



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CRIMINAL CASE NO. 33 OF 2018

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTION

VERSUS

GEOFREY KIYEGO BOIT.....1ST ACCUSED

ESCOL KIBIWOTT KOSGEY.....2ND ACCUSED

EDWARD KIBET LAGAT.....3RD ACCUSED

PHILIP KIPROTICH KOSGEY.....4TH ACCUSED

IRENE JEROTICH.....5TH ACCUSED

RULING

The accused persons herein are charged jointly with others not before court with an offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The accused persons were supposed to take plea yesterday, the 30th day of May 2018 but did not for the court had stayed the plea taking process in a Judicial Review application of which is pending interparties hearing on 7th June, 2018. Yesterday the accused persons applied for release on bond. The issue of the murder of *Josephat Mbachira* commenced by way of an Inquest at Kapsabet law court, Inquest No. 7/2016. The applicants argue that the said inquest is still pending and has a hearing date. They have co-operated well with the court in the said inquest by way of appearing during all the hearings and not interfering with witnesses. They avers that they are not a flight risk and should therefore be considered for release on bond pending hearing of the Judicial Review application on 7/6/2018.

The state opposed the release of 1st, 2nd and 4th accused persons, on bond. They relied on the affidavit of one *Mohammed Haman*, an Investigating officer from Directorate of Criminal Investigations Headquarters, Homicide Section, of which affidavit was sworn and filed yesterday.

The said affidavit gives a brief of the evidence there's against the accused persons stating that it's sufficient and overwhelming for the offence they are facing, of murder. Paragraph 21 discloses that the sentence for the said offence is death of which can be an incentive for the accused to abscond if released on bond. Paragraph 23 discloses that if the 3 said suspects are released on bond they are likely to interfere and to intimidate the key prosecution witnesses. Four reasons are given in support of the alleged allegation as follows: -

- i. Some key witnesses are casual workers and not natives of the area and if the suspects are released their safety will be jeopardized.
- ii. There is a witness put under witness protection due to threats and three others are in the process.
- iii. Some witnesses are neighbours to the said suspects and chances of interference are very high.
- iv. The suspects had compromised the initial investigation and if released on bond will take the opportunity to trace the witnesses and influence them to defeat justice.

In considering the issue before this court, I have considered that bond is a constitutional right to the accused unless there are compelling reasons as to why it should not be granted.

Article 49 (1) (h) reads: -

“An accused person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.

The issue which the court then need consider is whether the state has adduced or presented compelling reasons as to why accused No. 1, 3 and 4 should not be released on bond. The presented affidavit in paragraph 21 is not right for though the offence of murder is serious, it does not carry mandatory death sentence. Death sentence is the maximum provided for the offence but the court can provide any other lesser sentence. The offence allegedly took place in the year 2016 and there's an ongoing inquest regarding the same. There is no reliable evidence provided that safety of casual workers who are witnesses in the matter has been jeopardized. The state is not right in presuming that it will now happen given that some suspects have been charged. The allegation that one witness has been placed under protection due to threats and three others are about to, is very general. We do not know how, when and who among the suspects threatened the alleged witnesses. If it's just a question of them feeling unsafe, protection is available for them, and that cannot form sound basis for denial of a constitutional right.

The fact that some witnesses are neighbours to the suspects which raises chances of interference, is not by itself a fact of interference or that interference will occur. The allegation is based on mere suspicion of which cannot form basis for denial of a constitutional right. The fourth ground is that they compromised the initial investigation and are likely if released on bond do trace the witnesses and influence them to defeat justice. This allegation is general and does not disclose how each of the 3 suspects compromised the initial investigation. Talking of likelihood of them influencing witnesses is also a suspicion which is not weighty enough to amount to a compelling reason, to warrant denial of a constitutional right.

I have looked at the authorities provided. The case of *Ndikira Myumba Kizungu, Criminal case No. 23 of 2004*, the issue was determined before the new constitution was in place, and also at that time, as the court expressed, the offence of murder carried mandatory death sentence. It is therefore distinguishable to circumstances of this particular case.

In the case of *Mohamed Dadi Kokome and Another, Criminal (Murder) case No. 21 of 2010*, the court found there was strong evidence of attempt to interfere with the prosecution witnesses. In this case the court has found otherwise in relation to the same. In the 3rd case of *Stephen Nambili, Criminal case No. 32 of 2010*, the court considered among other things that there was animosity against the suspects by the deceased's family. It is not so in this case. In this one there is no strong presentation that the suspects are likely to abscond if released on bond. The three presented authorities do not well fit in the circumstances of this case where there's an ongoing inquest, since 2016.

The bottom line is that the state has failed to offer compelling reasons that would warrant the accused be denied bond or bail. The objection to the application for bond is therefore dismissed. Accused will be admitted to bond.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 31st day of May, 2018

In the presence of:-

Ms Kegehi for the state

Mr. Bitok for the 1st accused and holding brief for Mr. Kibii for the 4th accused

Mr. Mitei for the 3rd and 5th accused persons

COURT:-

Each accused be released on bond of 600,000/- with one surety in like amount. Mention on 7/6/2018.

SIGNED

S.M GITHINJI

JUDGE

31/5/2018