REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 4 OF 2013

SAMUEL MUGO KIMOTHO

DUNCAN KARIMI NGOTHO…….APPLICANTS

CYRUS MWANIKI

-VERSUS-

REPUBLIC……..…….....RESPONDENT

RULING

1. **SAMUEL MUGO KIMOTHO, DUNCAN KARIMI NGOTHO AND CYRUS MWANIKI MACHIRA** the applicants are commonly facing a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** before this court. They have contemporaneously made applications through Notice of Motions all dated 6th July, 2015 seeking the following orders:

1. **That the hon. Court be pleased to review or set aside an order given on 21st August, 2013 that had declined to grant them bond pending trial.**
2. **That the applicants be granted bond pending finalization of their trial.**

2. In view of the fact that the applications are similar, I will deal with them in a consolidated way. This ruling shall therefore apply to all the said applications.

3. The applicants herein had made similar applications dated 31st July, 2013 before this court sitting in Embu and Hon. Justice H. I. Ongundi disallowed the application on 21st August, 2013 on the ground that the applicants were likely to interfere with some witnesses who then were still students at St. Francis Girls High School where the incident leading upto the charges facing the accused persons occurred.

4. The applicants have made their applications under **Article 2** and **49(1) (h)** of the **Constitution** asking this court to review the aforesaid ruling and release them on bond pending conclusion of their trial now underway. The grounds relied upon are as follows:

i. ***That the circumstances cited during the ruling delivered on the 21st August, 2013 have now changed.***
ii. ***That six of the witnesses listed as witnesses are no longer students at St. Francis girls High School.***
iii. ***That the 2nd accused person/applicant is no longer a teacher at the aforesaid school.***

iv. ***That the 1st accused is no longer principal at the said school while the 3rd accused/applicant no longer exercises any authority over the six witnesses.***
v. ***That the six witnesses are no longer students at St. Francis School and no longer live in Kirinyaga.***
vi. ***That the applicants have been in custody for almost 2 years at which period only two witnesses were able to testify one of whom was a former student of St. Francis Girls High School. The situation has since changed but the applicants are of the view that the delay has infringed on their constitutional right given that the law presumes them innocent until proven guilty.***
vii. ***That the applicants are entitled to right to bail under Article 49(1)(h) of the Constitution unless the state has compelling reasons to deny them the right and that there are none in this case.***
viii. ***That the denial of bond should not be used as a form of punishment to the applicants as the law presumes them innocent.***

5. In their written submissions through their counsel the applicants have reiterated their right to bail submitting that there are no compelling reasons to deny them their rights under the Constitution. They have cited the case of **Joktan Magende & 32 others 2012 eKLR** to buttress their contention that the applicants cannot be denied bail on flimsy grounds but only on real and cogent grounds. Citing the provisions of **Article 29** of the **Constitution**, the applicants have added that they have a right to freedom which should not be deprived without just cause. On this point they have cited the case of **R –Vs- Danson Mgunya & Anor [2010] eKLR**.

6. They have denied the respondent's contention that they would interfere with witnesses if released on bond. They have faulted the prosecution contention saying that the allegation of interference of witnesses have not been proved by any document or evidence. It was submitted that the state should have provided evidence of telephone conversations to prove that attempts were made to interfere with witnesses – through threats. They faulted the respondent's letter marked as exhibit 'NCIA' and 'NCIB' saying that the same were done 2 years ago and no evidence of any response from Safaricom has been annexed to prove any of the allegations of interference with witnesses. They have contended that the prosecution have the onus to prove that the applicants have authority over the witnesses or are likely to interfere with witnesses but have failed in their obligation.

7. The applicants have urged this court to go by past decisions by other courts that the primary consideration for deciding whether or not to grant bail to an accused person is whether or not the accused will voluntarily and readily attend his trial and that he will not abscond if released on bond. They have cited the case of **WATORO –VS- REPUBLIC (1999) eKLR 220** in urging this court to find that the prosecution has not demonstrated that the applicants would abscond if released on bond.

8. The applicants have also pointed out their individual reasons why they deserve to be released on bond with the first accused contending that he has a sickly child who is disabled who requires care and would be of much help if released on bond. The 2nd accused on his part has contended he is a 2nd year student at Karatina University and that his studies are at risk if he is not released on bond. The 3rd accused has submitted that he is 65 years of age with 8 children and so he would like to be released so that he can assist in caring for his family.

9. The applicants have further relied on the following authorities in support of their application:

1. **Job Kenyanya Musoni -Vs- R [2012] eKLR.**
2. **Martin Kihuti Kibe -Vs- R [2014] eKLR.**
3. **R -Vs- Mohamed Samana & others [2012] eKLR**

10. The state through the Office of the Director of Public Prosecutions has opposed this application. Mr. David Sitati and Nicolas Chigiti, the learned prosecuting counsel and the investigating officer respectively have each sworn an affidavit to oppose the application by the applicants to be released on bond.

