



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MURDER 7 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMAA AHMED MUHUMED alias J**

**MOHAMED HALIL HASSAN**

**AHMED HILOBLE ALIE.....ACCUSED**

**RULING**

This is a ruling in respect of an application by the applicant/accused person, through their advocate, Mr Makasembo, seeking to be admitted to bail pending the hearing of their case.

The accused persons/Applicants are charged with three (3) counts of murder contrary to Section 203 as read with Section 204 of the penal code.

According to Mr Makasembo, these offences are bailable under the Constitution unless they are cogent reasons for them to be denied this right.

This application was opposed by M/s Mathangani for the state and she relies on the grounds deponed to in the affidavit sworn by the investigating officer one Kenneth Ngeiywa on 22<sup>nd</sup> February 2016.

The learned counsel applied for the said investigating officer to attend court and be cross examined on the content of his said affidavit. The investigating officer attended court and he informed court that the grounds upon which the accused persons/applicants released on bond/bail is denied are as follows;

- (a) that the investigations are still ongoing as one of the victims is undergoing treatment and the police are likely to bring up more charges such as attempted murder against the applicants/accused persons.
- (b) that the accused persons/applicant were positively identified by the witnesses who are going to testify in this case, hence the witnesses are at risk;
- (c ) that the applicants/accused persons are likely to interfere and or tamper with the evidence if released on bail/bond;
- (d) that the accused person/applicants may fail to appear before court given the gravity of the offence;

- (e) that some other suspects have left home and are being searched for in Boni forest;
- (f) that preliminary evidence shows that the accused persons/applicants will face further charges under the prevention of Terrorism Act;
- (g) that the nationality of the applicants/accused person is under investigation and hence yet to be ascertained;
- (h) that the applicants/accused persons have no fixed abode since they only moved to Lamu 3 months before the incident;
- (i) that the manner in which the victims were executed was most brutal and this has scared the witnesses in this case;
- (j) that there are accomplices who the police are still looking for.

The investigating officer was cross examined by Mr Makasembo for the applicants/accused person and it came out that he was the head investigator/coordinator in the matter. It also came out that he recorded witnesses statements, and he, together with Mr Nabonwa and Mr. Wanjohi investigated the case and arrested the accused persons/applicants.

The investigating officer in being cross examined further, stated that the offences occurred in three (3) different villages in one night, which villages are relatively apart. He however stated that it was possible for the applicants/accused persons to attack the three (3) villages at the same time. He also stated that the applicants/accused persons were identified on the basis of being neighbours with the witnesses but went on to state that they live in Pangani. He confirmed that he had ID cards belonging to all the three (3) suspects and even a student ID showing the 1<sup>st</sup> accused person was a student at PC Kinyanjui Institute. He stated that he had written to the National Registration Bureau and the said PC Kinyanjui Institute to confirm if the accused persons/applicants were Kenyan nationals and the 1<sup>st</sup> accused person, a student, respectively, but had not received any communication. He admitted that it was his personal opinion that the murder of the three (3) victims was most brutal. He also admitted that he had no direct or indirect evidence to confirm that the accused persons/applicants had threatened to kill witnesses. He further admitted that he had no evidence that the accused persons intend to abscond/ran away from the country if released on bond. He confirmed that he would have no problems of the accused person/applicants were released on bond/bail by the court.

In response to the averments by the investigating officer, Mr Makasembo submitted that the grounds which the investigating officer raised to have the accused persons/applicants denied release on bond/bail are only cultivated to denying them their Constitutional rights. He also submitted that the reason given by the investigating officer in opposing the accused persons' application to be released on bond are based on fictitious allegations and fears which are not supported by any evidence. He further submitted that some of the allegations are tainted with personal opinions and sentiments which ought not to be relied upon by the court to denying the accused persons bond.

Mr Makasembo, counsel for the accused persons went on to tell court that they would concede to stringent bond terms.

Ms Muthangari, counsel for the state, responded that the rights to bail is a limited right as it may be denied if there are compelling grounds presented before court. (See Article 49 (1) (h) of the Constitution). She maintained that she was relying on the grounds advanced by the investigating officer, That he had been on the ground since the incident occurred in Lamu, hence what he had raised cannot be referred to as fears but facts on the ground. She pointed out that the sentence for murder is death whereas that for attempted murder is life imprisonment, which sentences are heavy, and are likely to lure one to abscond.

