



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.....1<sup>ST</sup> ACCUSED
2. CHRISTOPHER LUMBAZIO ANDIKA  
alias LUMBA.....2<sup>ND</sup> ACCUSED
3. ANDREW KARANJA WAINAINA.....3<sup>RD</sup> ACCUSED
4. SAMUEL KURIA NGUGI Alias VISI.....4<sup>TH</sup> ACCUSED
5. ESTHER NDINDA MULINGE.....5<sup>TH</sup> ACCUSED
6. RUTH WATAHI IRUNGU Alias ATLANTA.....6<sup>TH</sup> ACCUSED

**RULING**

The application before me has been presented by the 1<sup>st</sup> accused Paul Wainaina Boiyo alias Sheki (hereinafter the applicant). He is the 1<sup>st</sup> accused in Criminal Case No. 8 of 2014 where he is charged with the murder of **Hon. George Thuo M'Mbutiti**. His co-accused are **Christopher Lumbazio Andika alias Lumba, Andrew Karanja Wainaina, Samuel Kuria Ngugi alias Visi, Esther Ndinda Mulinge and Ruth Watahi Irungu alias Atlanta**.

By a ruling dated 20<sup>th</sup> March, 2014, this court rejected an application by all 6 accused to be released on bail pending their trial. Subsequently the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> accused sought a review of the ruling dated 20<sup>th</sup> March 2014 and the court disallowed the same vide a ruling dated 26<sup>th</sup> June, 2014. In rejecting both applications, the court ruled that there exist compelling reasons why the accused should be denied bail.

In the ruling dated 20<sup>th</sup> March 2014 the court considered in depth every reason and argument advanced by both the applicants and the respondent and dismissed several grounds raised by the respondent. It however found that the accused persons were likely to interfere with prosecution witnesses. It found that the prosecution had demonstrated that the key prosecution witnesses who were employees of the 1<sup>st</sup> accused stood in a position of vulnerability *vis-à-vis* the accused and were therefore likely to be intimidated. The court considered it important to first secure the testimony of the key witnesses before granting bail. Subsequently, in the review application, the court ruled that there were no new circumstances or material facts to warrant a review of its earlier orders.

The present application has been made by the 1<sup>st</sup> accused/applicant. In oral submissions through his counsel **Mr. Khaminwa** he argues that the offence with which he is charged is bailable; that his life was not in danger if released; that there was no evidence that he would not interfere with prosecution witnesses nor commit any other offences. Counsel submitted several authorities to support his oral application urging the court that persons charged with murder and other serious international crimes have been released on bail by this court. **Mr. Khaminwa** also submitted that the applicant was in need of urgent treatment for cancer. He referred the court to a medical report attached to the earlier application.

Counsel further made another application that should the court not allow the application then it should pass on the file to another judge before whom he would renew the application.

In opposing submissions, **Mr. Kemo** for the respondent relied on the replying affidavit sworn by **Cpl. Maxwell Otieno**. He submitted that the court had rejected the earlier applications by the accused persons after making a finding that they were likely to interfere with investigations and witnesses. He stated that there were no new circumstances to warrant a review of the court's earlier orders. He further submitted that the authorities cited by defence counsel were clearly distinguishable. On the submission that the applicant was in need of urgent treatment he submitted that no medical report supporting the preposition had been produced and that the earlier report only made a prognosis requiring further investigation. On the application by defence counsel that the court should pass on the file to another judge, **Mr. Kemo** submitted that no reasons had been advanced for the court to recuse itself.

In considering this application, I start by commenting on the submission by learned defence counsel that should the court find that it cannot release the applicant on bail, then it should pass on the file to another court for determination of the present application. I consider this to be a strange application or submission not supported by any known law or procedure. An application by a party for a court to recuse itself must be based on good reason. It must be a serious application setting out reasons. It cannot be a suggestion conditional on how the court was likely to rule on a matter before it. The correct procedure would have been for the applicant to make a substantive application for recusal and await a ruling thereof before making the review application for bail; or alternately make the application for bail, await the ruling and apply for the transfer of the file to another court thereafter. To bring the two applications concurrently would in my view amount to a veiled attempt to influence the court to rule in a certain way in the substantive application.

Having so commented, I proceed to consider the substantive application before me. I have considered the arguments and support of the review application. I note that the arguments are similar in every respect to the arguments advanced in the initial application and the subsequent application to which I fully addressed my mind in the rulings indicated above. I also observe that the submissions in opposition are identical to those made earlier and to which I equally addressed my mind in the said rulings. On the face of it therefore, save for additional authorities and the applicant's medical condition, I find nothing new in the arguments raised both in support of and against the present application. The same were fully ventilated and considered in the earlier rulings. The only addition is the medical ground which is merited.

As earlier stated the main reason why this court denied the applicant and his co-accused bail the finding that the accused persons were likely to interfere with the key prosecution witnesses. In the ruling dated 26<sup>th</sup> June 2014 the court ordered that the applicants may renew their applications after the key prosecution witnesses have testified. In subsequent proceedings, the court mitigated the denial of bail by bringing forward the hearing dates for the prosecution to present the said witnesses. I note that the trial is set to commence on 22<sup>nd</sup> of September 2014. I direct the prosecution to present its key witnesses on the trial date and thereafter the applicant shall be released on bail. The present application is therefore disallowed until the key prosecution witnesses have testified.

Orders accordingly.

**Ruling delivered, dated and signed at Nairobi this 22<sup>nd</sup> day of September, 2014**

**R. LAGAT - KORIR**

**JUDGE**

**In the presence of:**

Mosinko                      Court clerk

All accused present

Dr. Khaminwa/Ombetta: For 1<sup>st</sup> Accused/Applicant

Mr. Solonka :                For 2<sup>nd</sup> accused

Mr. Mathenge:              For 3<sup>rd</sup> accused

Mr. Mathenge:              For 4<sup>th</sup> accused

Mr. Nyasani :                For 5<sup>th</sup> accused

Ms. Mambiri :                For 6<sup>th</sup> accused

Mr. Kemo/Ms Mwaniki: For the State/respondent