



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HCCR NO. 27 OF 2018

REPUBLIC.....APPLICANT

VERSUS

1. JOSEPH ONDICHO ADOGO ALIAS MUISLAM

2. RONALD ONDIEK OGWAGI ALIAS MICAH

3. LAMECH RIOBA SAKAWA ALIAS NYOKA MREFU

4. EVANS NYOKA.....RESPONDENTS

RULING

1. The 1st, 2nd, 3rd and 4th Accused persons have been charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Each accused person pleaded not guilty to the said charge and through advocate Mr. Onchwang'i they sought to be released on bail.

2. The prosecution opposed the said application. The investigation officer (I/O) filed an affidavit dated the 7th of August 2018. The I/O deposes that he is investigating the murder case in HCR 27/2018. That the deceased went missing on the 2nd of June 2017 and her body was found dumped and retrieved from a sewage manhole at Jogoo estate within Kisii Township. That the body is still lying at Kisii Teaching Referral hospital mortuary due to underlying land dispute in High Court ELC 110/2017 and 5/2018 which is believed to have motivated her killing. That the accused persons with other suspects still at large were found to have participated in the killing and disposal of the body of the deceased. That after the murder the witnesses in this case have continuously been threatened by the accused person/ suspects and some have of them have been reported at Kisii police station vide OB No. 91/30/9/2017. That some of the witnesses have been placed under witness protection programme while the remaining ones are still residing in the same village with the suspects. That it is within his knowledge that the 4 accused persons are under threat from villagers who are aggrieved by the death of the deceased and hence the 4 will not be safe whilst out of custody. That it is the constitutional right of each of the accused persons to be released on bond and also it is the constitutional right to have their lives protected, equally the witnesses in the case have the right to have their lives protected. That the 4 accused persons face the danger of being lynched by angry villagers if released on bond and that the lives of witnesses who are not under witness protection will not be safe if the four suspects are released on bond. That the court should delay granting bond to the accused persons until such time when the witnesses will be safe to reside in the same village.

3. Mr. Onchwang'i opposed the application. He submitted as follows; the prosecutor's application should not be granted. The question of bond is a constitutional right pursuant to Article 49 of the Constitution. That the I/O is relying on hearsay. That I/O has failed to show that there is an order barring the burial of the deceased nor has he explained why the deceased had not been buried to date. The I/O has also failed to explain how the criminal charge is related to the ELC matter. That there are no compelling reasons adduced to demonstrate why the accused persons should not be released on bond. That the I/O has already concluded that the accused persons participated in the killing and disposal of the body. That under Article 50 (2) (a) of the Constitution one is presumed guilty until found guilty. That there is no OB attached to the said affidavit to show that there was a complaint made by the alleged witnesses. The prosecution is relying on faceless witnesses. That if there are threats then the witnesses will inform the court. That the accused persons have been living in the same village with the same villagers since June 2017 when the deceased died. That they have not complained that their lives are in danger, that this is speculative and hearsay. That the court should discharge the speculative and hearsay evidence and grant the accused persons bond. That they are not a flight risk and will attend court as required. That they have no ran away since the death of the deceased.

4. Mr. Otieno in response stated that there are threats and that they have several cases which collapse when witnesses are threatened and don't attend court.

Determination

5. Under Article 49(1) (h) of the Constitution an accused has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons. An accused charged with murder is also entitled to bail or bond. The court has considered the reasons advanced by the I/O in his affidavit and I find that it does not adduce any compelling reasons to deny the accused persons bail. His affidavit is scanty. It talks of witnesses who aren't named. The threats are not specific nor is there evidence that the accused persons lives are in danger. I expected more from the investigating officer (I/O). His affidavit is scanty and cannot be relied on to deny the accused persons bail. Each accused person shall be released on a bond of Kshs. 500,000/- with 2 sureties of a similar amount. The Deputy Registrar will examine the document presented and approve the sureties' if they meet the stated bond terms. Each accused person shall attend court on the requisite dates, failure to do so could lead to a withdrawal of their bond. The accused persons are warned that any interference with the witnesses could lead to a cancellation of their bond.

Dated signed and delivered this 10th of August 2018

R.E.OUGO

OUGO

JUDGE

In the presence of;

Mr. Ochwang'i For the 1st Accused

Mr. Nyang'acha For the 2, 3 & 4th Accused persons

Mr. Otieno For the State

Rael Court /clerk