



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL CASE NO. 1 OF 2015

REPUBLIC.....RESPONDENT

-VERSUS-

MARTIN OLUOCH OKUSAKO 1ST APPELLANT

JARED OPONDO OWINO 2ND APPELLANT

CHARLES OCHIENG DHOYE3RD APPELLANT

R U L I N G

1. The three accused persons are charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. On 24th November 2011 plea of not guilty was entered in respect of each of the accused. That since plea was taken this matter has not proceeded to hearing.

2. On 24th September 2015 Mrs. Opondo learned Advocate appeared for the three accused whereas learned State Counsel Mr. Namasake appeared for the state.

3. Mrs. Opondo, learned Advocate applied for the three accused persons to be released on bond and/or bail since pre-bail report had been prepared and filed by Sub-county Probation Officer of Siaya on the 24th September 2015. In her application she urged that the Pre-bail report confirm the relatives of the accused are ready and willing to accept them in the community and that the accused undertake to live in the immediate Jurisdiction of this Court. On the other hand she urged the view of the victim family is that they are fearful that the accused if released on bond and/ or bail may engage with suspects in this matter and end up interfering with witnesses. She further urged the accused have been in custody since 2011 and witnesses had appeared before Court once in 2012 when this matter was adjourned. She urged the release of the accused persons is not likely to affect the situation. She concluded by urging access to bond and/or bail is a constitutional right which the three accused are asking to be confirmed on conditions that this Court may deem reasonable and fit to apply.

4. Mr. Namasake, learned state Counsel in response stated that as much as bond is Constitutional right of an accused person it is at Court's discretion to grant it or not. On Pre-bail report he submitted he has perused the same and urged this Court to consider the views of the victim's family, arguing the accused may be used by others not before court to interfere with witnesses, otherwise the learned state counsel did not have much to object on the granting of the bail/bond to the accused persons.

5. The pre-bail report dated 24th September 2015 has indicated the permanent addresses of the accused

persons, community ties, and the community members and their respect families willingness to receive the accused back. The victim/complainant view is opposed to the release of the accused persons on bond alleging that the person who hired them is a very dangerous person who is still free and roaming in the village. They fear if the accused are released on bond they will interfere with witnesses. The area administration has no problem with the accused persons being released on bond as they have had no conflict with the law before this matter.

6. Under **Article 49 (1) (h) of the Constitution of Kenya 2010** it is provided:-

“49 (1) An accused person has the right:-

- (a).....
- (b).....
- (c).....
- (b).....
- (e).....
- (f).....
- (g).....

(h) to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

7. The determination as to whether there are compelling reasons that can justify the denial for bond/bail should be made upon evaluation as to whether or not the accused person will attend his or her trial whenever required to do so by the Court. Some of the factors that court is required to consider include the nature of the offence and seriousness of punishment to be meted if the accused is convicted; the strength of the prosecution case; character and antecedents of the accused person; the failure of the accused person to observe bail or bond terms on previous occasions; likelihood of interfering with witnesses; the need to protect the victim; the relationship between the accused person and potential witnesses; the accused person flight risk, whether the accused is in gainful employment; public order; peace and security and protection of the accused person.

8. In an application for bond or bail it is the duty of the prosecution to satisfy to the court on balance of probabilities of the existence of the compelling reasons for the accused not to be released on bond or bail; the compelling reasons if satisfied would justify the denial of bail. The reasons should therefore in my view be specifically stated by the prosecution to persuade the court to deny the accused bail or bond. It is not in my view enough for the prosecution to solely rely on pre-bail report which is only intended to guide court or give court some information that may be considered in an application for bail or bond. The Pre-bail report remains an opinion given to court which is not binding as it may be tested through cross examination or by filing of replying affidavit to challenge the same. The prosecution is in a situation where they allege existence compelling reasons is required to file an affidavit in support through the investigating officer and/or victim or victim's family and/or through the administration in support of the compelling reasons.

9. In the instant application the state did not allege there being any compelling reasons to justify denial of bail, however the prosecution pointed out that from the pre-pail report, the court should consider the views of the victim's family. This Court is entirely in an agreement with the state that the victim or victim's family views should be considered in considering whether to grant bail or to deny bail. The victim's family in this case has not filed any affidavit to state the fears they have if bail is granted but the pre- bail report reveal the fears of the victim family is not from the accused but from a person who is

alleged to have hired the accused persons to commit the offence and who since then has been at large. It is further argued the accused will interfere with the witnesses; without any elaborations by way of an affidavit.

10. In a situation where an accused is likely to interfere with the witnesses if released, bond or bail has to be denied, however in such a situation bond will be denied if there is an existence of strong evidence of the likelihood of interfering with prosecution witnesses; which is not rebuttable and in such a situation court cannot impose conditions to the bail or bond to prevent such interference. The prosecution has not disclosed the names and/ or particulars of witnesses who are likely to be interfered with and had that been done this court would have considered denying the accused bond till the said witnesses give evidence. In view of the above and in my considered view the prosecution do not see the likelihood of the accused persons interfering with witnesses otherwise they would have specifically disclosed the names of witnesses likely to be interfered with or sought to call the witnesses before consideration of the application for the bail.

11. The accused are charged with a serious offence, and punishment to be meted if convicted is serious, this court cannot comment on the strength of the prosecution case at this stages, as none of the has been tendered so far however pre-bail report seems favorable to the accused person; as the accused person have a fixed bond and administration is not to their being released on bond nor is there any compelling reason not to grant accused persons bond, I find and hold the accused persons application to be released on bond to be merited. I therefore make the following orders.

(a) Each of the accused persons will be released on personal bond of Ksh. 700,000/= with one surety of like sum or on cash bail of Ksh. 500,000 with one surety of like sum.

(b) That upon release of the accused persons they should not interfere or threaten any of the victim family or witnesses and each of the accused person should also be reporting at Siaya Police Station once in a month on every 15th day of the month starting 15th October 2015 if released and to attend all mentions/hearings as may be set by this court in default the bond be cancelled and/or cash (if any deposited) be forfeited forthwith.

DATED at SIAYA this 29TH DAY of SEPTEMBER, 2015.

J. A. MAKAU

JUDGE

29.9.2015

Delivered in open court in the presence of:

Mr. Namasake State counsel for the state

Mrs. Opondo Advocate for the accused person

Court clerk - Vincent Onyango

J. A. MAKAU

JUDGE