granting or denying bail. These include probability of the accused person turning up for trial; nature of the charges he is facing; strength of the evidence and the gravity of the punishment in the event of conviction; presumption of innocence; interference with witnesses among others. Courts have placed paramount consideration on the whether an accused will turn up for trial until his/her case is concluded (see Watoro v. Republic [1991] KLR 220 at 283).**

**This matter is not coming to me on appeal but as a fresh application for bail.”**

The Applicant, who is the 5<sup>th</sup> accused, seeks to be released on reasonable bail terms with the main reason being that her children are suffering since her incarceration and the incarceration of her husband, the 3<sup>rd</sup> accused, about one and a half years ago to date.

The main issues which the prosecution bring up in opposition to the application for bail are that the accused may interfere with witnesses (one of whom is their daughter) and that the public interest is still in play since the high profile matters of the chief and OCS herein which led to the arrest of the suspects herein. Nonetheless, the considerations for grant of bail remain the same as has been established by the courts.

In the afore mentioned case of **Farah Mohamud Hirsi & 2 others v Republic [2013] eKLR**, the court stated the following on the scope of proving that an accused may or has interfered with witnesses;

**“I have stated before that apprehension that an accused person will interfere with witnesses without concrete evidence to that effect is not enough to sway the court that this is a compelling reason. As regards the gravity of the charges or the stiff penalty in case of conviction, my view is that the drafters of the Constitution were aware of the fact that some criminal cases are very serious compared to others when making the law that has allowed any accused person to be admitted to bail unless compelling reasons are shown to exist. My view is that it is not enough for an officer to swear an affidavit that such and such witness is being threatened. Let that witness swear an affidavit to that effect and present facts to court establishing that allegation.**

**My approach in this matter, relying on the paramount consideration in granting or denying bail, is whether the applicants will attend trial until the same is concluded. While stating this I am alive to the fact that it could be true that witnesses are being threatened.”**

The Applicants urge that circumstances have changed to warrant the court to reconsider releasing the Applicant on bail. Muriithi J (Mombasa HC) in **REPUBLIC V DIANA SULEIMAN SAID & ANOTHER [2014] EKLR** discussed the issue of changed circumstances at length and public interest below;

9. **“Counsel urged that the concept of changed circumstances is foreign to our law and a creation of the International Criminal Court statute. Indeed, Article 60 (3) of the Rome Statute of the International Criminal Court provides for review of bail in these terms:**

***“The pre-trial Chamber shall periodically review its ruling on the release or detention of the person, may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to the detention, release or conditions of release, if it is satisfied that changed circumstances so require.”***

See also decision of Pre-trial Chamber II in the case *The Prosecutor v. Jean Pierre Bemba Gombo* ICC-01/05-01/08.

10. With respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the

circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused's refusal to attend court while on bail, when sureties withdraw or for other reasons.

11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.

12. I find nothing in the provisions of Article 49 (h) of the Constitution or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes *functus officio* or that the issue of bail becomes *res judicata* upon decision to grant or refuse bail. Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail *until and unless* compelling reasons are demonstrated. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person "*is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.*"

I would agree that the court must strive to give effect to the Constitution and its Bill of Rights as a character of a civilised democratic society and I consider that the Bill of Rights in this case is not necessary inconsistent with the public interest as opposed to public opinion. Article 24 of the Bill of Rights recognises a limitation on the rights of a person based on conflict with the rights of others, as is reasonable and justifiable in an open and democratic society.

17. The issue of public interest in national security and public safety as a compelling reason in consideration for bail is incontestable based both on the spirit of the Article 24 limitations in the interests of others justifiable in a open and democratic society. When national security and public safety are threatened the very existence of the open and democratic and civilised society is also jeopardised. It must then become a matter of proper balance between the individual rights and the rights of the society so that the individual is entitled to enjoy the greatest extent of his rights consistent with the rights and interests of others or the public interest in the particular matter.

