



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 30 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

DANIEL LUMONYI AMAITSA.....1ST ACCUSED/APPLICANT

ELIUD SUKURA SAMITA.....2ND ACCUSED/APPLICANT

TIMOTHY WAFULA LUMONJE.....3RD ACCUSED/APPLICANT

RULING

The three accused **Daniel Lumonyi Amaita**, **Eliud Sukura Samita** and **Timothy Wafula Lumonje** have applied to be released on bail pending trial. They are facing trial for the murder of one **Dennis Omondi Adari**. The offence is alleged to have been committed on 6th April 2011 at Unga House Building, Westlands in Nairobi County. Their respective applications are dated 30th November 2012 and are filed through the firm of **Aboki Begi & Co. Associates**. Each accused has sworn a supporting affidavit basically asserting their constitutional right to be presumed innocent until proved guilty and their right to bail pending trial.

All three applications are opposed by the State through the replying affidavit dated 26th June 2013 sworn by **No. 59366 PC Didacus Oyugi** who is the investigating officer in the case. He avers *inter alia* that the applicants are a flight risk; were likely to interfere with witnesses; and were likely to abscond given the strength of the evidence against them.

The Constitutional basis for the application is not contested. “**Article 49 (i) (h) of the Constitution** on which the application is grounded provides that “*an arrested person has a rightto be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.....*”. It is common ground that the right can be limited by the court where there are compelling reasons.

In this application, I have been called upon to deny the applicants bail for the reason they may abscond and not attend trial. **Ms Ikol**, the prosecuting counsel has submitted that the applicants may abscond as there was strong evidence against them which evidence was likely to lead to the conviction of the accused. It is her submission that eye witnesses saw the applicants assaulting the deceased and that because of such strong evidence the applicants may flee the jurisdiction of the court if released. It is her further submission that the applicants are of no fixed abode and if released may not easily be traced.

Mr. Begi for the applicants contests the position that the applicants were likely to abscond. He submits that the evidence against them is not weighty and that indeed the investigation had, vide the covering

report to the Director of Public Prosecutions recommended that the applicants be charged with assault. **Mr. Begi** drew the court's attention to a Replying Affidavit (sic!) sworn by a Mr. Lucas Michael Wamalwa of Dragon Agencies Limited. He explained that the deponent was an employer of the applicants.

I will first address the issue of the Replying Affidavit of Lucas Michael Wamalwa. Firstly, it is not clear in what capacity he has sworn the same. No linkage has been drawn between the deponent and the applicants in the affidavit.

Secondly, while the affidavit is stated to be a Replying Affidavit, its contents reveal that it is a supporting affidavit which again brings into question the deponent's capacity and authority to depose of the facts therein. From these observations, I consider the affidavit of Lucas Michael Wamalwa of no value to the present proceedings and have disregarded it.

On the contested issue whether or not the applicants may take flight if released, it is to be remembered that the purpose of bail is to secure the accused's attendance at trial. However, where the prosecution expresses fear that the accused may abscond, it has a duty to explain and demonstrate the basis of such fear to the satisfaction of the court.

From the facts and circumstances of this case, I am of the view that the State has explained and demonstrated the basis of its fear that the applicants are likely to abscond if released.

In the premises, I am persuaded to exercise my discretion to deny the applicants bail. Their respective applications dated 30th November 2012 are rejected.

Ruling delivered, dated and signed at Nairobi this 23rd

day of **September, 2013**

R. LAGAT - KORIR

JUDGE

In the presence of:

.....:	Court clerk
Daniel Lumonyi Amartsa :	1 st accused/applicant
Eliud Sukura.....:	2 nd accused/applicant
Timothy Wafula Lumonje.:	3 rd accused/ applicant
.....:	For the 1 st accused/applicant
.....:	For the 2 nd accused/applicant
.....:	For the State/respondent