



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CRIMINAL CASE NO. 45 OF 2018

(FORMERLY KIAMBU CRIM. CASE NO. 89 OF 2016)

REPUBLIC.....PROSECUTOR

VERSUS

JANE MUTHONI MUCHERU.....1ST ACCUSED

ISAACK NG'ANG'A WAMBUI ALIAS GIKUYU.....2ND ACCUSED

BAIL RULING

1. The two Accused Persons, Jane Muthoni Mucheru (1st Accused Person”) and Isaack Ng’ang’a Wambui Alias Gikuyu (2nd Accused Person”), are jointly charged with murder contrary to section 203 as read together with section 204 of the Penal Code. They are accused, together with at least one other of unlawfully, and with premeditation killing Solomon Mbuthi Mwangi (Deceased). In two previous occasions, this Court has denied the two Accused Persons bail: the two reasons for denial were, first, fear of interference with vulnerable witnesses, and, second, apprehension that the two Accused Persons are flight risks.

2. The case has proceeded apace since its inception. The Prosecution has already called twenty witnesses. Only one witness – the Investigating Officer – remains to be called before the Prosecution closes its case. The expeditious hearing of the case has proceeded despite several challenges including the transfer of the Presiding Judge from Kiambu to Nakuru High Court; a few months of absences of the Defence Counsel due to illness; a few adjournments by the Defence due to illness of the 1st Accused Person; and an unsuccessful recusal application by the Accused Persons. At no time has the Prosecution ever asked for an adjournment.

3. The Prosecution is scheduled to close its case after its last Prosecution witness testifies tomorrow (26/02/2018). However, at the last hearing, the Defence renewed its application for review of the Court’s refusal to release the two Accused Persons on bail during the pendency of the case. They had earlier filed a formal Application dated 18/10/2018 with the same prayers.

4. The Application was opposed by both the Prosecuting Counsel, Ms. Mwaniki, and the Victim’s Counsel, Mr. Mathenge. I entertained oral arguments over the Application on 31/01/2009.

5. In arguing his Application, Mr. Njanja reminded the Court that bail is a right unless there are compelling reasons to deny it. His opinion is that there is nothing outstanding that justifies the Accused Persons to remain in custody.

6. Mr. Njanja presented two specific arguments in favour of admitting the Accused Persons – and especially the 1st Accused Person to bail. First, he argued that the 1st Accused Person has continued to suffer from serious ailments while in custody. He referred to several documents filed – including one filed at the instance of the Court – which show that the 1st Accused Person is suffering from serious gynaecological ailments (including onset of cervical cancer) and asthma. Mr. Njanja insists that even the prison authorities cannot deal with her ailments. He argued that it has proved very difficult for her to receive the advance medical treatment needed.

7. Second, Mr. Njanja urged the Court to consider bail in due consideration of the children the 1st Accused Person shared with the Deceased. He told the Court that the children have been subjected to “the lowest levels of survival. A life of begging.” The family of the 1st Accused Person, he said, have reached their limitations in helping. He pleaded with the Court to release the 1st accused so that the 1st accused can go and take care of her children.

8. Ms. Mwaniki, the Prosecution Counsel, opposed the Application. The basic gist of her argument is that after the Court refused to grant bail on 20/12/16 and again on 06/09/17, no new evidence has been tendered before the Court to warrant the review. She pointed out that the Prosecution has called 19 witnesses and that only one witness remains to testify. She reminded the Court that the Prosecution has always been ready to proceed but the defence has asked for several adjournments.

9. Ms. Mwaniki urged that the evidence tendered shows active communication between 1st Accused Person and Nelson Magati, the fugitive. There is a close connection between the two. She argued that if the 1st Accused Person is released, there are good reasons to fear that the accused persons will disappear. Ms. Mwaniki pointed out that Kenya has porous borders and that in any event, one needs only an ID to travel to a neighboring country.

10. On the ailments, Ms. Mwaniki pointed out that Nakuru PGH has given a plan of management. The defence, she insisted, has not demonstrated that the 1st Accused Person cannot get the treatment in a government hospital.

11. Finally on the issue of children's welfare, Ms. Mwaniki pointed out that this Court is here to adjudicate on the issue of murder not children welfare. Those are extraneous issues. She argued that the issue is misplaced before this Court.

