



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT CHUKA**  
**HCCR (MURDER) NO. 6 OF 2016**

REPUBLIC.....PROSECUTOR

-VERSUS -

JOHN PETER MBAABU.....1<sup>ST</sup> ACCUSED

KENNETH NJAGI.....2<sup>ND</sup> ACCUSED

CAROLINE KAMBURA.....3<sup>RD</sup> ACCUSED

VINCENT MURIUKI.....4<sup>TH</sup> ACCUSED

**R U L I N G**

1. **JOHN PETER MBAABU, KENNETH NJAGI, CAROLINE KAMBURA, & VINCENT MURIUKI** are all charged with the offence of murder in this case. The particulars of the charge as per the information presented are that on 30<sup>th</sup> July, 2016 at GICHWE VILLAGE, KITHITU SUB-LOCATION within THARAKA-NITHI COUNTY the four accused person unlawfully murdered ABINJA THARA MUCHIRI. They all denied the charge and the case is now pending for trial before this court.

2. **JOHN PETER MBAABU** (1<sup>st</sup> accused) and **CAROLINE KAMBURA** (3rd Accused), the 1<sup>st</sup> and 2<sup>nd</sup> applicants herein have now moved this court vide a notice of motion dated 15<sup>th</sup> February, 2017 under **Article 49(1) (h)** of the Constitution of Kenya 2010 to be released on bond on reasonable terms pending trial. They have further asked this court to review their earlier plea to be released on bond for the interest of justice. The application is based on the following grounds namely:-

*i. That they have a Constitution right to bail*

*ii. That they are ready to abide by the terms imposed*

*iii. That the first applicant has health concerns and that their being in custody with his spouse (the 2nd applicant) has not helped matters in so far as their marriage is concern*

3. In his affidavit in support of this application, the 1<sup>st</sup> applicant blames his woes on an alleged boundary dispute with his accusers who he has accused of taking advantage of his arrest to loot his properties and set ablaze his house. He has maintained that he is innocent and decried the suffering of children who had

to be taken in by relatives since his arrest and that of his wife the 3<sup>rd</sup> accused herein. He has further deponed that he has a permanent residence, a wife and school children and therefore cannot be considered as a flight risk.

4. On her part, the 2<sup>nd</sup> applicant has accused one Purity Kaari for her tribulations and deponed that she is innocent.

5. At the hearing of this application Mr. Kijaru Advocate for the applicants orally submitted that the 1<sup>st</sup> accused applicant had a medical condition (swollen) leg which has been a problem to manage in custody with the then ongoing doctors strike. He urged this court to consider the likelihood of the applicants turning up in court whenever required as a primary consideration in this application. He then contested the respondents claim that the applicants will jump bail and/or interfere with witnesses stating that the same has not been illustrated. Mr. Kijaru further faulted the respondent's contention that releasing the applicants on bond would pose a danger to their safety pointing out that the state is duty bound to provide security to all citizens including the applicants herein. He has cited the decision in the case of **Republic - Vs - Marcus Mwenda Mwololo [2016] eKLR** to back up this contention pointing out that if the applicants realize upon being released that there is danger posed, they would report the same to the police and action would be taken.

6. The 2<sup>nd</sup> and 4<sup>th</sup> accused persons through their learned counsel expressed their wish to ride on this application stating that it would be unfair to release the applicants on bond and leave them in custody when they were charged together. They have urged this court to consider releasing them on bond despite having not presented a formal application. Mr. Mutani further added that the situation on the ground has improved as the earlier hostility which mitigated against their earlier application to be released on bond has in their view subsided with the passage of time. The 2<sup>nd</sup> and 4<sup>th</sup> applicant have reiterated that no compelling reason has been advanced by the state to deny them their rights under **Article 49(1)(h)** of the Constitution.

7. The respondent has opposed this application through a Replying Affidavit by Inspector Mainge John sworn on 28<sup>th</sup> February, 2017. The respondent has contended that the medical condition of the first applicant can be managed in custody notwithstanding the ongoing doctor's strike deponing that there are enough medical facilities in prison. The respondent have further contended that the Applicants' right to bail is not absolute and can be limited for example where there are compelling reasons and the compelling reasons advanced by the respondent in this case are as follows:-

***i. That the accused persons are likely to interfere with witnesses.***

***ii. That the subject matter of this murder case has land related disputes involving close family members and the applicants are unlikely to be accepted back before the trial is concluded and that it is not safe for them to be released on bond.***

8. The respondent has also pointed to court that the issues brought up by the applicants are contested facts which should be canvassed during the trial in this case.

9. Mr. Machera for the Director of Public Prosecution submitted that the reasons advanced about the safety of the applicants if released on bond are compelling citing an incident where the 2<sup>nd</sup> accused was saved by police from a rioters mob who wanted to lynch him because of the incident relating to the murder of the deceased in this case. He further added that the 2<sup>nd</sup> accused suffered cuts as a result and that the community was quite angry about him. He further contended that the 4<sup>th</sup> accused has no place to abode and was therefore a flight risk. It was also submitted that one other suspect was lynched by a mob making it quite unsafe for the applicants to be released on bond. The state relied on the social inquiry conducted to support their contention. Mr. Machera differed with the applicants' counsel on the relevance of the cited authority in the case of **R- Vs- Marcus Mwenda Mwololo [2016] ek KLR** arguing that the decision in that case was based on the fact that there was no probation report filed concerning the applicants indicating that any evidence of hostility existed.

