



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO.37 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VRS**

**JAMES MWITI KABUGA..... 1<sup>ST</sup> ACCUSED**

**CLINTON MUTUGI GITONGA..... 2<sup>ND</sup> ACCUSED**

**PAUL GITONGA MBABU.....3<sup>RD</sup> ACCUSED**

**MATHEW MAWIRA KABURO.....4<sup>TH</sup> ACCUSED**

**MICHAEL MUTWIRI KABUGA.....5<sup>TH</sup> ACCUSED**

**RULING**

The accused persons James Mwiti Gitonga, Clinton Mutugi Gitonga, Paul Gitonga Mbabu, Mathew Mawira Kaburo and Michael Mutwiri Kabuga are charged with the offence of murder contrary to Section 203 as read with Section 204 of the PC.

They have all filled applications seeking to be admitted to bail/bond pending hearing of the case. The 1<sup>st</sup> application is by the 3<sup>rd</sup> accused Paul Gitonga dated 19<sup>th</sup> May 2015. In support of the application, the 3<sup>rd</sup> accused has sworn an affidavit where he deposes that he has been advised by his advocate on record that the offence of murder like all other offences, is bailable under the Constitution of Kenya 2010, and that he has an unqualified right to be released on bond/bail on reasonable conditions; that he is not aware of any compelling reasons within the meaning of Article 49 (1) (h) of the constitution of Kenya as to why he should not be released on bail/bond. He further undertakes to attend all mentions and trial sessions as may be directed if released on bail/bond.

The 2<sup>nd</sup> application is by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> accused persons. It is dated 20<sup>th</sup> May 2015. The gist of the application is that the accused persons are family people with children and a permanent abode and will therefore attend trial; that under Article 49 (1) (h) of the constitution, the accused persons have a constitutional right to be released on reasonable bond terms pending trial and that there are no compelling reasons to continue holding the accused persons in custody since the presumption of innocence dictates that the accused persons be presumed innocent until proven guilty and that to continue holding the accused amounts to rebutting that presumption.

The last application is by the 4<sup>th</sup> accused. It is dated 2<sup>nd</sup> July 2015. The gist of the application is that the accused has a constitutional right to be released on bail/bond and that he will strictly adhere to all the terms and conditions that may be set by the court for his release and that further there are no compelling reasons as to why the accused person should not be granted bail/bond.

The applications were opposed by Mr. Mulochi for the State who sought to rely on affidavit sworn by Corporal Alfred Akumu the investigations officer in this case. He deposed inter alia that all the key prosecution witnesses are well known to the accused persons since they reside in the same locality and if released on bail, the accused persons are likely to interfere with the witnesses thus undermining the prosecution's case; that apart from murdering the deceased in cold blood, the accused persons also attacked and seriously wounded one Newton Karani a prosecution witnesses in this case and if released on bail/bond, the accused persons are likely to pose a serious threat to the said prosecution witness who is already vulnerable; that there was tension on the ground with the local community threatening to lynch the accused persons and that in view of the above, there was a very high probability of the accused persons being harmed if released on bail/bond. He further deposed that even though the offence was committed on 2<sup>nd</sup> April 2015, the accused persons went into hiding and were only apprehended on 22<sup>nd</sup> April 2015, with the help of members of the community; that even though the offence of murder was now bailable, the grant of bail was not absolute but was a matter of discretion on the part of the court.

Consequently he urged that if the court was inclined to grant the accused persons bail, stringent conditions be attached on their release on bail.

When the applications came up for hearing on 6<sup>th</sup> July 2015, Mr. Mulochi, Counsel for the State reiterated the contents of the investigating officer's affidavit in opposing the applications.

Mr. Kijaru, Counsel for the accused on the other hand, urged that there were no compelling reasons as to why the accused persons should not be released on bail/bond and with regard to the pre-bail reports which were not favourable to the 1<sup>st</sup> and 5<sup>th</sup> accused being released on bail since they had committed other offences, were not compelling reasons as to why they should not be released on bail/bond. He also denied that the accused persons ever went into hiding as alleged and that they were living in their homes all along and that the allegation that they had attacked a prosecution witness was a mere allegation since they had not been charged with the offence.

No doubt, the accused persons do have a Constitutional right to bail but that right is not absolute. If there are compelling reasons, the court will deny them bond. Such reasons will be whether the accused persons will turn up for their trial; whether they will interfere with witnesses; their past character and antecedents and whether they will be safe if released.

Having carefully considered the affidavits in support of the applications and the affidavit in reply to the application and the prebail reports, I find that there are no compelling reasons disclosed by the prosecution to deny Accused 2, Accused 3, and 4 who are said to be habitual drunkards but whose social reports are not negative.

As for Accused 1 and 5, the social enquiry reports are negative. For Accused 1, his security is not guaranteed if released because the community is not ready to receive him back, being an illicit liquor dealer and the offence was committed at an illicit brewer (Accused 5) and the offence is still fresh in the minds of the community.

As regards Accused 5, bond was strongly opposed because he is a habitual illicit liquor brewer, where offence was committed and that he poses a security risk to the community and that his security cannot be guaranteed.

All these reasons, coupled with the allegations that the accused 1 also went into hiding after the commission of the offence. I decline to grant Accused 1 and 5 bond. They will conduct their cases while in remand. As for Accused 2, 3 and 4, each may be released on their own bond of KShs.300, 000/= with one surety of the same amount. During the pendency of the case, the Accused 2, 3 and 4 should be of

good conduct, attend court as will be required of them and not interfere with witnesses. In default of any of the above the bond will stand cancelled. Accused 1 and 5 to remain in custody pending hearing of the case.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**