18. The justice of the case appears to lie in the balancing of the accused's right to bail against the society's interest. On the one hand, there is the accused person's right to be presumed innocent and to be released on bail emphasized by his health condition as a diabetic and, on the other hand, there is the Lamu people's public interest in the emotional peace without fears of further attacks, backed by the recent experiences of multiple repeated attacks, that an arrested attacker has been released on bail giving him an opportunity to organize for more attacks. Without the confidence of such security, the affected people of Lamu will refuse to go back to their homes and continue to live as internally displaced persons thereby prolonging the period for return to normalcy and escalating the humanitarian problems associated with IDP situation. When the Court considers the prospect even one more death that may be occasioned by the accused's release from custody, its choice is clear as to which side of the balance to err on. It must facilitate quick restoration of the public safety, security and maintenance of law and order and the rule of law, and, based on these pillars, the return to normal life for the people of Lamu and Tana River regions of the country as is reasonably expected in a free, open, democratic and civilised society.

19. I consider that it is in the interest of justice for both the accused and the public that the criminal prosecution of the accused be conducted expeditiously."

I am persuaded by the findings as it relates to the issue before me.

The issue of the supposed said changed circumstances require the court to consider what to do with the issue of the children. I believe the older children who have attained the age of 18 years and above may not be assisted by this court. They cannot seek extension of parental responsibility in order to have their parents released. Extension of parental responsibility arises where a parent has already been ordered by the court to provide maintenance or other responsibility like paying school fees. If the child attains the age of a eighteens and is still in need of the maintainance and the fees the parent may be compelled by the court with an order extending the parental responsibility beyond the age of eighteen years. This unfortunately is not the case here. Three of the children are adults. The children Act defines a child as any human being above the age of eighteen years. The probation officers report shows that the adult children have been doing casual jobs to feed for themselves and their young sibling. The report further shows that it was their choice to move to Nairobi and live together in a rented house, The issue of extension of parental responsibility does not arise. With regard to the 11 year old child C. K, the Children's officer visited the children and made a report dated 29/10/2020 which was to the effect that the court should release one parent to assist the children as they are almost destitute as they have exhausted the good will of well-wishers and are about to be evicted from their residence in Nairobi due to non-payment of rent. I am of the view that the court would be in a position to make an order for the child to be taken into protective care. In making the decision, the court considers the best interest of the child not of the parents. This is done where the child is need of case and protection in circumstances under Section 125 of the Children Act. Alternatively, the court may order that the child be taken before Children's court for other orders. This court did direct that a protection and file be opened in the Children's Court Chuka where the children's issue will be addressed.

Meoli J in **LK & ANOTHER V REPUBLIC & 2 OTHERS [2020] EKLR**, though determining a child custody issue, stated the following which is relevant for our purposes;

**“27. Evidently invoking the powers of the court under Section 125 of the Children Act, (hereafter the Act) the Children Officer requested that the court to;**

- “1. Find the subject to be in need of care and protection.**
- 2. Grant temporally custody to GN (sic) of ID No. 1xxxxx until the matter is resolved.**
- 3. Summon the aunt, MK, to court to explain what they want with the subject.**

**However, this is subject to the court’s final ruling.”**

**... The scope of orders that a court may make upon being satisfied that a child is one in need of care and protection is stipulated in Section 125(2), (3), (5), and (6) of the Act.”**

This court has invoked Section 125 of the Children Act.

### **CONCLUSION**

I am of the view that the 5<sup>th</sup> accused/applicant has not demonstrated sufficient reason to warrant her release as the circumstances preceding the application are largely the same. The accused persons are still in a position to interfere with witnesses, more so their children, and the murders in issue attracted attention that is yet to dissipate at the mere mention of the issue. Additionally, the Children’s Officer can make arrangements for the care of their son due to the unfortunate circumstances. What is at stake in this matter is the application bail. When children are involved, what is of paramount consideration is the best interest of the child. This has been addressed where a person is held in lawful custody, some of the rights which the applicant is seeking are curtailed and may impact negatively on the children of such applicant. I find that the application lacks merits. It is surprising how the accused who are in the same predicament with the applicant are supporting this application. I do not wish to speculate. The application is dismissed.

**Dated, signed and delivered at Chuka this 17<sup>th</sup> day of December 2020.**

**L.W GITARI**

**JUDGE**

**17/12/2020**

Ruling has been read out in open court via skype.

**L.W. GITARI**

**JUDGE**

**17/12/2020**