REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.80 OF 2015

JULIUS TAPORIS DIKIRR…….....APPLICANT

VERSUS

REPUBLIC ……...…….RESPONDENT

RULING

1. The accused **Julius Taporis Dikirr** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 26th January 2015 at Narok County Government Headquarters within Narok County murdered Sikona Ole Muntet. This matter arose within the jurisdiction of Naivasha/Narok High Court. However on 2nd August 2015 the State made an application for the trial to proceed in Nairobi owing to security concerns. Following the said application which was not opposed by the defence, Lesiit J. directed that the case proceeds in Nairobi. The accused subsequently took plea on 16th September 2015 and denied the charge. He was remanded in custody pending trial which is set to commence on 14th March 2016. Following the remand order the accused filed the instant application to be released on bail.
2. The application is premised on Article 165(3) (a) and Article 49 (i) h of the Constitution. It is based on the grounds *inter alia* that the accused should be presumed innocent until otherwise proven guilty; that he voluntarily surrendered himself to the court's jurisdiction upon learning of a warrant of arrest against him in the Daily Nation of 26th August 2015; that the accused was an employee of the Narok County Government and was on duty at all material times; that the offence is bailable, and that he will not abscond the court's jurisdiction.
3. The supporting affidavit to the application is sworn by one Leteila Dikirr the brother of the applicant. He deposes *inter alia* that the applicant voluntarily presented himself before court and before Capital Hill police station prior to being charged; that the applicant was still an employee of the Narok County Government and continues so to be with demonstrated antecedent of obedience to the court process; that he was not a flight risk and would attend court; that the offence was bailable under the Constitution; that the applicant denies any involvement in the murder of the deceased and that he will not interfere with witnesses.
4. The State opposed the application. The Replying affidavit filed in court on 1st October 2015 was sworn by one **Pauline Njoroge** who is an investigating officer with the Independent Policing Oversight Authority (IPOA). She deposed *inter alia* that on 27th January 2015 IPOA received a report that riots and demonstrations had broken out in Narok town leading to the shooting of demonstrators. That the investigations revealed that the accused shot the deceased who was atop a tree taking photographs of the demonstrations; that at the time of the shooting, the accused who is a ranger in the employ of the Narok County Government was not authorized to be armed.
5. **Ms. Njoroge** further deposed that there was real possibility that the key witnesses would be intimidated and would fear to testify against the accused or even disappear for fear of their lives if the accused was released on bail; and, that the prevailing situation in Narok was volatile and the

accused should not be granted bail for his own safety.

6. The application came up for hearing on 8th October 2015. **Mr. Kang'ahi** learned counsel for the applicant underscored **Article 49(i) h of the Constitution** as entitling the applicant to be released on bail. He submitted that the opposition raised by the prosecution as contained in the replying affidavit did not disclose any compelling reasons why the applicant should not be granted bail. He argued that acceptable compelling reasons were interference with witnesses, likelihood of commission of further offences, and likelihood of not attending trial. He urged the court to consider the antecedents of the accused that he promptly presented himself before court when he learnt of the warrant of arrest against him.
7. Mr. Kang'ahi further submitted that the accused was a law abiding citizen and would not interfere with witnesses arguing that no report had been made that he had so interfered since the matter arose. Finally, counsel submitted that the applicant was in the public service and had strong family ties and therefore would not abscond trial.
8. Learned prosecution counsel, **Mr. Okeyo** relied on the averments of **Ms. Njoroge** in the replying affidavit. He submitted that the said affidavit disclosed compelling reasons why the accused should be denied bail. He drew the attention of the court to paragraphs 12-18. He gave the court the background to the case stating that riots broke out in Narok and that it was in the course of the demonstrations that the accused shot and fatally injured a member of the public. He stated that as a result the situation was still volatile for the security of the accused if released. Further, counsel submitted that the release of the accused would cause fear in the two key prosecution witnesses namely David Kool and Jackson Kool whose statements were annexed to the replying affidavit. He observed in his submission that the accused was still a ranger and if released could have access to a firearm and that this would cause real fear to the witnesses and affect the trial. He prayed that the accused remains in custody as the prosecution arranges for the protection of the two witnesses.
9. In response to the prosecution's submissions, Mr. Kang'ahi clarified to the court that the riots did not take place a month ago but sometimes in January 2015 and therefore there was no volatility on the ground anymore. He submitted that the accused was in no danger from the public and he needed no protection. On the issue of access to a firearm, counsel argued that the applicant was a warder and that he would have such access lawfully by virtue of his employment. With respect to the likely intimidation and interference with witnesses he submitted that the allegation was not demonstrated since no report or statement had been made by the witnesses between January and September 2015.
10. The right to bail is provided for under **Article 49 (i) h of the Constitution**. It states that "an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons". A reading of this Article shows that bail is a right in the first instance and can only be curtailed where there are compelling reasons. In interpreting this Article, courts have held time and again that bail then is not an absolute right. It is constitutionally circumscribed by the presence of compelling reasons. The court is by dint of that circumscription vested with discretion to consider whether any opposition or reasons advanced by the State amount to compelling reasons upon which an applicant may be denied bail. See **R. V Ahmad Abolafathi Mohammed & Another Nairobi Criminal Revision No. 373 of 2012.**
11. In considering an application for bail courts have established the principle that where the State opposes bail, it is incumbent upon it to demonstrate to the satisfaction of the court the existence of compelling reasons. This principle was aptly laid down by Ibrahim J. (as he then was) in the often cited case of **R. Vs Danson Mgunya and another [2010] eKLR** wherein he stated;

