



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL CASE NO. 49 OF 2018**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**FRANCIS MUSE alias MOI alias PRESIDENT.....1<sup>ST</sup> ACCUSED**

**REUBEN ASHIMBUNDU SHITAMBACHI.....2<sup>ND</sup> ACCUSED**

**BRIAN SHITAMBACHI MUKAMBISA alias BABA.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused are charged with murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code, Cap 63, Laws of Kenya. They have pleaded not guilty to the charge.
2. After their plea was taken on 15<sup>th</sup> August 2019, Mr. Ondieki, their advocate, applied for their release on bail pending trial. He submitted that the second and third accused persons were a father and son who had been arrested at their homes on 27<sup>th</sup> July 2019. He submitted that the state had completed investigations, and there was no reason why they could not be admitted to bail.
3. The application was opposed by Ms. Omondi, prosecuting counsel. She argued that the accused persons were a flight risk, for they had temporary abode. She referred the court to an affidavit sworn by the investigating officer.
4. In his rejoinder, Mr Ondieki submitted that pre-trial bail was a constitutional right that could only be denied where compelling reasons existed. He asserted that the accused had a place of abode from where they were arrested. He stated that the affidavit of the investigation officer did not state the place of abode of the accused, as it merely talked of a temporary place of abode. He submitted that the contents of the affidavit by the investigative officer was speculative as it did not cite the source of the information the basis of its averments. He stated that the fear that they were a flight risk was unfounded. Mr. Ondieki's submissions were reinforced by Mr. Mbaka who also addressed the court.
5. The court then called for a pre-bail report and fixed the matter for mention on 17<sup>th</sup> September 2019 for the purpose of receiving the said report. Come 17<sup>th</sup> September 2019, the pre-bail report was not ready, and the matter was allocated a further date on 2<sup>nd</sup> October 2019 for mention. The court did not sit on 2<sup>nd</sup> October 2019, and the matter was mentioned on 14<sup>th</sup> October 2019 instead. On the said date the prosecution was absent. The pre-bail report had not been filed, and there was no probation officer in court to explain the delay. I reserved the matter for ruling on 31<sup>st</sup> October 2019.
6. It is now common ground that pre-trial bail is a constitutional right for all offences. That right can only be curtailed where the prosecution presents compelling reasons.
7. In this case the state opposes the release of the accused persons on bail on grounds that they are a flight risk for they only have a temporary abode. The state relies of the affidavit of No. 69622 PC Athmana Ali, the investigating officer, sworn on 13<sup>th</sup> August 2019. She avers that the accused were a flight risk because of the nature of the offence and also avers that they were likely to interfere with witnesses. There is no mention of the accused lacking an abode or having a temporary one.
8. On the matter of abode, I am told by Mr Ondieki that the accused hail from Khayega and were arrested at their homes. According to the investigating officer the crime was committed on 12<sup>th</sup> July 2019 at Khayega market and the accused were arrested on 27<sup>th</sup> July 2019 at Shidodo Village, Khayega Location. Ms Omondi described their abode as temporary, while the affidavit of the investigating appears to suggest that they are residents of Khayega. I have carefully perused the prosecution's bundle of evidence. From the material therein, there can be no doubt at all in my mind that the accused persons abode is well known to be within Khayega, and at Shidodo to be specific. It

cannot be accurate, therefore, to say that they have a temporary abode, they are residents of Shidodo, Khayega.

9. On the claim that they are a flight risk, I understood Ms. Omondi to be making that submission on the ground of the alleged temporary abode. As it is now established that the accused have a known abode, that cannot be a good basis for assessing whether or not the accused were a flight risk. The fact that the offence is a serious one is not, by that fact alone, a good reason to conclude that a person may be disposed to run away. In any event the crime was committed on 12<sup>th</sup> July 2019 within Khayega, and the accused were arrested on 27<sup>th</sup> July 2019, having not fled from the area.

10. On the issue of the accused interfering with witnesses, I note that the investigating officer has not laid any background for the claim. It is not suggested that the accused are persons who are influential in the area, and, therefore, likely to use that influence to intimidate or interfere with witnesses in some way. Indeed, no reason has been given at all for suggesting that they could interfere with witnesses.

11. After an exhaustive review of the material before me I shall make the following final orders:

**(a) That Reuben Ashimbundu Shitambachi and Brian Shitambachi Mukambisa alias Baba are hereby admitted to bail and shall be realised from remand custody upon executing a bond of Kshs. 300, 000.00 each with a surety of like amount each; and**

**(b) That Francis Muse Liseche alias Moi alias President shall remain in remand awaiting trial.**

12. It is so ordered

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 31<sup>st</sup> DAY OF October 2019**

**W MUSYOKA**

**JUDGE**