



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 99 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ABEL MOSET MOGAKA.....1ST APPLICANT

PETER NYAGAKA MOGAKA.....2ND APPLICANT

ELIJAH MOMANYI OMWEGA.....3RD APPLICANT

RULING

1. This is an application for bond by the three accused persons, namely; 1, Abel Moseti Mogaka, 2, Peter Nyagaka Mogaka and 3, Elijah Momanyi Omwenga. The three persons were charged for **Murder, contrary to Section 203 as read with 204 of the Penal Code.** The particulars thereof are that on the 8th day of September, 2013 at Birongo market in Kisii Central district within Kisii county jointly murdered JOSEPH MOGAKA NYAMWANDA. They denied the charge and the court entered the plea of NOT GUILTY. Pending the trial and determination of their case, the accused persons have applied to be released on bond.
2. They are aware that it is their constitutional right to apply for bond. The constitution so states, in **article 49(1)(h)** thereof. However, in another provision, it circumscribes that right if there are compelling reasons to curtail these rights. In the words, the right to bond/bail is not absolute.
3. In an affidavit sworn on the 7th October, 2013 by the deponent, the said deponent, says, in para 4 of the affidavit, fears for (her safety, the accused persons have severally in the past threatened the deceased and the deponent which threat was reported to the chief of Birongo Location, Birongo Police post and Birongo Community policing. The deceased who they alleged murdered was the father of the two accused persons and the uncle to the third of the three accused persons. In that affidavit, the deponent urges the court to deny bail so that the case may be heard and determined on merit.
4. The court has to balance between the rights of the accused persons and the rights of the victim family. There is sufficient cause to believe that the release of these accused persons will not be in the interest of the victim family.
5. The pre-bail assessment report filed in court on 15th July, 2014, buttresses the deponent's fears for the victim's family, and such, does not assist their cause for the release on bond.
6. Accordingly, the court in exercise of its discretion, denies the application for bond by the three

accused person, for reasons so stated above. Thus the application is dismissed. They may renew the application.

7. It is so ordered.

Dated and delivered at KISII this 12th day of June 2015.

HON. C.B. NAGILAH,

JUDGE

In the presence of:-

Applicants in persons.

Mbelete for the state

Samuel Omuga - Court Clerk.