



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL CASE NO. 50 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PETER GITAHI NDUMIA.....ACCUSED

RULING

1. The Accused Person is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He was arraigned in Court on 05/07/2016 when he pleaded not guilty. At the time of his plea, Mr. Otieno requested to be placed on record for the Accused Person. He immediately applied to be supplied with all the relevant documents related to the case. He also requested for bail for the Accused Person. I set the bail hearing for 20/07/2016 and requested for a pre-bail report.
2. The Pre-bail Report was not ready on 20/07/2016 so we adjourned to 28/07/2016. The Pre-bail Report was later filed on 28/07/2016. Corporal Paul Chebet of the Kasarani CID Division Headquarters also filed an Affidavit on 14/07/2016 in which he opposed bail.
3. On 28/07/2016, Mr. Otieno renewed the bail request. He indicated that having read the Pre-bail Report, there was nothing disclosed therein that revealed compelling reasons sufficient to warrant refusal of bail.
4. Mr. Otieno's arguments focused on three points. First, he argued that the Accused Person was not a flight risk and that the Pre-bail report had confirmed this. Towards this, Mr. Otieno argued that the Accused Person is a married man with a wife and children, a fixed abode, a trade/profession and a stable extended family. Further, Mr. Otieno argued, the Accused Person did not attempt to escape when the incident leading to his arrest occurred.
5. Second, on the issue of security for the Accused Person, Mr. Otieno raised two arguments. In the first place, he argued that it is the State's responsibility to provide security – and the fear of a law-breaking mob taking the law into their own hands – should never be a factor in granting bail. Indeed, he went further to argue that to consider the possibility that an Accused Person might be lynched by a mob as a reason for denying bail would be to abet criminal behaviour of the mob. In the second place, Mr. Otieno argued that the Pre-bail Report had suggested that the Accused Person will be safe in his rural home in Nyeri anyway – and that the Accused Person's family stood ready to provide housing for him there.
6. Third, Mr. Otieno addressed the fears expressed by the Prosecution that the Accused Person might interfere with witnesses. This was addressed – although quite sparsely in the affidavit by Corporal Chebet – and in the address by the Prosecutor. Mr. Otieno argued that no tangible evidence had been offered to support the suspicion that the Accused Person will interfere with witnesses. It has not been shown, he argued, that any of the witnesses is vulnerable or has a special relationship with the Accused Person or that the Accused Person has the means to influence or compromise investigations. While responding to

the Prosecutor's address, Mr. Otieno pointed out the allegations made that several witnesses had already been contacted and asked not to testify were bare statements made from the bar which were undocumented. In any event, Mr. Otieno argued, the Court can make it a condition that the Accused Person does not interfere with witnesses.

7. On her part, the Prosecutor, Ms. Maari, opposed bail. She provided two reasons for her opposition. First, that it was for the security of the Accused Person that he be held in custody following what happened on the day of his arrest when members of the public rounded him up and beat him up: he was only saved from lynching and sure death by the Police. The only way to ensure his security, Ms. Maari argued, was to hold the Accused Person in custody during the pendency of the trial.

8. Secondly, Ms. Maari argued that there are credible fears that the Accused Person will interfere with investigations. She said that there are undocumented reports that a number of people from the Accused Person's family had approached two witnesses asking them not to testify in the case. These witnesses, she said, cannot be disclosed for security reasons.

9. I have considered the submissions by the two counsels, the Pre-bail Report and the affidavit by Corporal Chebet.

10. Bail is a Constitutional right (Article 49(1)(f)). The right is only inapplicable upon a showing of compelling circumstances by the State. Here, the State argues that the compelling circumstances are constituted by the fact that the Accused Person's security cannot be assured unless he is in custody. Secondly, the State argues that there is already evidence that the Accused Person may interfere with the witnesses and thwart the criminal trial.

11. The two grounds stated by the State could, in an appropriate case, constitute compelling grounds for denial of bail. I do not, however, think that this is one such case. It is true, and it is not denied that the Accused Person was attacked by a mob just before his arrest. It is also likely true that his presence in that community might spark general unrest and agitation which might lead to difficulties in the Police and the State guaranteeing the Accused Person's security. However, as the Pre-bail Report has recommended, the Accused Person has family in his rural home in Nyeri which is prepared to house him during the pendency of the trial. The Accused Person is prepared to accept proportionate conditions on his residency to secure his pre-trial release. I do not see any reason to insist on holding the Accused Person in prison for his own security when available evidence suggests that both his liberty and security can be secured by placing a condition that he does not return to the community where the alleged offence was committed during the pendency of the case.

12. It is also true that in certain circumstances reasonable apprehension of the likelihood of the Accused Person to interfere with witnesses can form compelling reasons. However, no cogent data has been supplied here that would warrant that conclusion. It is not enough for the Prosecution to state the fear in an affidavit. As for the "undocumented" reports that the Accused Person's family has already attempted to reach some witnesses, I do not see how the continued detention of the Accused Person would address that danger: if witnesses were contacted while the Accused Person was in custody, it follows that his continued detention is not the panacea for potential interference with the witnesses in this particular case. This is not to say that the fear is not well founded; it is simply to say that in the particular circumstances of this case, the continued detention of the Accused Person will not address the issue.

13. In the circumstances, the Court makes a finding that there are no compelling reasons to deny bond/bail to the Accused Person in this case. I hereby grant the Accused Person bond in the sum of Kshs. 1,000,000 and one surety of a similar sum. In the alternative, I grant cash bail of Kshs. 500,000.

14. In addition, the following conditions shall attach to the bail/bond:

- a. The Accused Person is ordered to refrain from contacting the Prosecution witnesses in any way whether electronically, in person, through agents or family or by phone. Any verified reported contact shall automatically lead to cancellation of bail/bond.

b. The Accused Person is ordered not to reside or visit Zimmerman estate or its neighbourhood during the pendency of the trial except with prior written authority from the Deputy Registrar.

c. The Accused Person shall report to the Deputy Registrar every alternate Thursday beginning on 11/08/2016.

Orders accordingly.

Dated and delivered at Kiambu this 5th day of August, 2016.

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JOEL NGUGI

JUDGE