



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 26 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JAMLECK GITARI MAINA.....ACCUSED

RULING

1. **JAMLECK GITARI MAINA** is facing a murder charge contrary to Section 203 as read with **Section 204** of the **Penal Code**. The particulars are that on 11th September, 2014 along Sagana-Karatina road within Kirinyaga County he caused the death of Patrick Wanjohi. The case is now pending for hearing. In the meantime he has moved this Court through a Notice of Motion dated 23rd May, 2016 for bail pending trial. His main ground for the application is that he has a right to bail which right is imbedded in our Constitution.

2. The application was supported by the applicant's supporting affidavit sworn on 23rd may, 2016 where he has largely exonerated himself from the offence he is facing indicating that the deceased was injured due to physical confrontation that occurred between him and the deceased on 11th September, 2014. This is of course not relevant in considering this application. What is however, relevant is that the Applicant has stated that he would abide by all the conditions set if he is released on bond. He has undertaken to attend court faithfully when required to do so and not to interfere with witnesses in this case. He also deponed that he sustained injuries which requires medication and an operation at Kenyatta National Hospital.

3. The Applicant through counsel denied that if released he would interfere with witnesses and more so a witness by the name Mercy Wanjiru who the prosecution had alleged that she was likely to be interfered with on account of the special relationship (said to be a girlfriend to the accused) with the accused. The Applicant's counsel submitted that the statement of the said witness is in tandem with the defence which the Applicant intends to adopt and therefore there was no need to interfere.

4. Mr. Sitati for the State opposed the application and relied on the affidavit of Inspector Tanui Barnaba, the investigating officer in this case. In the replying affidavit sworn on 28th June, 2016, the investigating officer has deponed that after the Applicant assaulted the deceased person he fled to Nairobi on 11th September, 2014 but came back on 10th November, 2014 when he was arrested. The investigating officer has however, conceded in his affidavit that the accused surrendered himself to the Police at Baricho.

5. Mr. Sitati has opposed the application on the ground that it would be unsafe for the Applicant to be released because members of the public were incensed with the incident so much that they burnt the

Applicant's house after the incident and that he would have been lynched had he been at home at that time. It was therefore contended that the accused person is safer in prison than if he was released on bond. He reiterated that one of the prosecution witnesses was one Mercy Wanjiru Munene who is said to be a girlfriend to the accused and that he will interfere with her if released on bond. Mr. Sitati stated that the statement of the said witness indicated that she was a key witness in the prosecution case. The State contended that the above reasons were compelling enough to deny the accused person bail pending trial.

6. This Court has considered the application and the objection made by the State through Mr. Sitati learned counsel representing the Office of Director of Public Prosecutions. A right to bail is a constitutional right enshrined in the Constitution of Kenya 2010. Under Article 49(1)(h) an accused person has a right to be released on bond or bail on reasonable terms pending trial unless there are compelling reasons to deny him/her of that right. That right is informed by the right to be presumed innocent until the contrary is established and proved which is a right also imbedded in the **Constitution** under **Article 50 (2)**. Those constitutional rights are well spelled out and this Court is obligated by the same Constitution to enforce the same and ensure that they are realized.

7. The Constitution provides that the right to bail can only be denied if compelling reasons are advanced and it is the duty of the prosecution to advance those reasons and prove that they are strong enough to hinder an applicant from enjoying any of his constitutional rights.

8. The investigating officer has deposed that the Applicant took off after allegedly assaulting the deceased who later succumbed to the injuries and died two days later. At the same time, the same officer has deposed that the Applicant herein surrendered to the Police on his own at Baricho Police Station where he was arrested. I do not see the basis therefore upon which the Respondent wants this Court to treat the applicant as a flight risk.

9. I have also considered the reason advanced that the Applicant's right to bail should be denied on account of his safety because of the likelihood of mob justice or hostility from the community. It is my considered view that mob justice in the first place is an illegal means by which some organized mob have abrogated themselves the power and the duty to punish suspected offenders by carrying out punishments they deem fit. This is clearly an abhorrence in a modern democratic country that cherishes the rule of law. The position of this Court is that if courts were be influenced by such activities for example denying an accused person his rights on the basis of such, it would be akin to giving the practice a legal seal of approval which in my view is dangerous and may lead to a miscarriage of justice. It is also ironical to deny an accused person his constitutional right on account of his safety or for his own good. His safety and his interests in my view are found in the Constitution and the law rather than in custody as contended by the Respondent. The safety of an accused person like any other ordinary citizen should be the business of the State. An accused person still enjoys all the basic rights under the bill of rights in Chapter 4 of the **Constitution of Kenya 2010** and the Government is under a duty to guarantee and protect them. It is therefore a bit ironical for the State to point out an apparent failure on their part as an excuse to deny an accused person their constitutional right. The safety and how a person will be viewed by the public has not and should not be a criteria used to consider whether or not an accused person should be granted bail except in exceptional circumstances.

10. The established criteria or guiding principles are as follows:

- (i) Whether the accused person is likely to turn up for trial or is a flight risk.
- (ii) Whether he is likely to interfere with witnesses.
- (iii) Nature of the offence and severity of the sentence.

11. have already disposed of the 1st criteria. The Applicant surrendered himself to the Police and there is no basis upon which the State can consider that the accused person here is a flight risk especially given the social inquiry done and the probation report which I have considered. The Applicant has a fixed abode and has a family and I find no reason at this moment to conclude that he is not going to attend court

if released on bond.

12. On the 2nd criteria, though the State has said that the Applicant is likely to interfere with witnesses on account that one of the witnesses is a girlfriend and that her evidence is key, the prosecution has not supplied this Court with the Statement of the witness because according to the Applicant, the said witness made a statement favourable to his defence. This Court is unable at this stage to find whether the said witness is key to prosecution or the defence. What is clear however, is that the reason advanced is not compelling enough to deny the Applicant his right to bail.

13. It is true that the offence faced by the accused is serious as the sentence if found guilty is the death penalty. That concern in my view will be taken care of strict terms which this court will set herebelow;

14. In the premises this Court finds merit in the application dated 23rd May, 2013. The same is allowed on the following terms:

(i) The accused person may be released on a bond of Kshs.1Million (one million shillings) with one surety of a similar amount.

(ii) If released he is required to stay clear of all the witnesses in this case and he is required not to either directly or indirectly try to reach them until this case is finalized.

(iii) He will attend court as to where and when he is required.

Dated and delivered at Kerugoya this 9th day of August, 2016.

R. K. LIMO

JUDGE

7.9.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant Naomi Murage

Accused present

Interpretation: English – Kikuyu.

Kiragu holding brief for Nchuki for accused present

Omayo for State present.

COURT: Ruling dated, signed and delivered in the open court in the presence of Kiragu advocate holding brief for Nchuki for the accused and Mr. Omayo for State.

R. K. LIMO

JUDGE

7.9.2016