



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 91 OF 2015

REPUBLICPROSECUTOR

VERSUS

MICHAEL OCHIENG ONYANGO.....1ST ACCUSED

EVANS OCHIENG RACHAR.....2ND ACCUSED

MICHAEL OTIENO NYADHIGO.....3RD ACCUSED

RULING

Two applications were canvassed before me on 18th April 2016. The first application is dated 22nd December 2015. The application cites Michael Ochieng Onyango, the 1st accused as the applicant. It was filed by Mr. Mogikoyo, advocate. The second application is dated 4th March 2016. It is in respect Michael Ochieng Onyango, 1st accused and Evans Ochieng Rachar, 2nd accused. It was filed by Mr. Masara, advocate on behalf of the two accused persons. Both applications seek orders of this court to admit the three accused persons to bail pending the hearing and determination of this case. The grounds in support of both applications are found on the face of the application and the supporting affidavits as the case may be. There is an error in the application by Mr. Mogikoyo because of citing the wrong client as the applicant. The record of the court and the submissions show that Mr. Mogikoyo represents the 3rd accused person Michael Otiemo Nyadhigo.

The three accused persons are charged with murder jointly with other persons not before the court. The offence is alleged to have been committed on 19th day of September 2015 at NACICO PLAZA along Ladhies Road in Nairobi within Nairobi County. The victim is one Rodgers Omunyokho Agoi.

Both applications were argued on the same day. In the affidavit in support of the application of the 3rd accused, Mr. Mogikoyo deposes that the accused undertakes to attend trial until otherwise directed by the court; that he will abide by the terms and conditions of bail set by the court; that the accused has a constitutional right to be released on bail and that investigations are complete. In his submissions in court, Mr. Mogikoyo told the court that the prosecution has not supplied sufficient reasons to back up the apprehension that the 3rd accused may abscond if released on bond; that the 3rd accused has not threatened nor does he intend to threaten any witnesses and that the witnesses have not sworn affidavits to allude to any threats by the 3rd accused.

The grounds in support of the application by the 1st and 2nd accused persons are that they are Kenyan citizens working in Nairobi where they live with their families; that they are not flight risks and that there are no compelling reasons to deny them bail.

The two applications are opposed by the state. The prosecution relied on a replying affidavit by Richard Ongera. In that affidavit the officer deposes that Michael Ochieng Onyango, 1st accused, is a member of KADEPO group which uses intimidation and extortion tactics to charge *mkokoteni* (handcart) operators to work in certain areas of Machakos Country Bus Station which they control and that if released on bail the accused in company of other members of that group still at large will intimidate witnesses; that the accused have no fixed abode; that counsel for the accused has not demonstrated exceptional circumstances warranting the accused to be admitted to bail; that there is compelling evidence to secure conviction and that due to the seriousness of the offence the accused may be tempted to abscond.

During the time of hearing this application counsel for the prosecution asked to be allowed to amend the affidavit to cover all the accused persons. This was opposed by Mr. Masara on the ground that amending the affidavit was unprocedural. The objection was upheld by the court. Mr. Masara was of the view that the affidavit was in respect of the 3rd accused. I have read the affidavit. It specifically refers to Michael Ochieng Onyango, who is the 1st accused in the trial. This accused person is Mr. Masara's client. Be that as it may. I will consider the two applications without undue regard to procedural technicalities.

Firstly, the law places the burden to adduce compelling reasons to persuade the court to deny bail to the accused persons on the prosecution. Mr. Richard Ongera is wrong to state that counsel for the accused has not demonstrated any exceptional circumstances warranting the accused to be admitted to bail. On the contrary, it is the State, through the Investigation and Prosecution to demonstrate compelling reasons.

This court cannot deny the accused bail because of seriousness of the offence without compelling reason that they will abscond. The law allows bail even for accused persons facing murder which is by all means a serious offence. Strong evidence as a ground to deny bail is also not compelling. The evidence collected in this trial has not been subjected to examination and cross-examination to test its veracity. Interference with witnesses is a serious matter because it amounts to subversion of justice. There must however be evidence to support such interference. Apprehension of such interference is not sufficient to persuade this court. Absconding from the jurisdiction of this court is very serious. This is why a court granting bail must set the terms and conditions to secure the attendance of an accused person.

I have carefully considered the two applications, the grounds in support of the same and the replying affidavit as well as submissions by both counsels. I find that the prosecution has failed to demonstrate compelling reasons to persuade this court to decline the two applications. However, the three accused persons have not demonstrated where they reside. They have not given enough details to enable this court to determine that they are Kenyan Citizens and that they will turn up in court when required to do so. For this reason I order that a social enquiry be done on the three accused persons to determine their places of abode, where they work and other related details to enable this court make its final orders. The matter is deferred pending a report from a Probation Officer on all the three accused persons, which report shall be filed within two weeks from today's date. Upon receipt of such report, this court will make its final orders in respect of these applications. It is so ordered.

Dated, signed and delivered this 26th April 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Onunga for the prosecution

Mr. Masara for 1st and 2nd accused

Mr. Mogikoyo for the 3rd accused

The three accused persons

Mr. Daniel Ngumbi, court clerk.