



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO 01 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

GLADYS WAMBUI MWANGI.....1ST ACCUSED

RAHAB MUKENYI AROMBA.....2ND ACCUSED

ALEX MUHANJI OKWEMBA.....3RD ACCUSED

JAMES MWAURA NGIGI.....4TH ACCUSED

NICHOLAS CHEGENYE MUDEGU.....5TH ACCUSED

RULING

1. Gladys Wambui Mwangi, Rahab Mukenyi Aromba, Alex Muhanji Okwemba, James Mwaura Ngigi and Nicholas Chegenye Mudegu being the 1st to 5th accused respectively are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 1st day of December, 2017 at Manyani Estate in Nakuru town, Nakuru East Sub-County within Nakuru County jointly with others not before court murdered **Julius Kimani Mathu**. All five accused took plea on 23rd January, 2018 and denied the charge.

2. Consequently their learned counsel **Mr. Wambeyi** (for 1st and 2nd accused), **Mr. Ochang** (for 3rd accused), **Mr. Mathea** (for 4th accused), **Mr. Miruka** (for 5th accused) made applications for the accused to be released on bail pending trial. Learned counsel **Mr. Chigiti** and **Motende** appeared for the state while learned counsel **Mr. Wahome** and **Mr. Maragia** appeared watching brief for the deceased's family. The 1st accused filed an affidavit in support of her application.

3. The application for bail for all accused was contested by the state. **No.79599 P.C. Dennis Miheso** who is the investigating officer in the case swore 2 affidavits in opposition. In summary, he made averments contending that the accused and particularly the 1st accused were likely to interfere with key witnesses who are family members and those who were employees. He averred that the accused persons were likely to abscond trial. Pursuant to leave granted to the victims' family to participate in the bond hearing pursuant to **Article 50 (9) of the Constitution** and **Section 4 (i) (b) of the Victim Protection Act**, the deceased's father one **Mathu Mumo** filed an affidavit in opposition to the grant of bond. He made depositions to the effect that there was a real possibility and danger of the accused interfering with

witnesses and tampering with evidence; and that the security of the accused persons was likely to be in danger.

4. The law and practice on bond for persons facing murder charges is now clearly settled. They are entitled to bond or bail pending trial as provided for by **Article 49 (i)** of the **Constitution**. The right is however not absolute as it may be denied where there exist compelling reason. The limitation must however be in accordance with **Article 24** of the Constitution which provides thus:

“1. A right or fundamental freedom in Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

a) The nature of the right or fundamental freedom,

b) The importance of the purpose of the limitation,

c) The nature and extent of the limitation,

d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

5. In **Republic Vs. Danson Mgunya & Another** cited to me by counsel for the 1st accused, **Ibrahim J** (as he then was) ably espoused the principle that the liberty of accused should only be limited where there are compelling reasons not to be released and that it was the duty of the state to demonstrate the same, and even then each case must be decided on its own circumstances touch and context. I couldn't agree more. In **R. V. Richard David Alden (2016) eKLR**, **Lesiit J** succinctly summarized the Bail and Bond Police Guidelines in the following thus:-

“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 of prosecution case; character of the accused and antecedents; failure by the accused to observe previous bail and bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is child offender; whether the accused is flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person.”

6. On the rights of the accused, **Lesiit J** further stated:-

“Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.”

7. In considering the present application, I start on the premise that all the accused are entitled to bail and that if the State considers that there were any compelling reasons then the same should be demonstrated to the court. From the affidavits on record and submissions of the respective parties it is apparent that the bond application has been opposed on three main grounds namely; interference with witnesses, likelihood of the accused absconding trial and the security of the accused. I will consider these issues beginning with

accused's own safety and security.

8. The investigating officer deposed in his affidavit sworn on 17th January, 2018 thus: “*that I have information from the ground which information I believe to be true that there is likelihood of 1st accused person being lynched or harmed by angry sympathizers of the victim if she is released on bond thus her safety is not guaranteed while out on bond.*” Learned prosecution counsel **Mr. Motende** submitted at the hearing that there was so much hostility on the ground and that the security of the accused could not be guaranteed. This submission was met with stiff opposition by the defence team which submitted that it was the duty of the state to provide security.

9. I must say that while security lapses may sometimes occur (as happened when the deceased's life was taken away), it is the duty of the state to ensure safety and security of its citizens. It would behove the police whose investigating officer is now aware of the heightened tension to put in place security measures. Further, I would believe that by applying for bail, the accused were confident that they will not be harmed. I therefore find the argument that the accused be detained for their own safety and security far-fetched and dismiss it.

