



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 13 OF 2014

REPUBLIC.....PROSECUTOR

AND

CYRUS MWANGI KIMUNYUACCUSED

RULING

1. **Cyrus Warui Kimunyu** is facing a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars contained in the information are that on 25th April, 2014 at Kinyaga the applicant unlawfully caused the death of ELIUD WARUI (deceased). The trial is now pending in this Court. He has now brought a Notice of Motion dated 6th April, 2014 seeking to be admitted to bail on reasonable terms pending trial under **Article 49** and **50 (2)** of the **Constitution of Kenya 2010**.
2. The grounds upon which the application is made are as follows:
 - i. ***That the applicant pleaded not guilty to the charge of murder.***
 - ii. ***That the case has not kicked off despite being set down for hearing on several occasions.***
 - iii. ***That the accused has a right to bail and that no compelling reason has been adduced by the prosecution.***
 - iv. ***That the accused has a right to a presumption of innocence.***
3. The application was supported by the affidavit of the applicant sworn on 6th April, 2016 where *inter alia* the applicant has deposed that the number of witnesses lined up by the prosecution is likely to make the case take long to be concluded. He has further expressed willingness to abide by any condition that may be given on bond. The gist of the application is that there are no compelling reasons to deny him his right to bail and dismissed reports that a house belonging to one JULIUS GITAU was burnt down arguing that there was no connection made by the prosecution between him and the said victim of arson. He, through counsel Mr. Ngigi, relied on the case of **William Mwangi wa Maina -VS- R (unreported murder case No. 6 of 2012 at Kerugoya High Court)**.
4. The respondent, through **Mr. Sitati**, learned counsel for the State, opposed the application and relied on replying affidavit of the investigating officer in this case one P.C. Michael Kimaru sworn on 9th May, 2016. The investigating officer has sworn an affidavit and enclosed copies of Occurrence Book extract No. 2/00005/2014 and No. 4/00045/2014 to show that irate members of the public descended on the homestead of the accused person on 29th April, 2014 and razed 3 houses to the ground because of the killing of ELIUD WARUI. Mr. Sitati stated that JULIUS GITAU was the father to the accused person and that had the accused person not have been arrested and safe in custody, he would have suffered in the hands of mob justice.
5. I have considered the application and the response made. A right to bail to arrested persons is a

constitutional right embedded in our **Constitution (Article 49 (h))** unless there are compelling reasons to deny him/her of that right. The right to bail can therefore be denied or limited only if the prosecution demonstrates a compelling reason. One of the primary considerations in determining whether there is a compelling reason is whether the accused is likely to abscond if released on bond or is likely to interfere with witnesses if released on bond. The respondent has failed to demonstrate any of these factors. The only reason given by the state as compelling is the safety of the applicant that is the fact that he is likely to suffer mob justice if released on bond. Although the safety of an accused person especially when the case is still fresh can be a factor in considering whether the safety is a compelling reason to deny him his constitutional right or not, caution and restraint is required in such circumstances. This is because of the very tenets in the law and constitution that an accused person should be presumed innocent until proven guilty.

6. No person or authority has a mandate to find a person guilty of any crime leave alone murder except the courts of law. Members of public in the name of “mob justice” have no right whatsoever to purport to “dispense justice” or deny an accused person his constitutional right. Secondly, the state has the duty and responsibility to provide security to all persons whether charged in court or not. It is wrong for the state to use safety which it is supposed to guarantee under **Article 26 and 29** of the **Constitution** as ground to deprive some constitutional rights to its citizens. I also find that finding that likelihood of mob justice as compelling does amount to legal backing or seal and/or abetting of mob justice in Kenya. This is not only undesirable but untenable in law. I am therefore not convinced that an accused person should be remanded for his own security. There is no member of public or any other person for that matter who should be allowed to take away someone’s right using extra judicial means. This Court is persuaded by the reasoning and observations made by the court in the case of **R -VS- John Kahindi Karisa & 2 others [2010] eKLR** where it was observed in part;

“I also reject the idea that the accused should be remanded and not granted bail for their own safety, security and good. Any accused person released on bail has his constitutional rights secured and protected. No member of the public or any other person can try him or punish him.....as it would amount to a judicial aiding and abetting of this criminal trend of public murders or so called mob justice for the court to purport to deny bail to the accused so as to protect them from being lynched by members of the public.....”

I also find that it would be a travesty of justice if a riotous mob is given room to determine the fate and the constitutional rights of criminal suspects. The same is archaic and has no place in a country where the rule of law is respected. The applicant’s constitutional right to bail and his right to presumption of innocence can only be limited by law and in this context by a compelling reason. I also find that with the passage of time the tensions prevailing at the time must have now gone down. This is informed by the probation report which I have considered and found it favourable to the application.

7. In the premises I am persuaded that the reason given by the respondent given the circumstances of the law and the reasons aforesaid is not compelling to deny the accused his right to bail. The application is merited and I allow it. The accused may be released on his bond of KShs.1 million with two sureties of the same amount.

Dated and delivered at Kerugoya this 30th day of June, 2016.

R. K. LIMO

JUDGE

30.6.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Accused present

Interpretation English-Kikuyu

Sitati for State present

Ngangah holding brief for Ngigi for accused.

COURT: Ruling signed, dated and delivered in the open court in the presence of Sitati for respondent and Ngangah holding brief for Ngigi for the accused/applicant.

R. K. LIMO

JUDGE

30.6.2016