



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO. 45 OF 2011

STATEPROSECUTOR

=VERSUS=

1.LYDIA MWANGO MOSETI

2.DOUGLAS NYAKUNDI OBIERO

3.ELIJAH OKARA OGECH.....ACCUSED PERSONS

RULING

1. The accused persons who face the charge of murder contrary to section 203 as read with section 204 of the Penal Code have applied for bail pending trial in enforcement of their constitutional right to bail under Article 49 of the constitution.
2. Counsel for the State, Mr. Majale has opposed bail relying on the affidavit on Japheth Ngetich of 20/6/12 sworn in the response to the application for bail by the 1st accused. The state's opposition to bail is based on principal grounds as follows:
 - a. That the prosecution has a very good case against the accused which may result in a conviction and in view of the maximum sentence of death applicable to the offence, the accused are likely to abscond. I demonstrating the strength of the prosecution's case, the investigating officer alludes to **“a confessional statement”** allegedly made by the 2nd accused **“linking the applicant/accused by mentioning another co-accused who is still at large namely James Monyenga not the applicant/accused paid him money, for the deceased to be murdered”**.
 - b. That the 1st accused is likely to interfere with witnesses who are said to be her own children aged 8, 3 and 1½ years.
 - c. That the 1st accused is likely to interfere with the evidence based on the investigating officer's claim **“that upon further investigating of the conduct of the accused person herein, I discovered that she concealed the killer weapon and other exhibits by throwing them into a pit latrine and if released on bail the applicant/accused may further interfere with the evidence.”**
 - d. That “if the 1st applicant/accused is released on bail she will expose herself by putting her own [life] in danger, as the situation on the ground is volatile
3. However, Prebail Probation Officer's Reports on the 3rd accused/applicants, dated 8/5/2013 and

filed upon on request by the court indicates that the accused are suitable persons for the release on bail. With regard to the 1st accused, the probation officer's report indicates that

“According to the local administration and family members the offender is not viewed as a potential threat to peace and her life is not in any danger if she is awarded bond. The community members are willing to receive her so that she may continue with the case while being able to provide for her children and tht she may start to rebuild her life.”

On the 2nd accused, the probation officer's report indicates that he was on TB treatment and all **“the community members through area assistant chiefs were also positive adding that he could benefit on bond.”**

As regards the 3rd accused, the probation officer reported that *“the area assistant chief Mr. Peter Mokaya informed us that as things stand at the moment, there be no signs at all of potential threat to the accused's life saying that he will ensure his safety if and when he is released back to the community. He therefore feels that it would be fine if the Honourable Court granted the accused bond.”*

4. I urging the application for bail, counsel of the 1st accused, Mr. Ogari, cited the High Court decision in Kisii HCCR case no 43 of 2008 emphasizing that following the new constitution **“the court will only decline to grant bail if the prosecution demonstrates the existence of compelling reasons for such refusal,”** and submitted that in this case, the opposition to bail is based only on suspicion that he accused will abscond, which may be addressed in the terms on the bail.
5. Counsel for the 2nd and 3rd accused, Mr. Moracha, adopted the submissions made by the counsel for the 1st accused and urged the court to grant the same bail terms for the accused persons.
6. That court examined the accused persons as to their circumstances and sources of income. The 1st accused stated that she was a 36 year old mother of 4 children of 18, 16, 12 and 6 years of age earning kshs.1,800/= per month with kshs 20,000 – 25,000/= in bonuses per year of her tea crop, and that she had her mother who owned a parcel of land of 8 acres to stand surety for her.

The 2nd accused said he was a 22 years old tomato dealer who earned kshs.100/= per day and had his father who owned a parcel of land measuring 1 ½ acres to stand surety for him.

The 3rd accused said he was 24 years old and driver by profession earning kshs3,000/= per month and that his father who owned a 14 acre parcel of land was willing to stand surety for him.

7. I have considered the application for bail by the accused persons, the replying affidavit sworn for the prosecution by the investigating officer, the Pre-Bail Probation Officer's reports and the representations by the accused persons. In accordance with article 49 of the constitution, I have to consider whether the prosecution has demonstrated compelling reasons for refusal of bail for the accused persons.
8. That the prosecution has a good case against an accused cannot be a compelling reason for refusal of bail; it is expected that the prosecution only prefer charges against an accused when there is a good case by way of sufficient evidence to sustain a conviction for the offence charged. The sentence of death being a maximum sentence may not be taken of itself to support a presumption that the accused will abscond. Moreover, bail is available under the constitution for all offences, including capital cases.
9. I deplore the attempt by the prosecution through the investigating officer to introduce into the mind of the court, the unproven alleged “confessionary statement” by the 2nd accused implicating the 1st accused and another person who is at large. Such confession must be proved to have been

taken in accordance with the provisions of section 25A of the Evidence Act and be subjected to strict consideration of accomplice evidence with an opportunity of the co-accused to challenge it. Investigating officers must be warned against irregularly introducing evidence relating to the trial in affidavits in response to bail applications in circumstances where cross-examination on such evidence is not possible or desirable.

10. This very objection of improperly adducing evidence by the Investigating Officer through affidavits in response to bail applications may be taken of the statement by the investigating officer herein that he had in the course of investigating found that the 1st accused had hidden the murder weapon in a latrine. That is a matter of evidence at the trial to be subjected to cross-examination by the accused or her advocate at the appropriate time. Moreover, the suggestion that there is other evidence with which the accused will interfere is not well founded as investigations are taken to have been complete on arraignment, and no indication to the contrary has been given.
11. In considering the allegation of likely interference with witnesses some of who are said to be children of the 1st accused aged 8, 3 and 1 ½ years, there appears to be some citation as the 1st accused states that her children are aged 18, 16, 12 and 6 years. However, the danger of interference which may exist with regard to an accused over her minor children witnesses must be weighed against the constitutional right to bail to determine whether there are less restrictive ways of preventing such interference without infringing on accused's, right to bail. I consider that, if there existence real danger of such interference, the remedy may be in taking witness protection measures including seeking temporary custody, care and control of the children from a children court rather than refusing the accused's right to bail.

Moreover, as part of the terms of the bail, the accused may be directed to stay away from the named witnesses. I note the counsel for the 1st accused, Mr Ogari in response to the assertion, stated that he has not been given any witness statements for the alleged 8 year old child of the 1st accused.

12. As regards the security of the accused persons, I must accept the finding of the probation officers Cornel Kirui Towett, Mercy Rugut and John Agili who investigated and reported on the 1st, 2nd and 3rd accused persons' bail requests, respectively.

13. For the reasons set out above, I will grant the accused persons bail pending trial upon terms to ensure that they attend court for the hearing:

1. **Accused to execute own bond of kshs 500,000/=.**
2. **Accused to provide one (1) surety of similar amount of kshs 500,000/=.**
3. **Accused shall not leave jurisdiction of the court without leave of the court.**
4. **Accused to attend the Deputy Registrar every 30 days pending hearing and determination of his trial.**

14. As regard accused no.1, prosecution is at liberty to move the court for orders relating to her access or contact with minor witnesses, as necessary.

Dated and delivered this 29th day of MAY 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... **for the 1-3rd accused**

..... **for the Prosecutor**

Mr. Edwin Mongare Court Clerk

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EDWARD M. MURIITHI

JUDGE