



NO.1011

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.10 OF 2014

REPUBLIC PROSECUTOR

VERSUS

MESHACK ODIWUOR MBOGO..... 1ST ACCUSED

JOSEPH MBOGO ONYANGO 2ND ACCUSED

JARED ONYANGO MBOGO ALIAS JESSE 3RD ACCUSED

WILSON OCHIENG MBOGO ALIAS ABUDO 4TH ACCUSED

RULING

1. All the four accused persons herein Meshack Odiwuor Mbogo, Joseph Mbogo Onyango, Jared Onyango Mbogo alias Jesse and Wilson Ochieng Mbogo alias Abudo are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on the 25th day of December 2013 at Kogelo East Sub Location in Migori within Migori County in the Republic of Kenya, they murdered Moses Ochieng Onyango.
2. They all pleaded not guilty to the charge and are on trial. In the meantime they seek to be released on bail/bond pending trial. This application is pursuant to the provisions of **Article 49 (1) (h)** of the **Constitution 2010** which provides 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 not to be so released.**”
3. Unlike under the former constitution where an accused person had to justify his request to be released on bond or bail. **Article 49 (1) (h)** of the **Constitution** makes it clear that such a person has the right to be so released unless there are compelling reasons for him/her not to be released. The burden of showing the existence of compelling reasons lies squarely at the feet of the State. However, the discretion to release or not release an accused person on bond rests with the Court.
4. Although the Constitution does not define what is meant by “**compelling reasons**”, it is not lost to the court that in every case that comes before it the prime purpose of the state is to ensure that the accused appears in court at all times to stand trial. It is thus extremely important for the court to be satisfied that upon being released on bond the accused shall avail himself or herself before the court for trial. It is also important to note that though the

provisions of **Article 49 (1) (h)** of the **Constitution** are omnibus, each case must be considered on its own merit with a view to giving life to the spirit of the constitutional presumption of innocence. See **Gatabaki -vs- Republic [1993] KLR 327**.

5. Other considerations to be taken into account by the court before deciding whether or not to grant bail are: whether the accused would interfere with witnesses or otherwise obstruct the course of justice; whether in relation to himself or any other person. Bond may also be refused if the safety of the accused person would be in jeopardy if he is granted bond. In cases where the accused persons are child offenders, bond or bail may be refused for the child offender's own welfare. There are also certain times when the court may not have sufficient information within its possession to enable it make a decision one way or another. Where such doubt exists, bond or bail may be refused.
 6. In the present case, the court called for and obtained Bail Assessment reports on each of the accused persons. The first accused is 34 years old, married with 6 children and is a peasant farmer. He dropped out of school at Class 7, but no reason is given for the same. He has no previous criminal history and is recommended for release on bond on reasonable terms.
 7. The second accused is 58 years old, married with 7 children. He is a peasant farmer and supports 4 orphans. He has previously worked as a village elder. He dropped out of school at class three. The report also shows that though the unfortunate incident happened the family of this accused and of the deceased's family have not fallen out. He is said not to be a flight risk. He has family members ready and willing to stand surety for him. He is recommended for bond on reasonable terms.
 8. The third accused Jared Onyango Mbogo alias Jesse is 19 years old. He comes from a peasant farming family. He never went to High School due to poverty. The report indicates that there are family members willing to stand surety for this accused. The bond on reasonable terms is recommended.
 9. The third accused is 19 years. He is a stand eight school dropout and is single. There is a relative willing to stand surety for him. According to the Bail Assessment report the third accused is not a flight risk. Bond on reasonable terms is therefore recommended.
 10. The fourth accused is aged 20 years. He is married with 2 children. He dropped out of school after sitting for KCPE. It is indicated in the report that his home environment is conducive for his release on bond and the same is recommended.
 11. After considering all the above reports vis-a-vis the law, the question that arises is whether the accused persons ought to be granted bail. The State indicated that there were no compelling reasons for them to oppose bail. The Bail Assessment Reports indicate that the home environment is conducive for the accused persons to be released on bond. This court however takes judicial notice of the fact that Migori is a border county and that chances of the accused persons sneaking across the border into Tanzania are real. For this reason and while approving the application for bond, I must give such terms as would ensure that the accused persons attend court throughout their trial.
 12. According the bond application is allowed on the following terms:-
 1. *Each of the accused persons may be released on his own bond of Kshs.1,000,000/= (One Million only) with two sureties of a like amount.*
 2. *The sureties shall be approved by the Deputy Registrar of this Honourable Court.*
 3. *During the pendency of this case, or until further orders of this Honourable Court, the accused persons shall attend court for mention of their case once every thirty (30) days. Their first such mention shall be on 18/07/2014.*
 4. *The accused persons shall not leave the jurisdiction of the court without the permission of the court.*
 5. *In default of any of the above conditions (3) and (4) the bond shall stand cancelled and the sureties immediately called to account.*
1. Orders accordingly.

Dated and delivered at Migori this 19th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Bigogo for Minda for Accused Persons

Miss Owenga for State

Mr. Bibu

- Court Assistant