



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO 7 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

1. MARGARET WAKINI NGUMI

2. PAUL NDAMBURI NGUNYI

3. DAVID KIRIMI DANIEL

4. DAVID KARAYA MWANIKI

5. BONIFACE GATHU GITHUI.....ACCUSED

RULING ON BAIL

1. The 5 Accused persons herein, **Margaret Wakini Ngunyi, Paul Ndamburi Ngunyi, David Kirimi Daniel, David Karaya Mwaniki and Boniface Gathu Githui**, are charged with *murder* contrary to **section 203 (as read with section 204)** of the *Penal Code*. It is alleged in the information dated 6th April 2018 that on 9th March, 2018 at Likii village in Laikipia East Sub-county within Laikipia County, jointly with others not before the court, they murdered one **Dennis Wambugu**.

2. On 14th May 2018 the Accused persons pleaded not guilty to the charge. Their trial is scheduled to commence on 4th July 2018. Though on 14th May, 2018 the learned prosecution counsel informed the court that it was not intended to oppose bail for any of the Accused persons, on 21st May, 2018 he stated that it was intended to oppose bail for *all* but the 1st Accused, **Margaret Wakini Ngunyi**. To that end the prosecution filed an affidavit on 5th June, 2018. It is sworn by one IP Francis Kairu, a police officer attached to Nanyuki Police Station and the investigating officer of the case. I have read that affidavit. I have also considered the submissions of the learned counsels.

3. Bail pending trial is now a constitutional right for all offences (***murder included***) that will be denied only for compelling reason. Any condition that the court might impose for such bail, again by constitutional edict, must be reasonable. For all that see **Article 49(1) (h)** of the *Constitution of Kenya, 2010*.

4. It is therefore clear that bail pending trial is no longer a matter for the discretion of the court. It is a constitutional right that can be denied only for compelling reason. So, it is a matter of judgment whether or not there is compelling reason to deny the accused bail.

5. Whereas the term ***compelling reason*** is not defined in the Constitution or in any law, nevertheless it would have to be a matter laid before the court by way of evidence, or that may otherwise come to the attention of the court, that compellingly dictates against admitting the accused to bail. The most important aspect of bail is that the accused will attend court for his trial as and when required to do so by the court. Any evidence tending to show that the accused is a flight risk and might therefore not attend his trial will be a compelling reason to deny him bail.

6. The courts have also considered other matters, like the likelihood of interference with prosecution witnesses, to be compelling enough to deny an accused bail. But there has to be some evidence of that likelihood; mere allegation is not sufficient.

7. Even an accused person's own safety can be a compelling reason to deny him bail, for if he were to suffer grave harm or death while out on bail he would then not attend his trial. But again, there must be evidence of the likelihood of such harm.

8. For the 1st Accused, **Margaret Wakini Ngunyi**, the prosecution has no objection to her being admitted to bail. She is a mother who has recently given birth to another child. I find no compelling reason to deny her bail.

9. As for the 2nd Accused, **Paul Ndamburi Ngunyi**, he is clearly a flight risk. He has recently escaped from lawful custody in this case and was charged with that offence vide *Nanyuki CM Criminal Case No 629 of 2018*. He pleaded guilty to the offence. Because he is not yet 18 (he is 17 years old) he was sentenced to three (3) years probation. It would be foolhardy to admit him to bail. The likelihood of him not turning up for his trial is too high.

10. The prosecution opposes bail for the 3rd, 4th, and 5th, Accused persons, **David Karimi Daniel, David Karaya Mwaniki and Boniface Gathu Githui**, upon the ground that they might be lynched by members of the of the public in their community who were incensed by the killing of the Deceased by a mob, an event that led to demonstrations.

11. I find it unlikely that people who were recently outraged by a mob killing would themselves participate in other mob killings. In any case, apart from the say-so of the investigating officer, there is no affidavit by an outraged member of the community concerned upon which the court can make an informed decision on the likelihood of harm to the 3rd, 4th, or 5th, Accused if admitted to bail. I find no compelling reason to deny them bail.

12. In the result, the 1st 3rd 4th and 5th Accused persons shall be admitted to bail upon each of them executing a bond of KShs 300,000/00 and providing one separate surety in like sum. It is so ordered.

13. The 2nd Accused, **Paul Ndamburi Ngunyi**, is denied bail. He shall remain in custody for the duration of his trial. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 19th DAY OF JUNE 2018

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 28TH DAY OF JUNE 2018