



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 45 OF 2012**

**PATIUS GICHOBI NJAGI.....1<sup>ST</sup> ACCUSED/2<sup>ND</sup> APPLICANT**

**CAESAR WACHIRA MUTHONI.....2<sup>ND</sup> ACCUSED/3<sup>RD</sup> APPLICANT**

**MARY NJERI WACHIRA .....3<sup>RD</sup> ACCUSED/1<sup>ST</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Patius Gichobi Njagi, Ceasar Wachira Muthoni and Mary Njeri Wachira** (1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> accused respectively) are charged with the murder of **Virginia Wamaitha Thuku**. The particulars of the charge are that on 17<sup>th</sup> day of August 2011 at **Mwiki District** within **Nairobi County** jointly murdered Virginia Wamaitha Thuku.

The accused were first arraigned in court on 19<sup>th</sup> July 2012 along with one Joseph Chomba Mwangi (then 2<sup>nd</sup> accused) to answer to the charge. Subsequently, upon the demise of the said 2<sup>nd</sup> accused, the three accused now before court were required to take plea on substituted information on 18<sup>th</sup> December 2012. They pleaded not guilty and were remanded in custody pending trial.

All three accused then applied for bail. The 1<sup>st</sup> applicant/3<sup>rd</sup> accused (Mary Njeri) filed her application dated 21<sup>st</sup> August 2012 on 5<sup>th</sup> September, 2012. The 2<sup>nd</sup> applicant/1<sup>st</sup> accused (Patius Njagi) filed his application dated 8<sup>th</sup> November 2012 filed on 15<sup>th</sup> November 2012. The 3<sup>rd</sup> applicant/2<sup>nd</sup> accused (Caesar Wachira), filed his application dated 17<sup>th</sup> December 2012 on 17<sup>th</sup> December 2012. Their applications were consolidated, heard together, hence this single Ruling.

The 1<sup>st</sup> applicant states in her Supporting Affidavit sworn on 21<sup>st</sup> August 2012 that the offence with which she is charged is bailable; that she has an unqualified right to be presumed innocent; that her continued detention undermines her unqualified constitutional right to be presumed innocent and amounts to punishment before trial; that she has delivered in prison and that her child needs to be brought up outside the prison environment; and, that she has no intention of relocating from the country.

The 2<sup>nd</sup> applicant states in his supporting affidavit sworn on 8<sup>th</sup> November 2012 that he shall not in anyway interfere with witnesses, and will remain within the jurisdiction of the court and live peacefully with members of society if released on bail.

The 3<sup>rd</sup> applicant on his part states in his supporting affidavit sworn on 17<sup>th</sup> December 2012 that he has a constitutional right to bail; that his continued detention pending trial undermines and contravenes his constitutional right to liberty and presumption of innocence and that he undertakes to attend his trial.

The three applications are opposed by the State through three Replying Affidavits of one **Clement Mwangi** of CID Headquarters, Nairobi, who is the investigating officer in the case. They were sworn on 7<sup>th</sup> November 2012, and on 7<sup>th</sup> February 2013 in respect of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants respectively. All three affidavits make averments to the effect that the 3 applicants met and planned to eliminate the deceased; executed the plan by cutting her into pieces, packing her body parts in paper bags and throwing her remains into Nairobi River; that the applicants had threatened witnesses and in particular the key witness, one Joel Wanjau Guchu whom the 2<sup>nd</sup> applicant sent an SMS through the mobile phone of the 1<sup>st</sup> applicant threatening him and who subsequently had to be rescued by police on the 9<sup>th</sup> July 2012.

Specific to the 1<sup>st</sup> applicant, the investigating officer avers that the prison facility has facilities for the care of her baby. Further, with respect to the 3<sup>rd</sup> applicant, he avers that the applicant made a confession under inquiry raising his likelihood of guilt.

At the hearing of the applications on 22<sup>nd</sup> April 2013 I heard extensive oral submissions from both the defence and the prosecution. I have carefully considered the submissions. I also called for a pre-bail social inquiry report in respect of each applicant. The submissions not only expound on the matters deponed upon in the rival affidavits but extensively deal with the issue of threat to and interference with prosecution witnesses. This issue has emerged in the Replying Affidavits and oral submissions before court to be the main ground why the State opposes the bail applications. I consider this issue one on which the application must turn.

