



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**HIGH COURT CRIMINAL CASE NO. 34 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH THIONG'O WAWERU.....1<sup>ST</sup> ACCUSED**

**HENRY NGUGI KARUGA alias MWENE CIO.....2<sup>ND</sup> ACCUSED**

**JULIUS KANYIRI WAMBUI alias KAMURANG'A.....3<sup>RD</sup> ACCUSED**

**JOHN NJOROGE GACHO alias NJINALO.....4<sup>TH</sup> ACCUSED**

**HARRISON KIBANDE MARUBU.....5<sup>TH</sup> ACCUSED**

**JOSEPH MUCHUI MUIRIRU.....6<sup>TH</sup> ACCUSED**

**BENARD MURIGI KARANJA.....7<sup>TH</sup> ACCUSED**

**JOSPHAT MACHARIA MARUBU alias KASEE.....8<sup>TH</sup> ACCUSED**

**MARY MUGECHI MBURU alias WAMUGECHI.....9<sup>TH</sup> ACCUSED**

**JOSEPH NYAMU KAGO alias KIMANGU.....10<sup>TH</sup> ACCUSED**

**PATRICK IKUU MUGO.....11<sup>TH</sup> ACCUSED**

**SAMUEL NJERU MBURU.....12<sup>TH</sup> ACCUSED**

**PETER MBURU MUNGAI.....13<sup>TH</sup> ACCUSED**

**PETER MURIGI NGIGE.....14<sup>TH</sup> ACCUSED**

**ZACKARIA NGARUIYA MUTWE.....15<sup>TH</sup> ACCUSED**

**JOHN KAMAU KARIUKI.....16<sup>TH</sup> ACCUSED**

**SIMON NGUGI GITAHU.....17<sup>TH</sup> ACCUSED**

**RULING**

1. The Applicant (Bernard Murigi Karanja) is the 7<sup>th</sup> Accused Person in Kiambu High Court Criminal Case No. 34/2016. He has approached the Court under Certificate of Urgency to renew his bail application vide a Notice of Motion Application dated 29/07/2016. The Application is supported by the Applicant's affidavit and annexed supporting documents. Mr. Businge appeared before me and argued the Application on behalf of the 7<sup>th</sup> Accused Person. Ms. Maari appeared for the State and opposed the Application.
2. A brief history of the case is necessary to put the matter in context.
3. The 7<sup>th</sup> Accused is charged along with seventeen other people with four counts of murder contrary to section 203 as read together with section 204 of the Penal Code. All the victims of the alleged murders are associated with Kihiu Mwiri Company in Murang'a County. All the Accused Persons were first charged – in two separate cases – at Milimani High Court Criminal Division. When a High Court was established in Kiambu, both case files were transferred here. The first case charged the first sixteen Accused Persons while the second case file charged the last two Accused Persons. On 28/07/2016 I consolidated the two cases and all the Accused Persons took a new, amended and consolidated plea where they pleaded not guilty.
4. Before the matters were transferred to Kiambu High Court, all the Accused Persons had applied to be admitted to bail pending trial. Lady Justice Stella Mutuku heard the applications for bail and, on 03/12/2015, gave a ruling denying bail to the first sixteen Accused Persons. When the two cases were consolidated, attorneys for the parties acquiesced that the bail ruling controlled the case as consolidated. They, however, urged the Court to expedite hearing. Consequently, we took early hearing dates for the case.
5. I directed that the ruling dated 03/12/2015 by Justice Mutuku is still in force and the reasoning therein would now be extended to the 17<sup>th</sup> and 18<sup>th</sup> Accused Persons and cover the case as consolidated. I also directed that the Court will hear the case on a priority basis and scheduled a status conference for 14/09/2016 and hearing on 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> December, 2016 and again on 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> January, 2017.
6. One day after the directions on consolidation, continued custody of the Accused Persons pursuant to the ruling dated 03/12/2015 and expedited priority hearing, the 7<sup>th</sup> Accused filed the present Application.
7. Mr. Businge argued that the Court should reconsider the 7<sup>th</sup> Accused Person's bail application on account of his illness. After establishing that bail is a constitutional right and that each bail application should be considered on its merits, he argued that the 7<sup>th</sup> Accused Person is 68 years old and suffers from acute glaucoma. The 7<sup>th</sup> Accused, Mr. Businge informed the Court, is now partially blind due to the disease. He is currently attending ophthalmology clinic at Kenyatta National Hospital where surgery on both eyes has been recommended. Indeed, operation on one eye has already taken place. Mr. Businge informed the Court that the doctors at Kenyatta National Hospital have recommended that the prison setting is not ideal for the recuperation of the 7<sup>th</sup> Accused Person. Indeed, he informed the Court that the doctors are reluctant to operate on the second eye while the 7<sup>th</sup> Accused Person is still in prison.
8. Mr. Businge urged the Court to review the denial of bail to the 7<sup>th</sup> Accused on account of what he termed new circumstances: the worsening of the medical condition of the 7<sup>th</sup> Accused. He argued that it would be in the interests of justice for the 7<sup>th</sup> Accused to be released on bail so that he can receive the medical attention he needs to save his eyesight. He reiterated that the 7<sup>th</sup> Accused Person is not a flight risk: he has a permanent abode which is known and he pledges to abide by any bail conditions placed on him. Finally, Mr. Businge reminded the Court that criminal responsibility is individual and not collective