10. On the second ground, the prosecution expresses fear that the accused were a flight risk and will abscond trial if granted bail. The investigating officer has deposed in his affidavit that the 3rd accused holds a temporary permit to Sudan and if released would leave the court's jurisdiction. This averment was repeated by the prosecution counsel without any demonstration that the 3rd accused would not attend his trial. In any case, the court can impose a condition that he does not leave the jurisdiction of the court during pendency of the trial or without leave of the court.

11. The defence team strongly argued that there was no evidence that the accused would take flight. As I consider this ground I am alive to the principle that the primary purpose of bail is to secure the accused's attendance at trial. All the authorities cited to me by both parties stress this principle (**See Watoro Vs. R (1991) eKLR**). Needless to emphasize an accused's attendance at his trial is critical and the ends of justice would be defeated if the accused were to abscond trial. (**See R. V. Patius Gichobi Njagi & 2 others 20143 eKLR**). In the present case however I am not persuaded that each of the five accused would abscond if released. No material has been placed before me to demonstrate that the fear of flight risk was real. It is speculative.

12. The final but most contested ground put forward by the prosecution was the likelihood of interference with prosecution witnesses. Courts have had numerous occasions to deal with this issue as demonstrated in the case law cited to me by counsel for all parties. In **R. V. Jaktan Mayende & 3 others, Gikonyo J** stated thus:

“- In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

13. In the above case, the court further went on to state that, the specific instances of interference with investigations or witnesses must be laid before the court to persuade the court. **See also R. V. Kokonya Muhssin 2013 eKLR & 3 others**. In **R. V. Patius Gichobi** cited above, this court held that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of the constitution. In **R. V. Dwight Sagaray & 4 others, 2013 eKLR**, the court stated that:-

“For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others.”

14. In the present case the investigating officer has averred in his sworn affidavit that the accused persons and in particular the 1st accused was likely to interfere with the prosecution witnesses; some of whom were her employees and some of whom were family members. He has cited an incident where the 1st accused is alleged to have tampered with the deceased’s vehicle after the killing. **Mathu Mumo**, the victim’s father who is also the 1st accused’s father in law has sworn an affidavit stating that all the witnesses save for formal witnesses were related or directly connected to the 1st accused. He names **Samuel Mwangi Mathu** and **Joseph Mwangi Mathu** (brothers in law of the 1st accused), **Arthur Macharia Mwangi** (brother to the 1st accused; **Diana Rose Wandiku Mumbi Njoroge** and **Jane Nyambura Mungai** (employees of KimsNet a company owned by deceased and accused and working directly under the accused).

15. It is apparent from the averments above which were not disputed by the defence that the 3 of the prosecution witnesses are related to the 1st accused and two are her employees. The fact of relationship alone however does not demonstrate possibility of interference. The court must be satisfied that the nature of the relationship was one that would put the witness in a vulnerable position vis-à-vis the accused or put the accused in a position of influence over the witness or as on that would attract flow of sympathy from witness to the accused. For the brothers in law there is no demonstration that they would be influenced not to testify in the case as they would in all probability, be seeking justice for their late brother. The same cannot be said of the other witnesses.

16. It has been shown that Diana Rose and Jane Nyambura are employees of the 1st accused’s company who work directly under the 1st accused. Being direct employees of the 1st accused, they occupy a position of vulnerability and would in the mind of the court owing to the employer/employee relationship be easily persuaded, intimidated or threatened leading to interference with the evidence and criminal trial that is yet to commence. It is to be remembered that the standard to be applied by the court is deciding whether or not there was such interference is on a balance of probability.

17. After carefully analyzing the opposing views on the issue of possible interference, I am persuaded that the 1st accused was likely to interfere with the prosecution witnesses identified above. With regard to the 2nd, 3rd, 4th and 5th accused, no material has been placed before me to demonstrate actual or perceived interference or their capability to so interfere with witnesses if released.

18. In the final analysis, I have found no compelling reason not to grant the 2nd, 3rd, 4th and 5th accused bail. They are released on condition that they execute a bond of 500,000/= and one surety of similar amount. Each shall not leave the jurisdiction of the court without leave of the court. For the 1st accused I have, as stated above, found compelling reasons to deny her bail. She shall remain in custody until the 3 prosecution witnesses namely Arthur Macharia Mwangi, Diana Rose Wandiku Mumbi and Jane Nyambura Mungai testify or until further orders of the trial court.

Orders accordingly.

Ruling delivered, dated and signed at Nairobi

This 30th day of January, 2018

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R. LAGAT KORIR

JUDGE

In the presence of:-

Emojong Court Clerk

Mr. Wambeyi for 1st & 2nd Accused

Mr. Ochang for 3rd accused

Mr. Matha for 4th Accused

Mr. Miruka for 5th accused

Mr. Chigiti & Motende for state