



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.73 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

JOHN KARARU WANGUI.....APPLICANT

RULING

1. The accused, John Kararu Wangui is facing two counts of murder contrary to section 203 as read with section 204 of the Penal Code. According to the information filed by the Director Public Prosecution, he is alleged to have murdered Esther Njeri Giathi and Ali Mwamburi on 18th September 2013 at Mukaru Pub in Kawangware-Riruta within Nairobi County.
2. The accused now seeks to be admitted to bail pending trial. His application dated 1st July 2013 is grounded on various articles of the Constitution including the right to bail (**Article 49 (1)(b)**); and the right to presumption of innocence (**Article 50(2)**). In his supporting affidavit sworn on 1st July 2013, he depones that his release will not prejudice the proceedings in any way and that he will attend trial whenever required and will abide by any conditions prescribed by the court.
3. The application is contested by the State. **Cpl. Jairus Namiti** of CID Riruta has sworn a replying affidavit stating that the applicant faces two counts of murder; that the prosecution witnesses are fellow police officers who worked with the applicant in the same station/division; there was profound fear on the part of civilian witnesses D3 and D4 who were eye witnesses; and that the applicant may be tempted to flee the jurisdiction of the court owing to the seriousness of the offence and the deterrent sentence upon conviction.
4. At the hearing of the application on 18th November 2013, **Mr. Sakwa**, for the applicant highlighted his written submissions which he had filed earlier in support of the application. In short, he urged the court to find that there were no compelling reasons not to grant the applicant bail but rather to find that there was no reasonable apprehension of interference with witnesses since the applicant had already been interdicted and would have no access to firearm or police uniform. He submitted that all the witnesses had recorded their statements with the police.
5. In her submissions before court, **Ms. Onunga** the prosecuting counsel urged the court to consider the circumstances of the offence. She stated that the applicant was engaged in a disagreement with his colleagues in Mukaru Club where he left the pub only to return armed with a rifle and indiscriminately starting shooting at the patrons killing two. She urged the court to consider that among the 10 prosecution witnesses were police officers who worked with the applicant and that therefore the possibility of intimidation and compromise was real. She further urged the court to consider that the civilian eye witnesses would fear for their lives if the applicant is released before they testify.
6. **Article 49 (i) (h) of the Constitution** upon which the present application is premised states that “an arrested person has a rightto be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.....” My

reading of this Article is that the right to bail may be curtailed by the court where there are compelling reasons. It is now settled that the duty of demonstrating compelling reasons primarily rests with the prosecution. See **Republic Vs Danson Mgunya and Kassim Sheebwana Mohammed, Mombasa Criminal Case No. 26 of 2008**. It is also clear that **Article 49(i) h** grants the Court discretion to decide each case on its own merits.

7. The present application is contested by the State on two grounds. The first one relates to its fear that the applicant may interfere with witnesses. In **Republic Vs. Dwight Sagaray & 4 others, Criminal Case No. 61 of 2012**, this court stated as follows:-

“.....interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others”

The court will however dismiss an allegation of possible interference if the prosecutor does not lay before the court facts to support such an allegation. See **Panju Vs. Republic [1973] E.A. 284**.

8. In the present case, the prosecution has demonstrated that the fight which led to the death of the two deceased persons in this case was between the accused and his fellow police officers who are now prosecution witnesses. It has demonstrated through this nexus the possibility of real interference. The likelihood of flow of collegial sympathy is real. Secondly, the prosecution has named two key civilian witnesses who were eye witnesses to the incident and demonstrated that the two will be greatly intimidated and fear to testify against the applicant. I am persuaded that the apprehension is not far-fetched. It is to be remembered that the standard of proof in an application of this nature is not one beyond reasonable doubt but on a balance of probability.
9. In the premises, I am persuaded that the prosecution has discharged its burden of proving that the release of the applicant may lead to interference of witnesses. I consider that the interests of justice in this case will be served by the expeditious trial of the case rather than the release of the applicant.

The application dated 1st July 2013 is rejected.

Orders accordingly.

Ruling delivered, dated and signed at Nairobi this 18th day of February, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Applicant

.....: For the applicant

.....: For the State/respondent