**Article 49 (i) (h) of the Constitution** on which the application is grounded provides that “*an arrested person has a right .....to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.....*” A reading of this Article shows that bail must in the first instance be granted as of right. However it is also my understanding that the right is not an absolute right and can be curtailed by the court where there are compelling reasons.

Further, where the State opposes an accused person’s application for bail, it is its duty to demonstrate to the court any compelling reasons envisaged under **Article 49 (1) (h)**. Such reasons would arise in my view from any fact or circumstance that would convince the court that the release of the accused would not serve the interests of justice in the particular case or the trial at hand. The court would therefore consider the circumstances of each case using commonly known criteria including but not limited to whether or not the accused will attend trial. See **Watoro V. Republic (1991) KLR 220**.

The State’s duty in bringing forth the compelling reasons was aptly discussed by Ibrahim J. (as he then was) in the case of **R. Vs Danson Mgunya and Kassim Sheebwana Mohamed, Mombasa Criminal Case No. 26 of 2008** wherein he stated;

*“I do hold that if the prosecutor objects to the release of the accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused to prove or at least demonstrate the existence of the “compelling reasons.”*

Further, in my view, where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the State must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case **Jaffer V. Republic 1973 E.A. 39**, the court cannot be called upon to speculate.

In the present application, I have been called upon to deny the applicants bail for reason that they are likely to interfere with witnesses. It is the State's submission that the deceased in this case was the wife of the 1<sup>st</sup> accused with whom they had been married for nine years and had one daughter and that a number of witnesses are relatives of the 1<sup>st</sup> accused while some are neighbours in the same locality.

Other than that it is the prosecution's submission that the applicants have already interfered with a key witness one Joel Wanjau Guchu. That on the 26<sup>th</sup> June 2012 while the 1<sup>st</sup> and 3<sup>rd</sup> accused were detained at Muthaiga Police Station, the 2<sup>nd</sup> applicant used the 1<sup>st</sup> applicant's phone number to send a threatening SMS to the witness. To back up this submission, prosecuting counsel presented to the court data from the safaricom mobile service provider showing the communication.

Prosecuting counsel further submitted that on 9<sup>th</sup> June 2012 the witness was threatened at Kutus town on the instigation of the relatives of the 2<sup>nd</sup> accused who raised an alarm leading to the witness being confronted by members of the public. The said witness was rescued by the police and subsequently put under witness protection. In addition, the court heard that on 2<sup>nd</sup> June 2012, the wife of the key witness was visited by unknown people at her home who alleged that they were CID officers. The incident was reported to the CID which confirmed that the visitors were not CID officers. It was the prosecution's belief that the visit was part of the scheme of intimidating the witnesses.

In submissions in response, defence counsel disputed that there was any scheme hatched by the applicants to intimidate witnesses.

I have carefully weighed the evidence presented by the State on this contested issue of interference with witnesses. I am persuaded that the State has demonstrated through a factual and experiential account that the accused are not just likely to interfere with witnesses but have actually engaged in acts of intimidation and threats to specific witnesses and their families. Indeed the pre-bail probation reports which I have considered independently also give credence to the prosecution's position. For the 3<sup>rd</sup> applicant particularly the social inquiry revealed that the local community suspect his involvement with a terror gang suspected of committing various crimes in the neighbourhood.

Finally it is on record that two witnesses in this case have been placed under the witness protection programme having been assessed and considered high risk by the Witness Protection Agency. That indeed is further incontrovertible testimony to the real threat to witnesses in this case. I hold, as I have held before, that a threat to prosecution witnesses is a threat to the administration of justice and goes to the root of the trial.

For these reasons, I am disinclined to allow the three applications for bail. The accused shall remain in custody pending the conclusion of their on-going trial.

**Ruling delivered, dated and signed at Nairobi this 22<sup>nd</sup> day of July, 2013**

**R. LAGAT - KORIR**

**JUDGE**

In the presence of:

.....: Court clerk

Mary Njeri Wachira : 1<sup>st</sup> Applicant

Patius Gichobi Njagi :2<sup>nd</sup> Applicant

Caesar Wachira Muthoni:3<sup>rd</sup> Applicant

- .....: For the 1<sup>st</sup> accused/applicant
- .....: For the 2<sup>nd</sup> accused/applicant
- .....: For the 3<sup>rd</sup> accused/applicant
- .....: For the state/respondent