



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 50 OF 2019

REPUBLIC.....PROSECUTOR

-vrs-

KELVIN MURITHI MUTHURI ALIAS KEVO.....1ST ACCUSED PERSON

ERIC MUTWIRI KIRIMA alias KABUDAA.....2ND ACCUSED

JAMLECK MURANGIRI.....3RD ACCUSED

RULING

1. **Kelvi Murithi Muthuri alias Kevo, Eric Mutwiri Kirima alias Kabudaa and Jamleck Murangiri (“the applicants”)**, have been jointly charged with the offence of murder contrary to *section 203 a read with section 204 of the Penal Code*. It is alleged that on 19/06/2019 at Ntani village, Kinajagi sub-location within Meru County they jointly murdered **Jackline Makena (“the deceased”)**.
2. The applicant denied the charge and their advocates applied for the release on bond of the accused.
3. The application was opposed by the prosecution on the basis of the pre-bail report by the probation officer. The report does not favor release of any of the accused person on bond.
4. The accused, in their written submissions made serious objections to the pre-bail report.
5. For the 1st and 2nd accused person it is alleged that the community members threatened to lynch them for they are allegedly drug peddlers. Drug abuse has become rampant in the community.
6. For the 3rd accused person, the report states that there is still tension in the community and this will jeopardize his life. It seems they are infuriated by the fact that the victim was his former girlfriend.
7. The accused persons submitted that the report contains mere allegations which have not been proved. That no charges have been made against the 1st and 2nd accused persons arising from the allegations of drug peddling. They read malice on the part of the probation officer.

ANALYSIS AND DETERMINATION

8. I do note that the accused persons and potential witnesses school and reside within the same locality. The events are also vivid in the minds of those who are affected as the fatal incident happened six months ago. Possibility of witnesses resigning to fear due to the presence of the accused so soon a time is real.
9. On the foregoing, I am content and persuaded to cite the expressions in **Republic v David Ochieng Ajwang Alias Daudi & 11 others (2013) eKLR** by Sitati, J. that:

"In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural

reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.”

10. Bail and bond guidelines are also important aid. In **Republic v Richard David Alden [2016] eKLR** the Learned Judge highlighted the general Guidelines that guide the Court in the enforcement of the principles of Article 49(1) of the Constitution as follows;

“The Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set out under section 123A of the Criminal Procedure Code. These general considerations are: the nature of the offence; strength prosecution case; character accused and antecedents; failure by the accused to observe previous bail or bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is a child offender; whether the accused is a flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person.”

11. In this case the prosecution has alluded to possibility of interference with witnesses. I find the apprehension to be real.

12. The prosecution also claimed probability of disturbance of public peace and order as well as possible danger to the lives of the accused. The prosecution has relied on the pre-bail report.

13. The report states that there is still hostility in the community who may possibly take the law on their hands and lynch the accused persons. Upon careful consideration of the report, I am convinced that there is a likelihood of harm being occasioned by the general public on the accused. Courts have lamented that such conduct is uncouth and unlawful and has no place in civilized society of the 21st century. However, I do not wish to test the waters with the lives of the accused. Therefore, I find these factors to constitute are compelling reasons not to release the accused on bond. I hope this will maintain public order, peace and security as well as keep the accused out of possible harm’s way. The denial of bail is nonetheless for the time being. The accused are at liberty to apply for bail should circumstances change for consideration by the court.

Dated signed and delivered in open court this 19th day of December, 2019

F. GIKONYO

JUDGE

In presence of

Mungania for 3rd accused

Muriera for 1st and 2nd accused – absent

F. GIKONYO

JUDGE