I listened to both counsel in their arguments before court and the investigating officer. I have also carefully read through the affidavit of the said investigating officer dated 22<sup>nd</sup> February 2016.

In considering an application where accused person is seeking to be released on bond, regard is placed on the provisions of Article 49 (I) (h) of the Constitution which states that:

“An accused person has the right;

***(h) “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”***

This article entrenches the right of the accused person to be released on bond/bail pending charge or trial unless there are compelling reasons for refusing.

This means that an accused person is constitutionally entitled to bail until and unless compelling reasons are demonstrated.

Section 123 of the Criminal Procedure Code, pursues bail for all criminal cases and makes bail available at all times.

It is not denied that the offences with which the accused persons/applicants are charged with are serious. But they are bailable.

However, the basis consideration is whether or not the applicant/accused persons will turn up to attend their trial. Only that each case is considered on its own merit.

The accused persons/applicants have denied the offence and therefore they are presumed to be innocent until proven guilty (see Article 50(2) (a) of the Constitution).

By having been arrested and arraigned in court, it is believed the same was founded upon reasonable suspicion of having been involved in the commission of the offence (s).

In ***NAIROBI HIGH COURT MISCELLANEOUS CRIMINAL APPLICATION NO. 254 OF 2006 JOYCE AMBASA AKWA VRS REPUBLIC***, Makhandi J ,as he then was, held that;

“The principle consideration in matter of bail is to secure the accused’s attendance at the trial of his case. If the court is of the view that the accused if granted bond, is likely not to attend court for hearing of the case, then the court would be entitled to deny him bond. In making such decision, regard will also be had of the seriousness of the charge, character and antecedents of the accused.”

It is not denied that the accused person/applicants in this case are charged with serious offences, which, if they are found guilty they face death sentence. This must be considered in an application for bail/bond in such a case since these are more probabilities and incentive to abscond unlike in cases of minor offences. But this fear may be taken care of by the court in imposing stringent bail terms.

I have considered the grounds upon which the prosecution in this case is relying on to have the accused persons/applicant not released on bond and find that the investigating officer did not tender any evidence any facts before this court to substantiate the claims/allegations. Even upon being cross examined on these allegations or claims by the applicants counsel, the investigating officer failed to substantiate the same. The investigating officer also stated that the attack on the victims was most brutal that it had instilled fear in the witnesses. It would be prejudicial to address my mind to this as this is evidence and yet the case is yet to commence.

All in all, I find the grounds advanced by the prosecution in opposing the accused persons/applicants application seeking to be released on bond, were mere allegations which cannot suffice. In fact, the prosecution did not establish compelling grounds to warrant the accused person/applicants being denied bail or bond.

***IN REPUBLIC VRS DANSON NGUNYA AND ANOHER (2010) eKLR*** J Ibrahim (as he then was)

stated

***“Liberty is precious and no one’s liberty should be denied without lawful reason and in accordance with the law. Liberty should not be taken for granted....”***

I therefore allow the applicants/accused persons application to bail/bond but with stringent terms.

The accused persons maybe admitted to bail/bond on the following terms;

- 1 Each applicant/accused person may be released on his own bond of Ksh 1,000,000 with two Kenya sureties of Ksh 500,000 each.
- 2 Each applicant /accused person or their sureties to deposit their passports with the court until the final determination of this case.
- 3 Each applicant/accused person to report to the DCIO Lamu every 21 days until the final determination of this case.
- 4 Each applicant/accused person to be of good conduct and maintain public order peace and security.

In default of any of the above conditions, the bond granted to each applicant/accused person herein will be cancelled.

**DATED AND DELIVERED ON THE 22<sup>ND</sup> DAY OF AUGUST, 2016.**

**D. CHEPKWONY**

**JUDGE**

**In the presence of;**

Mr Wamotsa for the state

Mr Njagi for the accused person.

C/clerk- Kiarie

Mr Wamotsa – We wish to apply for the typed and certified proceeding in this case.

Mr Njagi – We also apply or the typed conditions of bail and haring date.

Court – The proceedings and ruling to be typed and both accused to be supplied with certified proceedings of the same.

Hearing on 15.12.2016.

**D. CHEPKWONY**

**JUDGE**