10. I have considered this application and the submissions made by the applicants. I have considered the representation made by the 2<sup>nd</sup> and 4<sup>th</sup> accused persons who have urged me to consider their plight too. I have considered the response or the objections raised by state regarding releasing the accused persons on bond. The right to bail for arrested persons in Kenya is enshrined under that Article 49(1)(h) of Constitution of Kenya 2010. It is true as submitted by the respondent herein, that the right is not absolute as it is limited where compelling reasons exist to deny the right to the accused persons. The applicants in this application have raised ground which though appear to reinforce their reiteration of innocence, are issues which should be raised at the actual trial rather than in this application because it will be premature to test the veracity of these claims at this stage. I have looked the opposition made and the social inquiries conducted in regard to the four accused persons and it is apparent that the position of each applicant herein and that of the other the, accused persons should be considered separately and individually for the interest of justice.

11. In regard to John Peter Mbaabu (the 1<sup>st</sup> applicant), I find that the respondent's objection to his release on bond majorly hinges on his safety if released on bond and the alleged dispute over a boundary or land dispute with the deceased family. The 1st applicant on his part has stated that he is ailing and that the same ailment has been exasperated by the ongoing doctor's strike in Kenya. Although the respondent has countered this by contending that the medical condition can be managed in prison notwithstanding the doctor's strike, I find this issue of less relevance in this application because the law does not dictate that the applicant is required to show/give compelling reason to be released on bond pending trial.

12. The correct position of the law as per the cited provision of the Constitution is that an accused person has a right to be released on bond unless the state advances compelling reasons to deny him/her the right to bail. I find that the reasons advanced by the respondent particularly about interference of witnesses by the 1<sup>st</sup> and 2<sup>nd</sup> applicant, are mere speculations for the simple reason that the state has indicated that the same witnesses are hostile to all the accused persons and if that is the case then any such attempt made by any accused person here to interfere with any of the state witnesses in this case will readily be made and if the same is established, the bond would obviously be cancelled. I have considered the probation report concerning the 1st applicant and I do not find it compelling enough to deny the 1st accused/applicant his right to bail. The allegations made by the state that it will be unsafe to release the 1st accused owing to the land dispute and hostility on the ground in my view is not compelling in regard to both 1<sup>st</sup> and 2<sup>nd</sup> accused persons herein.

13. In the first place merely denying the accused herein bond will not solve the alleged land dispute. Secondly land disputes are not resolved through criminal or murder trial. The law provides legal avenues and procedures in the ELC court which is mandated by the Constitution to resolve such disputes. Thirdly, the safety of every person and their property is guaranteed by the Constitution of Kenya 2010. The provisions of **Article 26 and 29** the Constitution inter alia guarantees right to life and rights not to be subjected to any form of violence either through mob justice or other illegal form of violence and it is the duty of the state to ensure that the same is protected. It is therefore ironical for the respondent to use what can properly describe as self indictment for failing to provide security among other constitutional guarantees as a reason to deny its citizens their constitutional rights.

14. In regard to Calorine Kambura (the 3<sup>rd</sup> accused/2<sup>nd</sup> applicant herein), the respondent has pointed out the social inquiry report whose recommendations are similar to the report on first accused save that the perceived hostility from the community towards appears higher on account of an alleged report that some people had at one time laid in wait for her on rumours that she had been released. The question that I wish to pose here is if it is true that the local administration and the security apparatus knew about the activities of these dark forces, what did they do in order to bring them to justice? If the same people are the same one who abrogated themselves the duty to try and convict the murder suspect who is said to have been murdered, it beats all logic and the requirements of law to let them free. They ought and should have been arrested because this is a country that cherishes the rule of law. It is not right to let few misguided elements in our society feel that they can act with impunity in the name of '**mob justice**', '**community**', or any other name you may want to assign it. Allowing them to have a say on the rights of suspects charged in court is akin to allowing dark forces to erode the gains made in the new

Constitutional dispensation. Kenyans spoke unanimously about a number of rights now enshrined in the Constitution of Kenya 2010, and one of those rights are imbedded under **Article 49(1)(h)** of the Constitution and the position of this court is that it would amount to a travesty of justice if any of those rights are fettered by considerations that are tainted with lawlessness and impunity. That certainly is not the scenario that the people of Kenya envisaged when adopting, enacting and giving themselves the Constitution of Kenya 2010.

15. It is on the basis of the above that I do find that the reasons advanced by the state, including the social inquiry report in regard to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused respectively are not in my view compelling enough going by the clear constitutional provisions cited above. Their application to be released on bond is merited and deserved.

16. In regard to the 4<sup>th</sup> accused I find that the social inquiry report is more adverse to his application particularly because he has no fixed place of abode. His application to be considered alongside his Co-accused is negated by the reasons advanced by the state. I do find the reasons in this case compelling and relevant in the fair administration of justice. It is important to note that one of the principle consideration in application to be released on bond pending trial is whether the accused is likely to turn up for trial if released. In this respect I find that there are compelling reasons to decline the 4<sup>th</sup> accused person's application to be considered for bond pending trial because he is a flight risk.

The long and short of this is that the application to be released on bond in respect to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused person respectively is allowed. Each of the said three can be released on a bond of Kshs.1 million each with surety of the same amount for each. The 4<sup>th</sup> accused (Vincent Muriuki) shall remain in custody pending trial. I also direct that this case be fixed for trial immediately for the interest of justice.

**Dated and delivered at Chuka this 27<sup>th</sup> day of April, 2017.**

**R.K. LIMO**

**JUDGE**