11. Mr. Sitati has deposed that the applicants have been monitoring whereabouts of the witnesses in this

case despite being in custody that is why they have been able to know that they have moved out of Kirinyaga county.

12.The state has contended that the remaining witnesses should be allowed to testify with fear arguing that they have done their best to have trial expeditiously concluded.

13. The investigating officer in this case has deponed that the accused persons had at the beginning of trial in this case attempted to get in touch with some witnesses in this case by using proxies and that their attempt to get concrete evidence from Safaricom failed owing to some non cooperation from mobile service provider. He has further deposed that it took their intervention and reassurance to the witnesses' safety to convince the witnesses who have testified to come to court to testify.

14. The investigating officer has further deposed that the remaining witnesses have been assured of their security but might fear for their lives if the accused are released on bond. It is contended that one remaining key witness is a resident of Kirinyaga county and expressed fear that if the witnesses are interfered with then the prosecution case will fail.

15. The prosecution has submitted that it is fair and in the interest of justice to have the accused in custody until the trial is concluded. They have pointed out one of the witnesses who has testified (P.W.1) had to relocate to Mombasa owing to the threats that were directed at her.

16. The prosecution has faulted the applicants contention that the witnesses remaining do not reside in Kirinyaga saying that the contention is misleading and the possibility of interference is still real. They have submitted that the basis for denial of bond when the applicants first made the application still hold and that allowing this application would derail their case and realization of justice. They pointed out that there are only 2 key witnesses remaining who are still vulnerable and urged this court to take the evidence of the two witnesses if it is minded to release the accused on bond.

17. I have considered the application, the affidavits and the authorities cited by the applicants. I have also considered the opposition to the application. It is quite clear from reading of the Constitution and the authorities cited that the applicants are indeed entitled to right to bail premised on the right to be presumed innocent until proven guilty. Both counsels are in agreement that this legal position is anchored on **Article 49(1)(h)** of the **Constitution** which 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 be released."***

Many attempts have successfully been made in the past to define what amounts to a compelling reason and am persuaded to adopt the definition given in the cited case by the applicants, of **Job Kenyanya Musoni –Vs- R [2012] eKLR** where the judge in that case agreed with the decision in **Republic -Vs- Mohamed Hagar Abdirahiman & Anor [2012] eKLR** where the definition was given as follows:

> ***"A compelling reason would be such a reason that is forcefully convincing to persuade this court to believe that something is true."***

18. The applicants have maintained that the prosecution have failed to demonstrate that there are compelling reasons to deny them bail but in a rejoinder the state has responded that they are remaining with 2 witnesses who are unlikely to feel safe to testify if the accused were to be released on bond before they testify. It is further submitted by state that attempts were made at the beginning of trial by the accused persons to interfere with witnesses though their attempts to get evidence from Safaricom were frustrated due to factors beyond their control.

19. This court is in agreement with the assertions by the applicants that their right to liberty as enshrined under **Article 29(a)** of the **Constitution** should not be curtailed without justifiable reason. I have however, noted that the reasons advanced by the applicants have since been overtaken by events. This

application was made when only 2 witnesses had testified. At the moment seven witnesses have so far testified and the state has submitted that they are only remaining with 2 witnesses whom they view as still vulnerable and are likely to be interfered with.

20. I must say that the state has failed to place sufficient material before court to demonstrate that the accused persons are likely to interfere with witnesses so if that was the only consideration in this application, I would not have found it compelling enough. I am however, persuaded that there is compelling basis to give the prosecution chance to avail their 2 remaining witnesses to testify without any likelihood of hindrance for the interest of justice. I have noted the sentiments made by the state that one of the remaining witness resides in the locality where the accused persons reside. I have noted the observations made through submissions filed by the applicants counsel and I am in total agreement that the other important primary consideration for granting bond/bail is whether the accused is likely to attend court for trial or abscond. Taking into consideration the number of witnesses heard, the weight of the evidence and the totality of the circumstances obtaining in this case am persuaded that it is safe and in the interest of justice and a matter of great public interest to allow the course of justice to run to its conclusion without hindrance by any person or any event. In view of the stage of the current trial, I am not persuaded that renewing the application after two remaining witnesses have testified will serve any useful purpose or interest of justice. The interests of justice in the circumstances of this case will be served if the trial, of the accused persons is expeditiously concluded and a decision rendered on their innocence or guilt. So much progress has been made in this trial. Credit should be given to the investigating officer and the prosecution in timely availing witnesses to testify during the trial. I am sure that if the trend continues this case will be concluded soon without any delay.

For the above reason, I disallow the application dated 6th July, 2015.

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

R. K. LIMO

JUDGE

22.3.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Accused 1 present

Accused 2 present

Accused 3 present

Interpretation English-Kiswahili for 3rd accused.

Sitati for State present

Miss Kiragu holding brief for Magee for all the accused persons.

COURT: Ruling dated, signed and delivered in the open court in the presence of Sitati for prosecution and Miss Kiragu holding brief for Magee for the accused persons.

R. K. LIMO

JUDGE

22.3.2016