



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT CRIMINAL CASE (MURDER) NO. 3 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BENSON NJAGI MWANGI.....1ST ACCUSED/APPLICANT

ANTONY MUGENDI.....2ND ACCUSED/APPLICANT

REUBEN MUTEMBEI.....3RD ACCUSED/APPLICANT

R U L I N G

1. **BENSON NJAGI MWANGI, ANTONY MUGENDI and REUBEN MUTEMBEI** (Applicants) are all facing murder charge in this case contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information presented to this court is that the applicants herein jointly murdered **SILAS MUTHOMI MURIUNGI** (Deceased) on 13th May, 2017 at Kamonka village Mutino Location within Tharaka Nithi County. All the Accused persons (Applicants) denied the offence and the trial is pending in this court.

2. The applicants have now moved this court vide a notice of motion dated 6th June 2017 under **Article 49 1(h)** of the Constitution of Kenya 2010 for bail pending trial. The grounds upon which the application is made are as follows:-

(i) That it is their constitutional right to be released on bond pending trial.

(ii) That they will turn up in court for trial or when they are requested to do so and that in their view that is the primary consideration in releasing one on bond pending trial.

(iii) That all the applicants are close relatives and their continued stay in custody is causing prejudice to them and their families.

3. In support of this application all the three applicants have sworn their respective affidavit sworn on 6th June 2017 where they have deponed that they are all married with young families with permanent abode within the jurisdiction of this court. They have also deponed that they are presumed innocent and as such they should be admitted to bond/bail pending trial.

4. The applicants' learned counsel Mr. Kijaru contended that the state reasons for denying the applicants bond are not compelling in their view because no basis has been shown that the applicant would interfere with witnesses. Mr. Kijaru further submitted that the state has failed to demonstrate that the accused persons would tamper with evidence if released on bond and that mere allegations are not sufficient to deny them their constitutional right. The following authorities were cited to persuade this court to allow the application for bail;

(i) Republic -vs- Elias Chomba & 2 Others [2016] eKLR

(ii) Republic -vs- Marcus Mwololo [2016] eKLR

5. The Respondent through the office of Director of Public Prosecution has opposed this application through a replying affidavit of Mohamed Aden sworn on 16th June, 2017. The deponent has deponed that as the investigating officer in this case he is well versed with the facts at play in this case and that one of the factors he contends play against this application that they are likely to interfere with witnesses in this case. The investigating officer has further deponed that one of the accused persons had approached the deceased's family in an attempt to settle this matter and interfere with witnesses.

6. Mr. Machirah for the state has submitted that the police are still looking for three more suspects in this case who are still at large and that releasing the accused on bond will reduce the chances of apprehending them. It is further contended that the applicants are flight risk and

may not turn up in court if released on bond.

7. I have considered this application the grounds upon which it has been made and the submissions. I have considered the objection made by the state. A right to bail is a constitutional right available to an accused person under **Article 49(1) (h)** of the **Constitution of Kenya 2010**. The Constitution provides that an accused or arrested person has the right to be released on bond or bail on reasonable conditions unless there are compelling reasons not to be released. The burden to establish and prove the existence of compelling reasons is the one who alleges that there are compelling reasons to deny an applicant his/her right to bail. In this regard, the respondent in this application had the burden to demonstrate to this court that compelling reasons exist to deny the applicants herein their rights to bail.

8. I have considered the grounds or the reasons advanced by the state which they consider compelling enough to deny the applicants bail. They are:-

a) Likelihood to interfere with witnesses.

b) Absconding due to the failure by the applicants to have a fixed place of abode.

To begin with the allegation of the possibility of the applicants interfering with witnesses the state has pointed out an incident here in this court when the plea was taken when a person shot up from the back inside the courtroom stating that the accused persons were innocent. This court takes note of the incident where this court advised the person to await for trial and give evidence if necessary for the defence if he will be required so to do. I am however unable to see any connection between what transpired in the open court with the allegations of interference by the accused persons herein. The accused persons had been in custody for more than a week when the un identified person came to court and pleaded about their innocence. The investigating officer has also not stated who among the accused person if at all approached the victim's family with a view to settling the matter or interfering with witnesses. The investigating officer has not stated if one or all the accused persons attempted to interfere with the witnesses in this case. For a reason to be compelling enough in my view, it must specifically give details and not general statements such as in this instance.

9. The state has also stated that they are still pursuing three suspects almost two months after incident and two months since the applicants herein were apprehended. If the applicants had anything to do with failure by the police to apprehend the suspects while in custody, the same has not been demonstrated. I also do not find any explanation on how the release of the applicants on bond will increase the challenges the police may be having in apprehending the suspects anymore than they could be currently facing.

10. On the question of possibility of applicants absconding for failure to have a fixed place of abode, I find that the respondent's contention is negated by a favourable probation reports on all the three applicants. The social inquiry conducted reveals that contrary to what the Respondent has stated in this regard, all the three applicants have fixed place of abode and have their respective families.

11. In the end, this court finds that the reasons advanced by the respondents to deny applicants their constitutional right to bail are not compelling enough. I have considered the persuasive authorities cited by the applicants' counsel and I am persuaded that the application for bail pending trial is merited. The same is allowed. Each of the accused person may be released on a bond of Kshs. One million shillings (Kshs.1 million) with one surety of a similar amount. If released the applicants are advised to stay away from the witnesses and more so the victims family until after the trial and attend court punctually whenever required to do so. The date for trial shall remain as scheduled.

Dated and Delivered at Chuka this 27th day of June, 2017.

R.K. LIMO

JUDGE

27/6/2017

28/6/2017

Machirah for state.

Mr Kaaria for Accused Absent

Ruling signed, dated and delivered in the open court in the presence of Machirah for the state and in the absence of Kaaria for the accused person.

R.K. LIMO

JUDGE

28/6/2017