– and that the 7<sup>th</sup> Accused Person should not be denied bail on account of issues related to his co-accused Persons. Mr. Businge referred me to a number of authorities including: *Keziah Wanjiru Mbugua v R & 2 Others*[2015] eKLR; *R v Njeri Waweru & 3 Others* [2013] eKLR; *Job Kenyanya v R* [2012] eKLR; *R v William Mwangiwa Mwangi*[2014] eKLR; *R v John Kihindi Karisa & 2 Others*[2010] eKLR; and *R v Titus Kathurima* [2015] eKLR. I am familiar with those authorities and I have re-read them.

9. Ms. Maari opposed the Application. She relied on the Affidavit of Detective John Wahome. Both the Affidavit and Ms. Maari, in her submissions, made the following points:

a. First, that the Application at hand renews in exact details the same one denied by Justice Mutuku in her ruling on 03/12/2015. Indeed, Ms. Maari pointed out that the 7<sup>th</sup> Accused has relied on exactly the same documents he did in his earlier Application for bail. Hence, there is nothing new to warrant a review of the ruling made by Justice Mutuku. Indeed, Ms. Maari went as far as to suggest that the Application is an abuse of the process of the Court as all the issues raised here were addressed by the previous ruling.

b. Second, Ms. Maari pointed out that Justice Mutuku had specifically dealt with the issue of ailments facing the Accused Persons and ruled that they can receive medical attention while in remand. Nothing has happened to change that situation.

c. Third, Ms. Maari reminded the Court the reason for denial of bail in the first place: the credible threat to witnesses. She pointed to the evidence on record that two potential witnesses in this case had already been killed and other witnesses in related cases have also been found dead in circumstances that suggest that their willingness to testify in cases related to Kihiu Mwiri Company was responsible for their homicide.

d. Lastly, Ms. Maari referred to the Affidavit of Detective John Wahome which contains new details of the state of security in the Kihiu Mwiri area. The affidavit depones that following the mention of the case on 27/07/2016 at which several references to bail were made, members of the public attending the case misreported that bail was being considered for the Accused Persons. This led to a rise in tension in the area to the extent that members of the public who are opposed to the release of the Accused Persons on bail for fear of victimization of witnesses in the community torched the 1<sup>st</sup> Accused Person's house. The OB from the Police Station where this was reported is attached to the Affidavit.

10. I have considered the submissions of Mr. Businge and Ms. Maari. I have also carefully read the two affidavits and supporting documents filed. I start, as I am required to do, with the Constitutional position Mr. Businge reminded me: that Article 49(1)(h) makes bail a right. That self-same sub-article, however, also provides the proviso that bail can be denied if there are compelling reasons. In her ruling dated 03/12/2015, Justice Mutuku found, on a balance of probabilities, compelling reasons to deny bail in this case. In pertinent part, she ruled:

While this court agrees with other courts in various rulings that the paramount consideration in a bail application is whether the accused person will turn up for his trial until the same is concluded, this court considers that where the prosecution satisfies the court on a balance of probabilities that there is a danger that witnesses may be interfered with, the Court cannot turn its back on such a matter. Everyone, the accused and the victim and the family of the victim deserve to be accorded justice. Where evidence will not be forthcoming because a witness has been threatened or killed, then the course of justice is subverted.