12. Mr. Mathenge, counsel for the Victim's family, similarly opposed the Application. She associated herself with the Prosecution's sentiments.

13. Mr. Mathenge submitted that the defence has not demonstrated what has changed to necessitate review of the bail. He told the Court that in their Replying Affidavit they have demonstrated that the family of the Deceased is ready and willing to assist the children. Finally, Mr. Mathenge argued that the medical condition of the 1st Accused Person cannot be a stand-alone argument to grant of bail.

14. As this Court stated in its two previous rulings bail is a constitutional right enshrined in Article 49(1)(h) of the Constitution. The test the Court is required to use to deny bail in appropriate cases is similarly stated in the Article 49(1)(h): it is only upon the showing of compelling reasons by the Prosecution that the Court will deny bail. This test is the same whether on a first consideration of bail or at the review stage.

15. The burden is on the Prosecution to establish the existence of the "compelling reasons" that would justify denial of bail. As I stated in the ruling of 20/12/2016, our decisional law now states that for bail to be denied the evidence relied on to establish the "compelling reasons" required for constitutional reasons must be "cogent, very strong and specific evidence" and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, **R v Muneer Harron Ismail & 4 Others [2010] eKLR**. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons for purposes of bail is beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point in the trial. See, **Bail and Bond Policy Guidelines** at p. 19.

16. The only question before me is whether the Defence has placed before me material to warrant review of the two previous decisions denying bail. In my previous ruling, after hearing ten Prosecution witnesses I was prepared to make a finding that the Prosecution case was not "tenuous" – but that was not the sole reason to deny bail. The refusal turned on what I considered credible risk that the Accused Persons will abscond. I expressed the apprehension thus:

In the present case, after hearing ten witnesses, I am prepared to say that the prosecution case is not tenuous. I do not wish to say more for the fear of embarrassing the remaining trial and pre-judging issues. This in itself would not be sufficient reason to deny bail as I stated above. However, here, it is coupled with the unresolved question of Mr. Nelson Njiru who is a fugitive of justice in this case. Both direct evidence received in Court as well as the statement by the 1st Accused Person establish a connection between Mr. Njiru and both Accused Persons. The almost literal vanishing of Mr. Njiru into thin air should give us pause about the real possibility that the two Accused Persons could follow suit hence subverting justice in this case. Despite Mr. Njanja's valiant efforts to disassociate the 1st Accused with Mr. Njiru, I believe that her own statement speaks for itself: "I requested a friend, a Mr. Njiru who is also a teacher at Voi University if he could get me a friend who could assist me with a car..." Those are the 1st Accused Person's own words. It blitzes Mr. Njanja's denials from the bar.

17. Unfortunately for the Accused Persons, the unresolved question of Mr. Nelson Njiru remains. It casts a long and dark shadow on the pledges by the Accused Persons that they will not similarly abscond if admitted to bail.

18. I am not unsympathetic to the two humanitarian concerns raised by Mr. Njanja about the plight of the 1st Accused Person. She faces serious medical challenges – including an onset of cervical cancer. I do note, however, that the Prison Authorities and the Nakuru Provincial General Hospital have filed a comprehensive report which contains a plan for managing the medical condition over time. On its part, this Court will remain vigilant to follow up on the Prison Authorities to ensure that the Accused Person receives the medical attention she deserves.

19. As for the second concern raised by the 1st Accused Person – that her children are living in abject conditions in her absence – this Court will empathically remind them that the family of the Deceased has offered help both financial and emotional. So has the teaching fraternity in Murang'a in which their father was a prominent member. I hope they can accept that help. It is not easy to lose a parent and have the other one in custody – but while life can be unfair in this way – it is at times like this that life calls for resilience and flexibility. It is my hope that they can reach out to these two groups for assistance.

20. In view of the above, the Court declines the invitation to review its refusal to grant bail to the Accused Persons. This Court pledges, yet again, to prioritize this case in view of the fact that circumstances have deemed it necessary to deny bail to the Accused Persons.

21. Orders accordingly.

Dated and delivered at Nakuru this 25th day of February, 2019.

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JOEL NGUGI

JUDGE