REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 8 OF 2013

ANTONY GACHOKI MUGUONGO..…….APPLICANT/ACCUSED

-VERSUS-

REPUBLIC..……..…..……..……RESPONDENT/PROSECUTOR

RULING

1. The applicant herein, **Antony Gachoki Muguongo** is charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The particulars of the offence as contained in the Charge Sheet are that on 6th October, 2013 at Kianyaga Township, Kirinyaga East District within Kirinyaga County jointly with others not before court unlawfully murdered **Irene Wanja Muriithi**. He has denied the charge and the matter is pending for trial. He has now vide a Notice of Motion dated 26th June, 2015 applied for bond pending trial. The grounds upon which the bond is sought are as follows:

a. ***That the applicant has not been afforded the benefit of bond/bail herein and has been in custody for over 12 months.***
b. ***That the accused person has a constitutional right to bail pending trial.***
c. ***That investigations are complete and the matter is ripe for hearing.***
d. ***That the accused is ready to abide by all terms that may be imposed and shall not abscond if released on bond.***

2. The applicant in his supporting affidavit sworn on 26th June, 2015 has deposed that he has been in custody since 31st October, 2013 and he believes that the investigation of this case is complete. He has further deposed that he resides within Kirinyaga County and so he will not abscond.
3. That applicant through counsel submitted in response to the objection of the application by the State, that his right to bail is constitutional and that the replying affidavit by the investigating officer does not disclose compelling reasons for denial of that right.
4. The respondent through Omooria learned Principal Counsel opposed the application and relied basically on the replying affidavit of JOHNESS NYANGIGE the investigating officer in this case. The affidavit was sworn on 15th February, 2016 and the investigating officer has expressed fears that the applicant is likely to interfere with witnesses who are minors if released on bond. He has further deposed that the minors have promised to testify only if the accused is in custody. He therefore expressed fears that the case against the accused may collapse if the applicant is released on bond as the witnesses who are minors are likely to be influenced not to testify against the

accused person.

5. This Court has considered the application. It is not contested that murder though a serious offence is now bailable and the right to bail is a constitutional right. ***Article 49(1)*** of the **Constitution** provides as follows:-

> ***"An arrested person has the right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."***

The reasoning behind this provision is that every person charged with an offence in court is presumed innocent in terms of ***Article 50*** of the **Constitution** until otherwise is proven. It follows from this presumption therefore that a person should not lose his liberty unless there are compelling reasons.

6. The defence counsel has reiterated that the replying affidavit by the investigating officer has not demonstrated compelling reasons to deny the applicant bond pending trial. I have looked at the replying affidavit by the said investigating officer. He has deposed that the witnesses have informed him that they will testify only if the accused is in custody and pleaded that the three witnesses who are apprehensive should be heard first before this Court considers releasing the accused on bond. Mr. Omooria contended that this was a compelling reason to deny the accused bond at this stage.
7. The issue to be determined in this application is what amounts to 'compelling' reason and whether the investigating officer has disclosed compelling reason in his affidavit in response to the application for bond. There is also the question of social inquiry report which the applicant submitted favours his application to be released on bond.

To begin with the question of compelling reasons, it is important to note the meaning of 'compelling' as used in the constitutional provision. In recent cases brought before court, judges of this court, through in separate decisions have interpreted the meaning and the import of the phrase "compelling". In **Republic -Vs- Joktan Mayende & 3 others [2012] eKLR, Republic -Vs- Lucy Njeri Waweru & 3 others [2013] eKLR** and **Wilson Thirimba -Vs- DPP [2012] eKLR** respectively the courts made the following observations regarding the meaning of the word compelling;

> ***"Once again we will turn to the concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as "rousing strong interest, attention, conviction or admiration."***

This Court shall adopt the same approach and the finding by the honourable judges in the above cases. Furthermore, according to **Black's Law Dictionary** the word 'compelling' means to be "*convincing"* or "*overwhelming"*.