> *"I do hold that if the prosecutor objects to the release of the accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused to prove or at least demonstrate the existence of the "compelling reasons."*

In the same ruling **Ibrahim J**. cited the celebrated case of Nigerian Supreme Court **Alhaji Mujahid Dukubo –Asari –Vs- Federal Republic of Nigeria SC 20A/2006** which discusses some of the criteria that the court takes into account in considering bail. These include the nature of the charges; the strength of the evidence; the gravity of the punishment upon conviction; the

probability of the accused not attending trial; the likelihood of the accused interfering with witnesses or suppressing any evidence that may incriminate him and detention for the protection of the accused.

12. In the present case, IPOA has argued 3 reasons why the accused should be denied bail. The first is that the situation in Narok was volatile following the shooting of the deceased. This is captured at paragraph 15 of the replying affidavit and the oral submission of the prosecution counsel. In response to this, defence counsel submitted that the incident took place in January and not in the previous month as submitted by the prosecution counsel. I have addressed my mind to the issue of the date. On the face of it, the submission of the prosecution counsel is erroneous. The replying affidavit of the investigating officer states at paragraph 3 that the demonstration and riots that rocked Narok town leading to the shooting incident took place on 27th January 2015. The information upon which the accused is charged states that the alleged offence was committed on 26th January 2015. That is more than 8 months ago. It cannot therefore be true that the situation on the ground was still volatile. It has not been demonstrated either through the replying affidavit or the submissions by the prosecution counsel that there was a real possibility of lawlessness and insecurity if the accused were released on bail. In any case, it is the constitutional duty of the State to provide security to all citizens and ensure law and order. I therefore dismiss this fear as far-fetched.
13. The second reason advanced by the State is that the eye witnesses in the case one David Kool and one Jackson Kool were likely to be intimidated by the release of the applicant and may fear to testify in the case. This, it was explained, was because the applicant was a ranger in the employ of the County Government and who by virtue of such employment would be armed. It was also deposed in the Replying affidavit of the investigating officer that investigations had revealed that the county AP Commander who is the accused's superior had ordered the county rangers to return their firearms to the armoury but that the accused defied those orders and retained his firearm.
14. The witness statements of David Kool and Jackson Kool annexed to the replying affidavit have not been tested at trial. However on the face of it they describe the events leading to the incident. Each of them states that the accused person is known to them very well for reason that they come from the same locality. They knew him before and also as a ranger in the County Government. As stated before, defence counsel countered the submission that the accused was likely to intimidate witnesses stating that the accused had all along been at his work place in Narok without intimidating anyone. His further submission was that between the time of the incident and the time of arrest, no report of intimidation or fear was made by the witnesses. It is observed by the court that neither the prosecution nor the defence ventured into an explanation of the time lapse between the date of the alleged offence and the time the accused was charged. Suffice to state that the issue of interference or intimidation could not have arisen when the accused was not a subject of trial.
15. It is settled that interference with witnesses where demonstrated is a compelling reason to deny an applicant bail. In **Republic Vs. Joktan Mayende & 3 others Bungoma H.C. Criminal Case No. 55 of 2009**, the court held, while citing **Republic Vs Kellet [1975] ALL ER 468**, that "interference with witnesses is an impediment to or perversion of the course of justice". This is because interference with witnesses is a direct interference with the due process of law and therefore an affront to the administration of justice. See **Republic V. Patius Gichobi – Nairobi HCCR. 45 of 2012.**
16. In the present case it has not been alleged that the accused had played any active role to interfere with or intimidate witnesses. However, material has been placed before the court that the accused was still a ranger whose employment entitles him to be armed. It has been demonstrated through the replying affidavit of the investigating officer and the statements of the 2 prosecution witnesses displayed that the said witnesses and the accused are persons who hail from the same locality. I am persuaded on the basis of the material before court that indeed it would be highly likely for such civilian witnesses who have made witness statements to the police against a uniformed and usually armed suspect to fear to testify in court. They would be intimidated with the result that such fear would interfere with the course of justice. It is my view therefore that the release of the accused would not serve the interests of justice in this case.
17. Having carefully considered the circumstances of this case, I am disinclined not to grant the

accused bail at this stage.

The application is thus rejected.

Ruling delivered, dated and **signed** at **Nairobi** this **29th** day of **October, 2015**

R. LAGAT - KORIR

JUDGE

In the presence of:

……..: Court clerk

……..: Applicant

…….....: For the Accused/applicant

…….: For the State/Respondent