After considering that this matter is intricate and evidence may go as far back as the time Kihiu Mwiri came into existence in order to understand what motivated the deaths of the victims in this trial, and having read the attached statements of the victims, it is my view that I am persuaded by the prosecution, on a balance of probabilities, that there are compelling reasons in this case to decline to allow the respective applications.

11. It is in the face of this ruling that the 7<sup>th</sup> Accused Person renews his Application. The Application is predicated by the worsening conditions of the 7<sup>th</sup> Accused Person. But what about the primary factor considered by the court, namely the likelihood of interfering with witnesses and the need to protect the victims of the crime? The 7<sup>th</sup> Accused Person did not address this at all except to request for an individualized consideration. I understand that to mean that if the Court considers the 7<sup>th</sup> Accused Person as an individual it is likely to come to a different conclusion about the compelling reasons advanced for denying bail respecting the 7<sup>th</sup> Accused Person.

12. As a factual matter, I should point out that there is no new evidence that has been placed before the Court about the medical condition of the 7<sup>th</sup> Accused Person. This is not to conclude that the 7<sup>th</sup> Accused Person does not suffer from glaucoma which threatens his sight; it is to state that Justice Mutuku dealt specifically with the issue and concluded that it was possible for the 7<sup>th</sup> Accused Person – and, indeed, all the Accused Persons – to be treated while on remand. She invited the Accused Persons to request for appropriate, tailored orders to facilitate this medical attention if any would be needed. The 7<sup>th</sup> Accused Person has not requested for any such customized order respecting his medical condition but has instead moved the Court to be admitted to bail.

13. The ruling dated 03/12/2015 catalogued and expounded on a finding of credible evidence, on balance, that releasing the Accused Persons on bail would likely interfere with witnesses. Indeed, this is more than hypothetical apprehension: past experience on this and related cases have yielded terrifying results: at least two dead would-be witnesses. Our Courts have previously held that where there is more than speculative apprehension that an Accused Person could inflict genuine fear and anxiety in potential witnesses, the Courts ought to consider that as a factor in denying bail. (See ***R v Joseph Wambua Mutunga & 3 Others [2010] eKLR.***)

14. The finding of credible apprehension of a likelihood of interference and intimidation of witnesses as well as the need to protect the victims of the crimes still subsists. That likelihood has not subsided. Indeed, the stakes have been increased by the entrance of a new factor: public order, peace and security. The unrebutted affidavit evidence of Detective Wahome states that there is a real possibility that the release of any of the Accused Persons on bail would lead to a disturbance of public order. The fact that the public's anger was targeted at the 1<sup>st</sup> Accused's property after the Court session on 27/07/2016 and not the 7<sup>th</sup> Accused Person's family or property does not lead to the conclusion that the release of the 7<sup>th</sup> Accused Person on bail would lead to a more favourable response by the public.

15. The question would be whether in balancing the rights of the 7<sup>th</sup> Accused Person and the interests of justice, the medical condition of the 7<sup>th</sup> Accused Person warrants that he be admitted to bail. I do not think so. As pointed out above, Justice Mutuku dealt with the issue in her ruling dated 03/12/2015 and found that the balance tilted in favour of denying bail. Nothing has changed. The medical reports relied on by the 7<sup>th</sup> Accused Person are exactly the same as those Justice Mutuku perused and advertently ruled that she was "alive to the fact that the Remand Prison has a health centre where all persons held in custody are attended to medically. Where need arises to be referred to another health institution with better facilities, then reference is made to that effect. Where need arises for a court order, then can be sought to ensure that anyone who requires medical treatment receives it."

16. In the circumstances, it is my finding that insufficient evidence and reasons have been placed before the Court to warrant the review of the denial of bail in this case and especially in light of the directions on priority hearing as well as the explicit address of the medical conditions in the ruling dated 03/12/2015. The 7<sup>th</sup> Accused Person shall remain at liberty to move the Court for specific orders tailored to ensure he receives the medical attention he needs.

17. Consequently, the Application dated 29/07/2016 is hereby denied. The 7<sup>th</sup> Accused Person shall remain in custody as per the ruling dated 03/12/2015.

Orders accordingly.

**Dated and delivered at Kiambu this 12<sup>th</sup> day of August, 2016.**

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**JOEL NGUGI**

**JUDGE**