



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 8 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

- 1.PAUL WAINAINA BOIYO ALIAS SHEKI.....1ST APPLICANT
2.CHRISTOPHER LUMBAZIO ANDIKA alias LUMBA.....2ND APPLICANT
3.ANDREW KARANJA WAINAINA.....3RD APPLICANT
4.SAMUEL KURIA NGUGI Alias VISI.....4TH APPLICANT
5.ESTHER NDINDA MULINGE.....5TH APPLICANT
6.RUTH WATAHI IRUNGU Alias ATLANTA.....6TH APPLICANT

RULING

1. **Paul Wainaina Boiyo alias Sheki, Christopher Lumbazio Andika alias Lumba, Andrew Karanja Wainaina, Samuel Kuria Nugi alias Visi, Esther Ndinda Mulinge and Ruth Watahi Irungu alias Atlanta** are facing trial for the murder of Hon. George Thuo M’Mbutiti. It is alleged that they committed the offence on the night of 17th November 2013 at Porkies Garden Restaurant in Thika Town within Kiambu County with others not before court. They denied the charge when arraigned in court for plea on 14th January 2014.

2. The six accused now seek to be released on bail pending trial. All their six applications were consolidated for hearing hence this single ruling. The applications are anchored on various articles of the Constitution. All the applicants state that the Constitution entitles them to bail under Article 49. They also assert their right to be presumed innocent until proven guilty under Article 50. They have variously stated in their respective supporting affidavits that they will attend their trial, will not abscond and will not interfere with prosecution witnesses.

3. The State is opposed to the applications. **No. 65466 Sgt. Martin Nyuguito** has, in his capacity as one of the investigating officers, sworn a replying affidavit contesting the application. He avers at paragraph 6 of his affidavit sworn on 20th January 2014 that there was sufficient circumstantial evidence to connect the accused to the alleged offence and that there were compelling reasons to warrant denial of bail.

4. Among what he states are compelling reasons are that there was a likelihood of interference with witnesses; that the investigations were still on-going; that there was real danger that the accused would

suppress evidence having previously interfered with the scene of crime; that given the severity of punishment if convicted the accused may be tempted to abscond to escape punishment; and, that the accused may be harmed by some members of the public if released.

5. As stated by the applicants in their respective applications, Article 49 (i) (h) of the Constitution gives them the right to bail. The only fetter to that right is the existence of compelling reasons. Where the State opposes bail, it has the duty to demonstrate to the court the existence of such reasons. This duty was aptly discussed by Ibrahim J. (as he then was) in the case of **Republic Vs. Danson Mgunya and Kassim Sheebwana, Mombasa Criminal Case No. 26 of 2008**.

6. Further, in my view, where the State opposes bail it must not just enumerate perceived fears. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts, experiences and circumstances unique to each individual case that would warrant denial of bail. See **Republic –Vs- Patius Gichobi & 2 others, Criminal Case No. 45 of 2012**.

7. At the hearing of the application, I heard submissions from learned defence counsel **Ombetta** (for 1st, 3rd & 6th accused), **Solonka** for 2nd accused, **Kamau** for 4th accused and **Mundia** for 5th accused. In their respective submissions, counsel cited Articles 20, 21, 28, 29, 38 and 49 of the Constitution as supportive of the applicants' position. They urged the court to interpret the Constitution in a manner that favours the application of rights to the accused and to uphold the Bill of Rights stating that denial of bail negates the bill of rights and the presumption of innocence. I also heard opposing submissions from **Mr. Kemo**, the learned prosecution counsel. The submissions revolved around 6 key issues which I address below. Both the defence and prosecution counsel referred me to a number of authorities which I have considered.

8. The prosecution believes that the applicants may be harmed by members of the public if released on bail. In the submission of **Mr. Kemo**, the deceased was a prominent personality whose death has raised substantial public interest and because of this, the State believes there might be some members of the public out to exact revenge on the accused. Defence counsel on the other hand believe that there are no threats on the ground against the accused. They argue that no one threatened or harmed the accused between the time of the incident and when they were arrested. I agree with defence counsel.

9. While it is indeed undisputed that the deceased was a prominent personality and leader and that the case has attracted substantial public interest, I find nothing either in the Replying Affidavit of the investigating officer or in the submissions of **Mr. Kemo** which demonstrate the likelihood of the accused being at risk of avenge attacks. They remain merely suspects who are entitled to safety and security like any other citizens. I must therefore dismiss this ground as it is unsupported.

