



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 84 OF 2015**

REPUBLIC.....PROSECUTOR

VERSUS

NAHASHON MUCHIRI MUTUA.....ACCUSED

**RULING**

**Background**

The accused is charged with the murder of Martin Koome Manyara contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the deceased was murdered on the night of 19<sup>th</sup> December 2013 at Ruaraka Police Station within Nairobi County.

This ruling is in respect of the Notice of Motion dated 9<sup>th</sup> October 2015 and filed in court on 12<sup>th</sup> October 2015. It is brought by the accused through his counsel Mr. Wasonga, advocate instructed by M/s Wasonga Kimakia & Associates. The Notice of Motion was filed at the time when the accused person was a suspect. On 29<sup>th</sup> October 2015 when the application came for hearing, Mr. Wasonga applied to amend the application to insert the word “accused” instead of “suspect”. The application was allowed.

**The application**

The application is brought under Articles 25 and 49 (1) (h) of the Constitution. It seeks to have the accused admitted to bail on reasonable conditions pending the hearing and determination of this case.

The application is supported by the grounds found on the face of it and on the supporting affidavit sworn by the accused on 9<sup>th</sup> October 2015. The accused states that he has right to be admitted to bail unless the prosecution provides evidence of compelling reasons; that he has sureties ready to post bond; that he has been cooperating with the investigators in this matter and that as a police officer and a former court prosecutor he knows and understands the need to comply with the terms this court may set.

In his affidavit in support of the application, the accused deposed that he is currently a Chief Inspector of Police attached to Machakos County as the Staffing Officer Personnel after working in various stations in different capacities. He states that he has cooperated with Independent Policing Oversight Authority (IPOA) in the investigations; that he has relatives in Nairobi and Mariakani who can vouch for him; that he is a Kenyan citizen and that having worked in different stations his safety while in custody cannot be guaranteed.

The accused further deposes that he got injured in July 2015 and has undergone surgery on his right knee and he requires two physiotherapy sessions every week to aid the healing process.

Mr. Wasonga made oral submissions in support of the grounds of the application. He submitted that there is every reason to believe that the accused will attend trial when required to do so; that the accused is not a flight risk; that he has cooperated with the investigators and the court; that the accused has not interfered with witnesses even though he has been out there before he was placed in custody and there is no incident of interference with witnesses; that the witnesses are under protection and therefore cannot be under risk of interference and that the accused cannot access medical care and physiotherapy while in custody. He annexed to the application documents including a letter dated 6<sup>th</sup> October 2015 from Kijabe Hospital (“NMM1”) in support of his submission that the accused requires medical attention regarding his injured right knee.

Counsel relied on the case of **Aboud Rogo Mohamed & Another v. Republic [2011] eKLR** and urged the court to allow the application and admit the accused to bail. In the cited case the accused persons were released on bond. They had been charged with engaging in an organized criminal activity.

### **Response**

The application is opposed. Mr. Okemo, prosecution counsel, relied on two affidavits to oppose the application: the affidavit sworn by Mr. Evans Okeyo an investigator with IPOA and that of Ms Ann Karimi Manyara sister to the deceased.

Mr. Evans Okeyo has deposed that the accused interfered with the investigations by intimidating and coercing witnesses who had recorded statements with IPOA; that while he was the OCS Ruaraka, the accused released a misleading Crime and Incident Report that the deceased had been assaulted by Kevin Odhiambo as a result of which he died, leading to the arrest and charge of the said Kevin Odhiambo with murder in HCCR Case No. 1 of 2014; that a Nolle Prosequi was entered and the case terminated when it was found that the report by the accused was misleading.

Mr. Evans Okeyo further deposed that not all witnesses have been protected and that those who remain are exposed to potential risk of being interfered with in the event the accused is released on bond.

On her part, Ann Karimi has deposed in her affidavit sworn on 15<sup>th</sup> October 2015 that the accused is influential and she will be intimidated by his being free on bond.

Mr. Okemo in his oral submission told the court that the accused’s medical condition is not life threatening and he can be attended to while in custody and this court is capable of making orders to ensure that the accused is treated; that the accused is not the only law enforcement officer in custody and that there are special arrangements for law enforcement officers in custody and that the accused may go to any length to subvert justice if released.

In the file is a list of authorities filed by James Kironji, advocate for the victim. Mr. Okemo did not address the court on these authorities. Mr. Kironji did not seek to address the court on them either. Be that as it may I have had the occasion to read the authorities, namely:

- i. **Republic v. David Ochieng & 11 Others HC at Kisii Criminal Case No. 96 of 2013.**
- ii. **Republic v. Eric Masega alias Madiaba HC at Kisii Criminal Case No. 49 of 2013.**
- iii. **The Republic v. Gorman & Others (2004) AHRLR 141 (GhSP 2004).**
- iv. **R v. Hall [2002] 3 S.C.R 309, 2002 SCC 64.**

### **Determination**

I have carefully considered the application, the supporting affidavit, the Replying affidavit, oral submissions by counsels on opposing sides as well as the authorities cited. Each party cited authorities that advance their interests. In the authorities cited by the counsel for the victim, the courts in those cases declined to grant bail citing various factors. In the **Aboud Rogo case** cited by the counsel for the accused, the court allowed the application and admitted the accused persons to bail. It should not escape attention that no case is similar to another in facts and circumstances of the offence and more often than not each

case presents unique circumstances. The court must exercise its discretion to determine whether in its opinion there are compelling reasons. It is the duty of the prosecution to prove existence of compelling reasons on a balance of probabilities.

I have read the annexures to the application and the replying affidavit. The court also observed that the accused was walking with the aid of crutches. It is also not lost to the court that counsel for the applicant applied to have the accused referred to Kenyatta National Hospital for physiotherapy.

On the part of the prosecution, I have read the annexed statements by the witnesses who claim to have been intimidated and coerced. This court was told that not all the witnesses are under the Witness Protection Agency and that even those under that Agency are not free from interference by the accused if released on bail.

While the paramount consideration in a bail application is whether an accused person will attend court during the hearing of his case until the same is concluded, this court cannot overlook situations where there is evidence of interference, intimidation or coercion of witnesses or likelihood of such interference. After careful analysis of this application, it is my considered view that the prosecution has proved compelling reasons on a balance of probabilities. I find that I am persuaded that there exists compelling reasons to deny the accused bail/bond at this stage. It is crucial to secure evidence of key witnesses first. The medical condition of the accused can and will be attended to while he is in custody. Consequently, his application for bail is hereby declined. The same can be reviewed after all the key witnesses have testified upon being moved by the accused and/or his counsel. Orders shall issue accordingly.

**Dated, signed and delivered this 23<sup>rd</sup> November 2015.**

**S.N.MUTUKU**

**JUDGE**

**In the presence of:**

Mr. Okemo, prosecution counsel

Mr. Wasonga, advocate for the accused

Mr. Kironji, advocate for the victim

Mr. Nahashon Mutua, the accused

Mr. Daniel Ngumbi, Court Clerk