



**REPUBLIC OF KENYA**

**High Court at Meru**

**Criminal Case 68 of 2010**

**REPUBLIC.....APPLICANT  
VERSUS**

**VICTOR NTHIGA KARUTHU.....1<sup>ST</sup> ACCUSED  
JAMES NYAGA GITEMBA.....2<sup>ND</sup> ACCUSED**

**RULING**

The accused persons **VICTOR NTHIGA KARUTHU** the 1st accused **and JAMES NYAGA GITEMBA the 2ND ACCUSED** were arraigned before this court with one count of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that they committed the offence on 30<sup>th</sup> October 2010. They were brought before the court with the said information on 9<sup>th</sup> November, 2010 and they have been in custody since then.

The Accused persons have applied for bail during the pendency of their trial for the offence charged through their counsel Mr. Nyenyire. Mr. Nyenyire in his very brief submissions urged the court to grant bail to both accused persons and he cited Article 49 of the Constitution as the basis for his application. Counsel urged that the accused persons have been in custody since 2010. Mr. Nyenyire also submitted that he had talked to his clients and that both had undertaken to attend court without fail as required if they were released on bail.

The State was represented by Mr. Moses Mungai learned State Counsel. Mr. Mungai submitted that even though an accused person can be granted bail, under Article 49 of the Constitution that right is not absolute. Counsel urged that bail should not be granted where there were exceptional circumstances and urged that in the instant case he had been informed by the investigating officer that there was still animosity between the families of the accused and the deceased. Counsel urged that there was apprehension that the accused persons may interfere with witnesses and this expression had been made through a letter to their office written in July 2011. Mr. Mungai urged the court to note that discussions between the two families when both accused persons offered to enter into a plea agreement failed.

The court called for a Pre-Bail Report on the accused persons. The reports are dated this month. The one made by the Probation Service in respect of the 1<sup>st</sup> accused person indicated that there was a danger the 1<sup>st</sup> accused person may be attacked in revenge by members of the family of the deceased who still harbor strong bitterness as a result of this incident. The Probation Officer also pointed out that the family of the deceased also alleged that there was a danger of the 1<sup>st</sup> accused person influencing witnesses and therefore affecting the quality of the evidence in the case. The Probation Officer also pointed out that the two families of the 1<sup>st</sup> accused persons and the deceased have had long standing land dispute which the local leaders and the Area Chief had tried but had been unable to settle. The Probation Officer also pointed out that members of the community where the accused persons and the deceased persons come from did not wish to make any comments on the issue of the accused persons being released on bond as

they regarded it a family issue and were therefore unwilling to divulge any information. The Probation Officer left the matter to the court to decide whether or not to grant bail to the 1<sup>st</sup> accused.

Regarding the 2<sup>nd</sup> accused the report from the Probation Service, just like that of 1<sup>st</sup> accused remained neutral and did not recommend or decline release on bail. It was prepared by the same Probation Officer. In this one he noted that the 2<sup>nd</sup> accused person's family and the deceased family are closely related. The Probation Officer pointed out that the family of the deceased was not receptive to the 2<sup>nd</sup> accused being released on bail. The Officer pointed out to the court that there was a great tension between the two families. It was also pointed out that the family of the deceased had accused the 2<sup>nd</sup> accused of the likelihood of interfering with the witnesses. He also pointed out that the wife of the deceased had expressed fear for her life and of the lives of her children if the 2<sup>nd</sup> accused person was released on bail.

**“Article 49(1) (h) of the Constitution stipulates:**

**(1) An arrested person has the right:-**

**(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons—not to be released.”**

I have considered the applications for bail by the accused persons. The reports from the Probation and the Police through the DPP's office are consistent. They indicate very strongly that the situation on the ground is volatile and the possibility of retaliation cannot be taken lightly or for granted. From the Probation officers report, there is also a fear of interference with witnesses as well as a threat or perceived threat to the immediate family members of the deceased. These reports are recent ones and give the current situation on the ground. All these are in my view compelling reasons why the accused persons should not be given bail just yet.

I do appreciate that the incident in question took place in 2010. I also do take into consideration that the accused persons have a constitutional right to be released on bond. However I do find that the threat to life, the possibility of exposing the surviving members of the deceased family to danger and the possibility of interference with the witnesses are all satisfy an exception to the right under Article 49(1) (h).

Accordingly I find sound and cogent compelling reasons why not to grant the accused persons application for bail. The applications are both declined.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2013.**

**J. LESIIT  
JUDGE**