8. For the State to satisfy the court that the reasons for denying an accused person bond are compelling they should show that the reasons are not mere allegation or flimsy. The reasons must be strong and solid. It is important to note that allegation of interference of witnesses or likelihood of interference of witnesses is a serious matter that cannot be taken lightly. The reason is obvious. Interfering with witnesses with an aim of influencing, compromising or terrifying them to either, not to give evidence or, give false evidence can lead to a serious miscarriage of justice and breakdown of law and order. That is why interference of witnesses in many jurisdictions the world over is a potent ground to deny or restrict the liberties of accused persons. In the case of **R -Vs- Lucy Njeri Waweru & 3 others [2013] eKLR** Hon. Justice F. N. Muchemi sitting in Nairobi High Court declined to grant the accused persons bail on the grounds that the accused persons were likely to interfere with key witnesses and that they were also at risk of harm from close family members of the deceased. The court however, gave the accused persons liberty to review their application in future after the family members had testified in the case.
9. This Court also finds the decision in the case of **Republic –Vs- Kokonya Muhssin [2013] eKLR** relevant to the application now before Court in so far as what constitutes compelling reason to deny accused person bail is concerned. In that case the court enumerated instances which if

proved would constitute compelling reasons. The following observations were made;

> ***"All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence or will give particular evidence or in a particular manner. Interference with witnesses offers a wide range it can be immediately on commission of the offence during investigations at inception of the criminal charge in court or during the trial, and can be committed by any person including the accused, witnesses or other persons. The descriptions of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice and if it is so found it is a justifiable reason to limit the right to liberty of the accused……"***

10. This Court further finds that what constitutes compelling reason as contemplated from the wording of the aforesaid constitutional provision is both subjective and objective. On one hand it is objective in the sense that a standard has been set as to what can constitute compelling reason (which has been interpreted by many courts to be below the standard of beyond reasonable doubt and slightly above the standard in a balance of probabilities) and on the other hand, it is subjective in the sense that different parameters do apply at times as what is compelling in one set of circumstances or a place or region may not necessarily be compelling in a different set place or region. That is why each case must be decided on its own merit as it is difficult to find one magic bullet or pill that applies uniformly in all cases.
11. I have considered the probation report filed in this case and noted that it is favourable to the application before Court. It is however, difficult to explain the rationale for the marked differences of the report with the affidavit of the investigating officer relied on by the State in vehemently opposing this application. Looking at the report and the contents of the affidavit one would be excused to think that they do not relate to the same accused person and the same locality where the accused person resides. This Court has however, considered the fact that at the end of the day it is the wearer of the shoe who knows where the shoe is likely to pinch. The prosecution knows their case and the burden they have to discharge during trial. The investigating officer is in a more responsible position in so far as prosecution of this case is concerned. It is also important to note that this Court takes the view that probation officer's report is not binding. It is just guiding. The investigating officer on the other hand has sworn an affidavit and he knows he can be subjected to cross-examination on the contents of the affidavit. This Court therefore finds that the replying affidavit carries more weight than probation report for the above reasons.
12. I have carefully considered the reasons advanced by the State in this application and find the same, given the circumstances obtaining particularly the age of the witnesses, to be compelling enough especially on account that the trial of this case is scheduled for 3rd May, 2016. The State can bring the 3 witnesses that day to testify after which the applicant can review his application to be released on bond. For this reason, I decline to allow the application dated 26th June, 2015 for now. The same application can be reviewed later as I have stated above after the 3 vulnerable witnesses have testified.

Dated and delivered at Kerugoya this 22nd day of February, 2016.

R. K. LIMO

JUDGE

22.02.2016

Before Hon. Justice R. Limo, J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Interpretation English-Kikuyu

Sitati for State present

Accused present

Kahiga for accused absent.

COURT: Ruling signed, dated and delivered in the open court in presence of Sitati for State and in the presence of accused person.

R. K. LIMO

JUDGE