



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 86 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHARLES VITANYI MUHUBWA.....1<sup>ST</sup> ACCUSED**

**SIMON KAKAI ENOCK.....2<sup>ND</sup> ACCUSED**

**BOAZ NYONGESA RASA.....3<sup>RD</sup> ACCUSED**

**BONSTON WANYONYI RASA.....4<sup>TH</sup> ACCUSED**

**JACKSON OKUMU SESWA.....5<sup>TH</sup> ACCUSED**

**ISAAC MUTINYI SHITSHESWA.....6<sup>TH</sup> ACCUSED**

**RULING**

1. All the accused pray for bail pending their trial. On 23<sup>rd</sup> February 2017, their learned Counsel, *Mr. Maloba*, formally applied for bond. The Learned State Counsel sought time to reply.
2. In the meantime, the accused appointed new counsel, *Mr. E. Miyienda*. On 27<sup>th</sup> April 2017, the application for bail was *renewed*. There are six *pre-bail reports* filed by *Salome Eboya*. She is the Lugari Sub-County Probation Officer. Although they are all favourable, the court noted some discrepancies. First, copies of the reports annexed to the affidavit of the 1<sup>st</sup> accused sworn on 1<sup>st</sup> April 2017 were *not* signed by the probation officer. Secondly, the original reports filed by the probation officer were signed on *her behalf* by an *undisclosed* officer.
3. The court summoned the probation officer. On 9<sup>th</sup> May 2017, she confirmed that *she* authored the reports; and, that the original reports were emailed to; and, executed by her colleague in Eldoret, *Tabitha Muhindi*.
4. The Republic opposes the application for bail. There is a replying affidavit sworn on 4<sup>th</sup> April 2017 by *Maleya Namatatsi Etemesi*. She is the mother of the deceased. She deposes that shortly before the incident, all her eight houses and a sugar plantation were torched. She sought refuge at Lumakanda Police Station from 27<sup>th</sup> March 2017 to 5<sup>th</sup> April 2017. She deposes that demonstrations were held seeking the release of the accused; and, baying for her blood. She was thus forced to relocate from Chekalini. Lastly, at paragraphs 12 and 13, she deposes that a relative of the 6<sup>th</sup> accused has threatened her; and, that the D.P.P and IPOA are arranging witness protection.

5. The accused contest those averments. There is a replying affidavit of the 1<sup>st</sup> accused sworn on 1<sup>st</sup> April 2017. Learned counsel for the accused referred to paragraph 6 of the affidavit. He was of the view that the victim's family was engaging in criminal conduct in the village. He submitted that it would be unfair to on the one hand offer protection to the victim's family and on the other hand deny the accused bail. Finally, he submitted that the accused cannot possibly interfere with witnesses because the victim's family has relocated from the *locus in quo*.

6. I have considered the pre-bail reports, the depositions and rival submissions.

7. The accused face a weighty charge of *murder*; but they are still deemed to be *innocent*. The sentence for murder is *death*. The accused are entitled to protection of the law. Under Article 49 (1) (h) of the Constitution, they are entitled to bail *unless* there be *compelling* reasons. See *Muraguri v Republic* [1989] KLR 181, *Republic v Elias Kipkemoi*, Eldoret High Court Criminal Case 42 of 2014 (unreported), *Republic v John Mwenya Chumbe*, Eldoret, High Court Criminal Case 47 of 2014 (unreported).

8. The overarching objective of bail is to ensure the accused *attend* their trial. *Muraguri v Republic* [1989] KLR 181. Relevant matters to be considered at this stage include the nature of the charge; the likely sentence; previous criminal records, the views of the family of the victim, the possibility of interference with witnesses; the temptation to abscond; and, the safety of the accused.

9. The *Victims Protection Act 2014* requires the views of victim's family to be taken into account at the point of bail. The accused are charged for the unlawful killing of *Jeremiah Eshitemi*. Those are mere *allegations* at this *stage*. But I have a *sworn affidavit* by the victim's mother stating that her eight houses and sugar plantation were torched; and, that her family sought refuge for several weeks at Lumakanda Police Station from 27<sup>th</sup> March 2017 to 5<sup>th</sup> April 2017. Some demonstrations were held seeking the release of the accused; and, baying for her blood. She deposes that she was forced to relocate from Chekalini. More importantly, she deposes that a relative of the 6<sup>th</sup> accused has threatened her; and, that the DPP and IPOA are arranging a *witness protection programme*.

10. Those are not matters that I can shut my eyes to. True, the witness or her family has relocated from *Chekalini*. Her family may have engaged in criminal conduct leading to the skirmishes in the village. That is not for me to say at this stage. But there is now a trial for *murder*. Although the pre-bail reports are favourable, there is compelling evidence that the witness known as *Maleya Namatatsi Etemesi* is under threat; and, that the DPP or IPOA are arranging a *witness protection programme* for her. So much so that if the accused are released, there is a *real* likelihood of interference with a witness or evidence in this case.

11. That to me is a *compelling* reason *not* to release the accused on bail. The upshot is that the application by the accused to be admitted to bail is refused at this *stage*. However, the accused are at liberty to *renew* their motion once *Maleya Namatatsi Etemesi* concludes her testimony in this case.

12. It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 30<sup>th</sup> day of May 2017.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read at in open Court in the presence of:-**

All the accused persons.

Mr. Miyienda for the accused.

Mr. Muchiri for the Republic.

Mr. J. Kemboi, Court Clerk.