



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: R.E OUGO

CRIMINAL CASE NO. 4 OF 2019 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

LABAN NYAATA SAMUEL.....1ST ACCUSED

NANCY BOCHERE SAMUEL.....2ND ACCUSED

DANIEL MOGAKA ONDIMU.....3RD ACCUSED

RULING

1. On the 15th of August 2019 **Daniel Mogaka Ondimu** was arraigned before this court in Criminal case No.31 of 2019. By an information dated the 15th August 2019 the accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that “on the night of 23rd and 24th day of September 2018 at Mariba village in Kenyena sub-county within Kisii County, jointly with others already before the court, murdered Alvinah Nyabuari Moracha. His case was consolidated with Criminal case no. 4 of 2019 on the 22nd September 2019.

2. The accused person pleaded not guilty. The prosecution has opposed the defence application to have the accused person released on bond/bail. Mr. Wesonga argued that the court should be guided with Article 42 of the Constitution of Kenya 2010. That nothing has been tabled before this court to show that the accused person was at large. That the police are doing their investigations and that the Court should be guided by the principle that there is presumption of innocence until proved guilty. That the accused is not a flight risk and he will abide by any bond terms the Court will impose.

3. No. 236162 Inspector Nicolas Wambugu testified on oath that he is the investigating officer in this case. That the accused person was arrested on the 15th August 2018. That the accused has been on the run from 29th September 2018. That the alleged offence happened on the night of 23rd and 24th September 2018. They have been pursuing the accused from the date of the alleged murder of the deceased. The accused was arrested in Nairobi after he changed his places of residence severally and his mobile number too. That he has changed his mobile number ten (10) times and he has given them a lot of difficulties in getting him. That their officers had to spend 10 days in Nairobi to get him. That the accused is flight risk and based on his behaviour in the last 10 months. That he believes that the accused was aware that they were looking for him and that he was told by one of the accomplices called Laban that he was at risk if the accused was arrested because he will know that he linked him to the offence.

4. During cross examination by Mr. Wesonga for the accused Inspector Wambugu stated that they arrested the accused person in Nairobi and took him to Kenyena police station. The accused was taken to Ogembo law courts as they sought to complete their investigations. That he does not know the accused's shop nor does he know the accused's home. The accused lives in South Mugirango. That they did not seek warrants of arrest against him. He believes that the accused knew he was looking for them. That they arrested him on Saturday, Monday was a holiday and on Tuesday they needed to do a forensic examination, they needed to do a DNA test on the accused.

5. Mr.Otieno for the State submitted that if the accused was readily available he would have taken plea on the 5/2/2019 but he was not available. That the accused was not available for 10 to 11 months, he was at large. That the accused is a flight risk and one person is apprehensive that his life is in danger. That the reasons they have given are compelling and the accused should not be released on bail.

6. Mr.Kaba in addition to the submissions made by Mr.Wesonga submitted that the accused is family man, his family depends on him and he operates a shop. The accused had always been there. That there was no warrant of arrest that was sought against him. The accused has always been available. That there was no evidence that the accused changed his number ten times and that the prosecution has not given any

compelling reasons to deny the accused person bond or bail.

7. I asked for a pre- bail report, it indicates that the 3rd accused is married and has children. He is a businessman in Nairobi operating a food kiosk and a bar. That his family members are ready and willing to stand surety for him and give a log book of a vehicle as security. That he has no previous convictions and that he is not a flight risk. The report is favourable.

8. Bond/ bail is a constitutional right to anyone who is charged. However the DPP depending on the circumstance of each case can seek to have the accused denied bond/ bail. In this case the prosecution has submitted that the accused should not be released on bond/bail for reasons that he went into hiding after the alleged murder, that he changed numbers and that getting him has been a problem and that he is flight risk. The 3rd accused's counsel has asked the court to grant the accused bond/bail. It was submitted that the DPP has failed to tender evidence that the accused could not be found or that he changed his phone numbers as alleged.

9. I have heard the benefit of perusing the proceedings before the trial court in HCCR 4 of 2019 before the said case was consolidated with HCCR 31 of 2019. There is no indication that the prosecution sought a warrant of arrest for the 3rd accused in the said case. The information in HCCR 4 of 2019 dated 5th February 2019 indicates that Laban Nyaata Samuel and Nancy Bochere Samuel allegedly committed the offence with another not before the court. The investigating officer indicated that they were looking for the 3rd accused and that he changed his mobile number ten times. There was no evidence to corroborate this nor was there any evidence to show that they sought the 3rd accused in his home area or his place of business. In my view the DPP has not shown any compelling reason to deny the 3rd accused bond or bail.

10. The 3rd accused shall be released on a **bond of Kshs 800,000/- with one surety of like amount or a cash bail of Kshs. 400,000/-**. Upon release he shall report to the DCI Kenya every (1st) first Monday of each month until further orders from this court. Meanwhile he shall be remanded at Kisii GK prisons.

Dated, signed and delivered at Kisii this 23rd day of September 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Wesonga For the 3rd Accused

Mr.Otieno Senior state counsel office of the DPP.

Ms. Rael Court clerk