10. Similarly, I must dismiss the averment and submission that the applicants are likely to abscond trial owing to the seriousness of the charge and the attendant sentence upon conviction. While it is a relevant factor that the more serious the offence, the higher the likelihood of flight risk, it is also true that where an accused person may be innocent he would be willing, and indeed may be eager, to be tried to prove such innocence. I am not persuaded in this application that the applicants are likely to abscond trial. No antecedents have been placed before court to doubt that they will attend their trial if released.

11. The third ground on which the application is contested relates to the strength of the prosecution evidence. In the estimation of the state, the investigation has sufficient circumstantial evidence to secure the conviction of the accused. Prosecution counsel submitted that forensic analysis shows that the deceased suffered death from poisoning and that the accused were with him at the time of the incident. This submission has been dismissed by the defence on the ground that the circumstantial evidence is weak evidence. In my view, it is rather premature in this case to go into the evidence in the form of witness statements as the same is yet to be tested at trial. I therefore do not consider it a reason to warrant denial of bail.

12. The fourth and fifth grounds which the prosecution has advanced relates to the likelihood of the applicants interfering with witnesses and with on-going investigations. **Mr. Kemo** submitted that there was a close nexus between the accused and the identified prosecution witnesses which was likely to make

it possible for the accused to interfere with key witnesses. He pointed out that the 1st accused was the proprietor of Porkies Garden Restaurant, the scene of the crime, while the 3rd, 4th and 5th accused worked at the club and that the 2nd and 6th accused were regular patrons of the club.

13. In making the submission, counsel relied on averments at paragraph 9 of the replying affidavit sworn by the investigating officer. The averments detail the relationships between each accused and the key prosecution witnesses. In the submission of the state, the relationships are such that the accused persons are placed in a position of influence over the witnesses particularly for the 1st and 3rd accused who are proprietor and manager of the club respectively. For the 4th and 5th accused they are colleagues of the witnesses while the 2nd and 6th are regular patrons. This issue of possible interference with prosecution witnesses was contested by all the defence counsel. It is their contention that there was no proof that the accused were in a position to influence the prosecution witnesses who in any case have already made their statements to the investigators.

14. I have carefully weighed the rival averments and oral submissions on this issue. I take the view that interference with prosecution witnesses is an issue that goes to the root of a trial and is a compelling reason contemplated in Article 49 (i) (h) of the Constitution. For a court to be persuaded on the possibility of interference with witnesses however, the prosecution must demonstrate a real possibility. As already stated above, it must prove that it is not a mere fear or imagination.

15. In this particular case, I find that the prosecution has discharged its burden. It has demonstrated to the court on a balance of probability that the nexus between the applicants and the prosecution witnesses is one that not only places them in close proximity but places the accused in a position of influence as is the case of the 1st and 3rd accused *vis-à-vis*, the employees of the club who are witnesses or a collegial position likely to attract sympathy in the case of the 4th and 5th accused *vis-a-vis* the witnesses. Under those circumstances, I am persuaded that the applicants are likely to interfere with witnesses.

16. Closely linked with the possibility of interference with witnesses is the issue of interference with the scene of crime. The investigating officer has averred at paragraph 11 of the Replying Affidavit that the area forming the scene of crime was swept and cleaned after the incident. Prosecuting Counsel submitted that the interference with the scene raises the prospect of interference with investigations. He further submitted that there was a possibility of other charges being preferred against the accused on destruction of evidence. Although the prosecution is yet to prefer charges against whoever may have been responsible for such action, it is not in dispute that such an action amounts to an attempt to suppress evidence. I find that the allegation goes to further demonstrate the real possibility of interference with the course of justice in this case.

17. In the premises, I find as demonstrated above, that there are compelling reasons not to admit the applicants to bail at this stage. They are at liberty to renew their applications at a later stage. Their respective applications are thus dismissed.

Orders accordingly.

Ruling delivered, dated and signed at Nairobi this 20th day of March, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: 1st Applicant

-: 2nd Applicant
-: 3rd Applicant
-: 4th Applicant
-: 5th Applicant
-: 6th Applicant
-: For the 1st accused/applicant
-: For the 2nd accused/applicant
-: For the 3rd accused/applicant
-: For the 4th accused/applicant
-: For the 5th accused/applicant
-: For the 6th accused/applicant
-: For the State/respondent