



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 67 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE MUTUMA GATOBU.....1ST ACCUSED

ISAAC TEMOI SOET.....2ND ACCUSED

TOM MANYWANDA.....3RD ACCUSED

STEPHEN MBUI MUCHAI.....4TH ACCUSED

RULING

1. The Accused persons **BONIFACE MUTUMA GATOBU**, **ISAAC TEMOI SOET**, **TOM MANYWANDA** and **STEPHEN MBUI MUCHAI** are charged with the offence of murder contrary to Section 203 as read with Section 205 of the Penal Code the particulars of which were that on the night of 22nd August, 2016 at unknown place within Nairobi County murdered **JOB NYAMBUYA OMARIBA**.

2. They all pleaded not guilty to the said charge and by Notice of Motions dated 21st and 22nd September, 2016 respectively applied severally to be admitted to bond pending trial which applications were supported by their annexed affidavits. On behalf of the 1st Accused **BONIFACE MUTUMA GATOBU** it was deponed that he will abide by whatever conditions and terms that the court will set and shall be available whenever required by the court to appear before it for the trial.

3. It was deponed further that the same had a young family comprising of his wife aged 24 years and three little children aged 8, 7 and 2 years respectively and therefore given his marital and parental responsibilities could not contemplate jumping bail. It was stated therein that investigations in the case were complete and there was no possibility that he will interfere with the same and being a government officer he will remain under interdiction without access to police firearms or protection, therefore cannot be a threat to anybody.

4. On behalf of the 2nd applicant **ISAAC TEMOI SOET** it was deponed that there were no compelling reasons that would deny him his constitutional right to bond as no prejudice will be occasioned to the respondent or the cause of justice if he were to be released on bond pending trial. On behalf of the 3rd Applicant **TOM MANYWANDA** it was deponed further that he was willing to abide by any terms that the court may impose.

5. On behalf of the 4th accused **STEPHEN MBUI MUCHAI** it was deponed that he was willing to abide by whatever terms and conditions the court may set and shall appear before court when required. It was further deponed that he had a young family comprising of wife aged 46 years and children aged 26, 21 and 13.4 years respectively with serious health challenge being asthmatic. He further contended that investigations in the case were complete and the same had been in custody since 26th August, 2016.

6. In reply to the said application the prosecution through **SGT JONATHAN NJOROGI** swore an affidavit in which it was deponed that the applicant were close friends of the prosecution key witness and therefore there was a likelihood that they might interfere with the same. It was deponed further that the 1st Applicant and the deceased hailed from the same locality and one of the prosecution witnesses had relocated to unknown place due to fear for her life.

7. The 3rd Applicant filed a further affidavit in response to the replying affidavit by the state in which he deponed that the State had failed to present any compelling reasons as to why he should be denied bond since the prosecution had not availed to court the names of witnesses and the nature of interference. It was deponed further that he was a family man with community ties and in gainful employment by the National Police Service.

SUBMISSIONS

8. When this matter came up for hearing before me, Mr. Macharia for the 1st and 4th Applicant submitted that it was a settled law that under Article 49(1) (h) of the Constitution of Kenya, 2010 an accused person can be admitted to bond on reasonable terms unless the prosecution gives compelling reasons. It was submitted that the accused has a young family and presented himself to the police when he was called upon and had been in custody since then. It was submitted that the only compelling reason given by the State was the likely interference by named witnesses but that the nature of the interference and why the State cannot prevent the same had not been given.

9. On behalf of the 2nd Applicant it was submitted that the same voluntarily presented himself to the police and had been in custody since then. It was submitted that the right of the accused to bond had been interfered with. It was submitted that the details of the allegation or interference with witnesses have not been given and in support thereof **High Court Criminal Case o. 26 of 2008 - Mombasa REPUBLIC vs DANSON NGUNYA & ANOTHER** was submitted.

On behalf of the 3rd Applicant it was submitted that the liberty of an individual was so clear and therefore the right to bail was a constitutional right. It was submitted that the only consideration was whether the accused will turn for trial and the cases of **DANSON MUGUNYA (supra) and MUNGER ISHMAEL vs REPUBLIC** it was submitted that the question was whether the 3rd accused was such a person who would submit himself for his trial and in answer thereto it was stated that the accused had submitted himself to the police when he knew that a report of abduction had been filed against him and knew that he would be charged with murder.

It was submitted further that the accused had fully cooperated with the investigators and that his trial is likely to take long noting that he was a father to a young family with the first born being in form one, a teenager who requires his father's guidance and the second born aged 3 years.

On behalf of the State it submitted that the State had placed their witnesses under witness protection and that the rights of the accused to bail should be balanced against the deceased right to life.

PRE-BAIL REPORTS

13. To assist the court in the determination of the issues herein I ordered for pre-bail reports which have now been filed. On behalf of the 1st accused it was stated that the same was known to one of the key witnesses who had been taken into witness protection program and that the same had a fixed abode within the police lines.

14. On the 2nd accused it was stated that the same was attached to Kabete Police Station and enrolled as a student at Mt. Kenya University where he was studying criminology on part time basis. It was stated that the same had been philanthropic hosting his village mates who were in Nairobi looking for employment. The family of the victim were stated not to be opposed to his being released on bond.

15. On the 3rd accused it was stated that the same was the sole breadwinner of his family and also cared for his sickly mother. The family of the Victim did not have any objection to the accused being released on bond since material witnesses had been placed under witness protection.

16. On behalf of the 4th accused it was stated that the same was not a flight risk and that he suffers from asthma for which he had been hospitalized twice while in police custody. The family of the victim did not have any objection to the accused being released on bond.

17. Bond as has been submitted by the defence is a constitutional right of every accused person which can only be limited where there is compelling reasons to be advanced by the State. In this matter the State has submitted that all their material witnesses have been placed on witness protection and therefore the possibilities of interference with the same has been eliminated or reduced. There is no evidence tendered by the prosecution to show that the accused persons are flight risks and or are likely to interfere with the course of justice while out on bond.

18. I am however alive to the fact that the accused persons while at this stage being considered innocent until the contrary is proved are/were police officers at the time of the alleged commission of the offence herein and their freedom though guaranteed by the constitution has the potentiality of creating real or perceived threat to any of the prosecution witnesses and or the relatives of the deceased who have however indicated that they have no objection to their release. This is a factor which I have taken into account in setting the bond terms herein.

19. It is clear to my mind that as at now there are no valid compelling reasons advanced by the State to enable me deny the accused their constitutional right to bond and would therefore allow the applications herein and order that all the accused persons be released on bond on the following terms:-

a) Bond of Kenya shillings one million (Kshs.1,000,000/-) with one surety of similar amount for each of the accused persons.

b) In the alternative the accused persons may be released on cash bail of Kshs.500,000/- with one surety of similar amount each.

c) During the period of their trial the accused persons shall make no contact of whatever nature with any of the prosecution witnesses and or the family of the victim.

d) All the accused persons shall upon their release report to the Officer Commanding Central Police Station – Nairobi immediately and shall report to the same after every 30 days at dates to be set by the OCS.

e) All the accused persons shall not make any contacts with the police officers who are or were working at their former respective police stations/post during the period of this trial and shall not visit the said station without the express written authority of the Officer Commanding Central Police Station.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this

17th day of November, 2016.

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J. WAKIAGA

JUDGE

In the presence of :-

Mr. Mwenda for the State

Otieno Tuli for the 3rd Accused

No Appearance Macharia for 1st and 4th accused

No appearance Koyoko for 2nd accused

All Accused persons present

Court clerk Tabitha