



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL CASE NO. 10 OF 2019**

**(FORMERLY NYAMIRA CRIMINAL CASE NO. 5 OF 2019)**

**BETWEEN**

REPUBLIC.....PROSECUTOR

AND

JACKSON MONG'ARE MANYARA ALIAS JOHN .....1<sup>ST</sup> ACCUSED

FANEL OUKO OURU .....2<sup>ND</sup> ACCUSED

MONG'ARE MANYARA ALIAS JOSEPHAT..... 3<sup>RD</sup> ACCUSED

**RULING**

1. The accused, **JACKSON MONGARE MANYARA alias JOHN, FANEL OUKO OURU and MONGARE MANYARA alias JOSEPHAT**, are charged with the murder contrary to **section 202** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the information are that on 20<sup>th</sup> February 2019 at Nyabomite village, Nyameru Sub-location, Keera Location within Nyamira County, they murdered **EVANS MINARO AYANA**.

2. They were arraigned in court on 5<sup>th</sup> March 2019 and denied that charge against them. The issue before me for consideration is whether to grant the accused bail and if so on what terms.

3. Under **Article 49(1)(h)** of the Constitution an accused person has the right to be released on bond or bail on reasonable conditions pending charge or trial, unless there are compelling reasons not be released. It is the burden of the prosecution to establish compelling reasons which include the likelihood that the accused will fail to attend court, commit or abet the commission of a serious offence, endanger the safety of victims, individuals or the public, interfere with witnesses or evidence, endanger national security or public safety and where it is necessary for the protection of the accused.

4. Further, **section 123A(1)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* which is to be read with **section 123** thereof provides as follows:

123A (1) Subject to Article 49 (1)(h) of the Constitution and notwithstanding section 123 in making a decision on bail and bond, the court shall have regard to all the relevant circumstances in particulars: -

- a. The nature and seriousness of the offence.
- b. The character, antecedents, associations and community ties of the accused person,
- c. The defendant's record in respect of the fulfillment of obligations under previous grants of bail,
- d. The strength of evidence of having committed the offence.

**Subsection (2)** thereof stipulates that a person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;

a. Has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody.

b. Should be kept in custody for his own protection.

5. In order to bring themselves within the limitation of “**compelling reasons**” the prosecution relied on the affidavit of PC Mathew Omondi, of DCI Nyamira who deponed that

[7] THAT the accused persons’ security is in issue as their lives are in danger and the local community will not receive them at all if released on bail/bond.

[8] THAT there is a lot of hostility in the local community towards the accused persons. As a matter of fact, probation officers who were executing a court order, were viciously attacked by the community members when they went to gather information aimed at assisting them in preparing a pre-bail report. The incident was captured in OB 71/11/03/2019.

[9] THAT though the offence of murder is now bailable, the grant of bail is not absolute but a matter of discretion on the part of the court. The court should consider the rights of the accused persons vis-à-vis the victim (deceased) as both rights are enshrined in the Constitution.

6. In addition to the deposition by the investigating officer, the Probation Service was directed to furnish bail assessment report which were filed on 27<sup>th</sup> March 2018. The common denominator in the reports is that that the general mood of the community was very hostile and the accused were in danger if they were released on bond.

7. The issue for resolution is whether accused should not be released on bail for their own protection. When the matter came up for hearing counsel for the accused informed the court that several steps had been taken to mitigate the dangers faced by the accused. First, they informed the court that the accused had relocated from Nyamira Town area to Nyansiongo where their protection was assured by their family members. Second, as employees of the Nyamira County Government, they had been interdicted and were no longer required to go to work every day at the County Headquarters in Nyamira. Third, the High Court at Nyamira had transferred this case to Kisii for hearing hence the accused would not have to go to Nyamira Town to attend hearing thus exposing them to risk.

8. In considering whether to release the accused on bond I am also guided by the consideration that in order to achieve the purpose of the limitation, I am enjoined to consider the least restrictive means to achieve it. As I stated the ground put forth by the State for opposing bail is that of security of the accused. Those concerns have now been mitigated by the accused themselves and by the court. I also note that some time has elapsed since the offence was committed hence the hostility towards the accused may have receded. I do not consider it necessary at this stage to deny the accused the right to be released on bail.

9. In the circumstances, and for the reasons I have set out above, I order the release of the accused on the following terms;

1. The accused are each released on a bond of Kshs. 1 million with one surety of like amount.

2. Upon release, each accused shall report to Kisii Police Station every Monday after every two weeks pending hearing and determination of the case or until further orders of the court.

**DATED** and **DELIVERED** at **KISII** this 11<sup>th</sup> day of **APRIL** 2019

**D. S. MAJANJA**

**JUDGE**

Mr Nyamwange, Advocate for the 1<sup>st</sup> and 3<sup>rd</sup> accused.

Ms Okeige, Advocate for the 2<sup>nd</sup> accused.

Mr Jami, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.