



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO.26 OF 2015

REPUBLIC

VERSUS

GILBERT MAKORI MINYONGA alias MUSAVENI ONSANDO - 1ST ACCUSED
JOSEPH MANDELA MANINI alias TOM - 2ND ACCUSED
SAMUEL KAMWANA MOREMA - 3RD ACCUSED

RULING

1. The 3 accused persons herein, through the advocate Mr. Mosesti, applied to be released on bond pending the hearing and determination of their case.
2. The accused are charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal code.**

The particulars of the offence are that on 17th April 2014 at Bogitaa sub-location in Kisii South District within Kisii County in the Republic of Kenya jointly with others before the court murdered **Denis Obwoga Kerema.**

The accused persons have all pleaded not guilty and are awaiting trial.

3. **Article 49 (1) (h) of the Constitution** stipulates as follows:

“An arrested person has a right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

4. During the hearing of the application for bond, Mr. Mosesti, who appeared for the accused persons submitted that the accused were innocent until proven guilty and therefore had a right to bond. Mr. Mosesti added that the affidavit of the investigating officer PC. Fred Okoth filed by the prosecution in opposition to the bond application was shallow, riddled with matters of hearsay and did not disclose any compelling reasons for denying the accused persons bond.
5. In the said affidavit, the investigating officer deponed that the accused persons were a flight risk having been on the run for one year after the commission of the crime and further, that the witnesses to the case had been threatened by the accused persons and as such, there was the risk of the accused interfering with the witnesses if released on bond.

6. It was Mr. Moseti's contention that the Probation Officer's pre-bail report was favourable to the accused persons and as such, they ought to be granted bond pending their trial.
7. Mr. Otieno, counsel for the State on his part conceded that even though the accused have a constitutional right to bond, that right is not absolute and can be denied or withheld upon the prosecution providing compelling reasons.
8. According to Mr. Otieno, the reasons advanced by the investigating officer in his affidavit sworn on 17th August 2015 were compelling enough to warrant the court's exercise of its discretion to deny the accused person's bond.
9. The courts have endeavoured to define what constitutes compelling reasons in many instances since the constitution has not provided for instances that may be construed to offer compelling reasons. In **Republic vs Dorine Aoko NKR HCCR. Case No.36 of 2010** (unreported) Emukule J, stated as follows:

“.....to my mind again those compelling reasons are the very same ones spelt out in Section 72(5) of the repealed Constitution, and elaborated in Section 323 of the Criminal Procedure Code, namely, that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (*taking away another person's life, disloyalty to the State of one's nationality or grievous assault and injury to another person or his property*) are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim to see a perpetrator of murder, treason or violent robbery (*committed or attempted*) walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (*committed or attempted*) would thus be a compelling reason for not granting an accused person bond or bail....”

10. In **Republic vs Danson Ngunya & Another (2010) Eklr**, Makhandia J, (*as he then was*) stated that if the State wants the accused deprived of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.
11. In the instant case, the pre-bail report filed by the Probation Officer favours the release of the accused persons on bond. The affidavit of the investigating officer, however, gives the reasons for the State's opposition to bond on two critical points as follows:

Paragraph 4 **“That the applicants will be in contract with the witnesses and will interfere with the witnesses.”**

Paragraph 6 **“That the applicants are a serious flight risk. The applicants have been at large since the 17th day of April 2014 when the offence was committed and were only arrested more than a year later on 5th May 2015.”**

12. I have carefully considered the law and the circumstances surrounding this case. The charge sheet shows that the offence was committed in April 2014, the accused persons first appeared in court on 18th May 2015. Therefore the fact that it took State more than a year to present the accused in court lends credence to the investigating officer's averment in the affidavit that the accused persons went into hiding and were at large immediately following the commission of the crime in question.
13. I disagree with the defence counsel's submissions that the affidavit of the investigating officer is full of matters of hearsay since the said affidavit has been made under oath and the only way the truth about the facts deponed to therein could have been challenged or tested would have been

through the cross-examination of the deponent on his statements on oath. Counsel for the accused persons did not call the investigating officer for the said cross examination and therefore, there is no basis for declaring what he stated under oath to be hearsay.

14.To my mind, the investigating officer is an independent party in these proceedings as it has not been shown that he has malice, bias or ulterior intentions that could make him lie on oath.

15.It is clear to me that the apprehensions by the investigating officer to the release of the accused persons and the reasons he has given are plausible, valid and are compelling. The reasons given warrant this court to deny the accused persons bail.

16.In the premises and for the reasons, given above, the accuseds' application for bond pending trial is dismissed. The case shall be mentioned before the Deputy Registrar on **25th November, 2015** with a view to fixing a hearing date.

17.I have looked at the particulars of the charge herein as shown in the charge sheet and noted that the year in which the offence was committed is not shown. The State should endeavour to amend the charge sheet to show the year before the case is fixed for hearing.

18.It is so ordered.

Dated, signed and delivered in open court this 30th day of October, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- Boyon for the State
- Moseki for the Accused persons
- Omuga: court clerk.