



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCR NO. 3 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GERLAD NJERU M'IBUA.....1<sup>ST</sup> ACCUSED**

**JULIUS MBURU KINANGA.....2<sup>ND</sup> ACCUSED**

**JOHN NTHIGA KIREMA.....3<sup>RD</sup> ACCUSED**

**SISIRIA KATORA ROCHIANGA.....4<sup>TH</sup> ACCUSED**

**LEAH MUTHONI NGIGI.....5<sup>TH</sup> ACCUSED**

**JULIUS NJERU KIMENYE.....6<sup>TH</sup> ACCUSED**

**JORNARD NJAGI KIBIUBI.....7<sup>TH</sup> ACCUSED**

**GEDIEL MUNYUA MUNUGU.....8<sup>TH</sup> ACCUSED**

**TOM KINYUA NJOKA.....9<sup>TH</sup> ACCUSED**

**R U L I N G**

1. **GERALD NJERU M'IBUA** and the eight other applicants are charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of **Penal Code** and the particulars as per the information presented at that on 30<sup>th</sup> April 2019 at Kamaindi Location, within Igambang'ombe Sub-County, within Tharaka Nithi County, they jointly with others not before court unlawfully murdered **JAPHET MAJAU MUKENGU**.

2. All the accused persons/applicants have denied committing the offence and the matter is pending for trial. They have now moved this court vide Notice of Motion dated 28<sup>th</sup> May 2019 for bail/bond pending trial insisting that they have a constitutional right to bond and that no compelling reasons have been advanced to deny them bail. They further aver that all have permanent and known residences.

3. They have supported this application with the affidavit sworn by their learned counsel Mr. Mark Murithi sworn on 28<sup>th</sup> May 2019. In the affidavit the counsel contends that the offence facing all the applicants are bailable and that the applicants undertake to abide by any term imposed by this court.

4. At the hearing of this application the defence counsel invoked the provisions of **Article 49(h)** of the **Constitution** and submitted that the Constitution provides the right to bail with the only limitation being where compelling reasons are advanced by the prosecution. He contends that there are no compelling reasons to deny bail to the accused persons herein arguing that the only parameter on consideration is whether the applicants can turn up for trial or whenever required in court.

5. The Applicants have termed the Respondents allegations that they are likely to interfere with witnesses as speculative because no concrete evidence have been placed before this court that about the likelihood of interference.

6. The applicants have further faulted the State for using security of the applicants against them stating that the State should be guaranteeing security of its citizen pursuant to **Article 29** instead of trying to justify its inadequacy. The applicant insist that they are innocent and are

deemed so by law until proved otherwise. The defence counsel asserts that principle applies to all the accused persons including the 3<sup>rd</sup> accused who is facing another case of arson which is not yet concluded.

7. They have faulted the social inquiry reports filed which they term too general and that the fears observed in the reports have nothing to do with the applicants because they have been in custody.

8. The State through the Office of the Director of Public Prosecution has opposed this application vide the Replying Affidavit sworn on 17<sup>th</sup> June 2019 by CIP Stansellous Mwangi Githiro, the investigating officer in this case. The investigating officer has deposed that the deceased herein was killed using crude weapons and set ablaze by the applicants who are neighbours to the deceased. He has further deposed that the deceased was a Chief in Kamaindi Location and that the killing was witnessed by close family members present at the scene at the time and that the witnesses are also neighbours to the accused person making it likely that the witnesses may feel intimidated to come and testify in court during trial. He has further averred that a senior police officer was also killed when he went to apprehend the perpetrators and that releasing them on bail now will send a wrong message that might undermine peace, law and order in the Areas.

9. The investigating officer has pointed out the example of 3<sup>rd</sup> accused who had been facing another trial vide Chuka Chief Magistrate's Court Criminal Case No.1087/2016 and was out on bond when he committed the present offence in this case. The State argues that if released on bond there is a possibility of further attacks of innocent people either on revenge attacks or perpetuation of further attacks.

10. The learned prosecuting counsel Mr. Momanyi has added that though the accused enjoys a presumption of innocence, a denial of bond does not negate that presumption insisting that denying bond will protect the integrity of their case against the accused persons and releasing accused person may interfere with witnesses. He has urged this court to take into consideration the pre-bail reports.

11. This court has considered this application and the response made. It is indeed true that an accused person in Kenya enjoys a right to bail among other rights enshrined in the Constitution of Kenya 2010. It is also true that the right to bail is not absolute because where the State advances compelling reasons that right can be denied.

12. I have considered the reasons advanced by the prosecution and considered the pre-bail reports conducted on all the accused persons. It is a fact upon which this court can take judicial notice that the deceased herein was a high profile person killed at Kamaindi Area within Tharaka Nithi County. He was Area Chief and that fact is not contested. It is also not contested that the OCS Chuka Police Station was killed as he pursued the perpetrators of the killers of the deceased herein. This fact demonstrates the incident really shook the people living in Tharak Nithi and indeed the nation at large owing to the manner it was carried out and especially given that the murder incidents affected Senior Government officers and followed each other from the same locality. When the prosecution states that the witnesses may feel intimidated or have fears if the accused are released on bond at this stage, this court cannot ignore the fact. This is owing to the fact that as I have observed the murder incident herein involved an Area Chief and in a rural setting, a Chief is Senior Government officer. I find it compelling that a common person would ordinarily feel insecure because he/she would feel that if a Chief and an OCS can be killed in a gruesome way, what might happen to them? I have gone through the social inquiry done on all the applicants reveal that it would be adverse to have them released on bond at this stage. The running theme in all the reports is the security fears among the prosecution witnesses who happen to be neighbours to the accused persons. Though this court agrees with the defence counsel that security concern to the suspects should not be used to deny the suspect bail, the security fears or interference of the prosecution witnesses whether real or imagine can constitute a compelling reason to deny an accused person bail. I am persuaded by the social inquiry report that the incident is still fresh in the minds of the locals where the deceased and applicants come from and release on bond may have undesired negative consequences in this trial. While it is true that the accused persons enjoys the right to the presumed innocent until proved otherwise, I do not think that denying them bond at least until the civilian witnesses testify, will vitiate that presumption. The Probation Officer in her reports has indicated that in some instances, some witnesses literally took off when she attempted to interview them which to her was an illustration of fear among them. I find that fact compelling because if at all the witnesses are to flee because of fear of the applicants herein upon release on bail, the trial would be thrown into jeopardy and adversely affect the administration of justice.

In the end I find that given the circumstances obtaining in this case and the reasons advanced by the prosecution and going by the social inquiry reports, I am persuaded to disallow the application dated 28<sup>th</sup> May 2019 for now. The applicants are at liberty to move this court at a later stage when hue and cry over the incident will have subsided and/or the civilian witnesses will have testified.

**Dated, signed and delivered at Chuka this 24<sup>th</sup> day of July 2019.**

**R.K. LIMO**

**JUDGE**

**24/7/2019**

Ruling dated, signed and delivered in the open court in presence of Kijaru holding brief for Murithi for all accused and Maari for State.

**R.K. LIMO**

**JUDGE**

**24/7/2019**