REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.79 OF 2012

ALBERT NJIRU ……..…..……1ST ACCUSED

ELIJAH KIMOI……2ND ACCUSED

JOB JAMES WERU …….3RD ACCUSED

DANIEL PAKAR MATUNGE ……..4TH ACCUSED

STEPHEN ARIKA …….……...5TH ACCUSED

KENNEDY OMINDE ……...6TH ACCUSED

VERSUS

REPUBLIC…….…….PROSECUTOR

RULING

The six accused persons namely **Albert Njiru, Elijah Kimoi, Job James Weru, Daniel Pakar Matunge, Stephen Arika** and **Kennedy Ominde** are facing trial for the murder of one Stephen Gichuhi Njoroge. The offence is alleged to have been committed on 14th January 2011 along Slaughter earth road at Ruaka area Gigiri within Nairobi County. The accused are police officers who are said to have been on patrol duties on the fateful night when in pursuit of such duty they encountered and shot at a group of people whom they suspected to be robbers fatally wounding the deceased.

The accused were arraigned in court on 2nd October 2012 when they all pleaded not guilty and were remanded in custody. On the same day, they filed individual applications to be released on bail pending trial. The applications are dated 1st October 2012 and were filed by the firm of **Ombetta & Associates**. All six applications have been consolidated and heard together hence this single Ruling.

All the applications are opposed by the State through the Replying Affidavit of **No. 215805 Supt. Peter Mungai** in his capacity as the DCIO and one of the investigating officers in the case.

All the applications are grounded on the applicants' constitutional right to bail and their presumption of innocence. The supporting affidavits too have common averments including that murder is a bailable offence; that the applicants have an unqualified constitutional right to be released on reasonable conditions; that the applicants have unqualified right to be presumed innocent until proved guilty; that denial of bail of personal liberty is tantamount to punishment before conviction; that there were no compelling reasons not to be granted bail. All the applicants have averred that they will attend their trial.

The applications were argued before me on 16th May 2013. During the hearing, **Mr. Swaka** prosecuted the application for the 1st accused/applicant. The applications for the 2nd, 3rd, 4th and 6th accused/applicants were prosecuted by **Ms. Ongere** on behalf of **Mr. Ombetta**, while the application for the 5th accused/applicant was prosecuted by **Mr. Odhiambo**. **Mr. Konga** made submissions on behalf of the State.

After a careful consideration of the rival affidavits and lengthy submissions by counsel, only two key issues emerge in this application. The first is the accused's right to bail under **Article 49 (i) (h) of the Constitution** and the interpretation thereof. The second is the prosecution's perceived fear of intimidation of witnesses by the accused if released on bail. I will therefore address these two issues.

Article 49 (i) (h) of the Constitution 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 released." It was submitted on behalf of the applicants that the right is unqualified and bail must be granted as of right. **Mr. Odhiambo** for the 5th applicant argued that the State is not allowed by the Constitution to oppose bail but is only required to bring to the attention of the court any compelling reasons. In his view, such reasons ought to be stated at the very first instance when an accused is brought before court. On the other hand, **Mr. Konga** for the State submitted that the right to bail is not an absolute right but one that is at the discretion of the court. He argued that in the present application the court should exercise its discretion to deny the applicants bail.

My reading of **Article 49 (i) (h)** is that any arrested person is entitled to be released on bond or bail pending a charge or trial. This right has since the promulgation of the Constitution 2010 been extended to persons facing any charge including that of murder as in the instant case. This right however is in my view not unqualified as submitted by the applicant's counsel for the same Constitution qualifies it in the following terms "..unless there are compelling reasons." The right then becomes one which can be curtailed by the court where there are compelling reasons. The Constitution, has in its wisdom, not listed what would qualify to be a compelling reason but left the decision thereof to the discretion of the court. It is then the duty of the court exercising discretion judiciously to decide each case on its own peculiar circumstances.

It was the submission of **Mr. Odhiambo** for the 5th applicant that an accused need not make a formal application for bail but that the court should grant it as a matter of right. While I agree with the argument that there is no legal requirement for filing a formal application it has been the practice of the court that bail applications for murder suspects be filed. The reason for this practice, I believe, is that it allows the respondent an opportunity to reply to the application through affidavit evidence. This is the proper way for the State to bring to the attention of the court any compelling reasons. If the respondent's counsel were to oppose the application by making submissions from the bar the same would not hold much weight in persuading the court.

Secondly, it has been long settled that where the State wishes the court to deny an accused bail, it is its responsibility and indeed duty to provide the compelling reasons. This position was again ably expounded by **Ibrahim J**.(as he then was) in **Republic Vs- Danson Mgunya & Anor, [2010] eKLR**. It is therefore my view that the practice adopted by the courts is fair to the extent that the court while exercising its discretion in considering an application for bail, does not do so in a vacuum. If the State objects to the application, it must demonstrate the reasons for so doing the reasons must be explained and demonstrated to the satisfaction of the court. They must be compelling reasons as required by **Article 49 (i) (h) of the Constitution**. It is also to be remembered that the standard of proof is not one beyond reasonable doubt but on a balance of probabilities.

Having dispensed with the interpretation of **Article 49 (i) (h)** aforestated, I now turn to the main reason advanced by the prosecution as to why the applicants should not be granted bail. It is the State's fear contained in the Investigating Officer's averments at paragraph 4, 5 and 6 of the Replying affidavit and oral submissions by **Mr. Konga** that since the applicants are police officers, their release on bail may cause the civilian witnesses to fear to testify against them or that the accused themselves may interfere

with the witnesses.

In urging the court to consider this as a compelling reason, **Mr. Konga** placed reliance on **Republic V Ahmed Mohamed Omar & 7 others, Criminal Case No. 14** of **2010** where the court dismissed an application for bail. In the case **Ochieng J**. had occasion to discuss the reality of civilian witnesses being apprehensive were the accused, who were administration police officers, to be released on bail pending trial. In dismissing the application, the Judge rendered himself thus:-

> *"Secondly, because the applicant is an Administration Police Officer, who would have access to a gun if he were released on bail pending trial, I hold the considered view that his release would cause the civilian witnesses to be genuinely apprehensive of their safety. The said apprehension is real because the applicant already has not only the names of the potential witnesses but also her copies of their statements."*

The applicants' counsel on the other hand have strongly countered the position of **Mr.Konga**. **Mr. Swaka** submitted that the applicants had no access to guns as might have been the case in **Republic –Vs-Ahmed Mohamed** *(supra*). **Ms. Ongere** submitted that any interference with witnesses was a criminal offence which could be dealt with and the witnesses would be at liberty to report such an offence. Mr. Odhiambo on his part submitted that the applicants should not be discriminated merely because they were police officers.

I agree with the submission by defence counsel that the applicants should not be denied bail merely because of their employment as police officers. Indeed that would be discriminatory and unconstitutional. However, the question before court is not whether or not the applicants were police officers but whether the apprehension of the civilian witnesses as explained by prosecuting counsel was real or merely imagined. The applicants have been in custody for a period of 8 months now. Once charged, they must have been suspended from their duties. It is therefore unlikely that if released they would have access to firearms.

It is however my considered view that the apprehension on the part of witnesses would not be limited to the applicants' access to guns. It would extend to a perceived position of influence and balance of power between a law enforcement officer *vis-a-vis* a civilian. Such balance in the mind of any ordinary citizen tilts heavily in favour of a law enforcement officer. I would therefore agree with the prosecution counsel that indeed the witnesses would fear to see the accused walking freely in public. They would feel intimidated. Such a state would not serve the interests of justice in the trial at hand. Indeed it is a compelling reason not to release the applicants.

Finally, I observe in this application that the trial has progressed well with seven witnesses having testified so far. It is my considered view that the ends of justice in this case will be served by fast tracking the trial to conclusion.

In the premises, and for the foregoing reasons, I find that there exists a compelling reason not to grant the applicants bail. Their respective applications dated 1st October, 2012 are dismissed.

Ruling delivered, and **signed** at **Nairobi** this **13th** day of **August, 2013**

R. LAGAT – KORIR

JUDGE

In the presence of:

…… .: Court clerk

Peter Githongo Maina : 1st Applicant

Elizabeth Kiura : 2nd Applicant

Duncan Thuku Mwangi : 3rd Applicant

……....: For the 1st accused/applicant

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…….: For the 6th accused/applicant

…….: For the State/respon8dent