



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 43 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

KELVIN MUTHU MWANGI alias KEVO.....1ST APPLICANT

JEFFERSON GIMODE alias SINDE.....2ND APPLICANT

STEPHEN WASHIORI MWANGI

alias SHIORI.....3RD APPLICANT

JOSEPH NJENGA THUO4TH APPLICANT

ANTONY MBURU KIARIE.....5TH APPLICANT

RULING

All five accused persons **Kelvin Kelvin Muthu Mwangi Alias Kevo, Jefferson Gimode Alias Sinde, Stephen Washiori Mwangi Alias Shiori, Joseph Njenga Thuo Alias D.B. and Antony Mburu Kiarie** are facing trial for the murder of one **Patrick Mubia Nyaga**. They are alleged to have committed the offence on 26th February 2013 at Dandora Phase II in Njiru District within Nairobi County. They all denied the charge when arraigned in court at different times. All five accused have now applied to be released on bail pending their trial which is yet to start.

In their respective applications, the applicants seek to be released on the basis of **Article 49 (i) h of the Constitution** which they state gives them the right to bail. They also ground their applications on the right to be presumed innocent until proven guilty. Thirdly, there is a suggestion running through their respective applications that their arrest may have resulted from mistaken identifies.

All the applications are opposed by the State through two replying affidavits sworn by **No. 79030 P.C. Philip Too**. The first affidavit dated 25th July 2013 is in respect of the 1st, 2nd and 3rd accused while one dated 31st July 2013 is in respect of the 4th and 5th accused. The applications were consolidated for hearing and were argued before me on 23rd September 2013 by **Mr. Muoki** for the 1st and 4th accused; **Mr. Mburu** for the 2nd and 3rd accused; and **Ms. Gulenywa** for the 5th accused. **Mr. Okeyo** made submissions on opposition on behalf of the State.

From the averments in the Replying Affidavits and the submissions of **Mr. Okeyo**, it is apparent that the State opposes the application on 3 grounds. The first is that the accused are a flight risk and if

released, they may disappear and not turn up for trial having not demonstrated their permanent residence. This fear is captured at paragraphs 5 and 7 of the Replying Affidavit. **Mr. Okeyo** explained the fear as stemming from the act that the applicants work as garbage collectors at the Dandora dump site where it is alleged that they attacked and beat the deceased to death.

I have paid critical attention to the fear that the applicants might abscond. In the State's view the applicants are deemed to be of no permanent residence since they work and probably live at the dumpsite. I have carefully considered averments in the respective supporting affidavits on this issue. The 1st applicant undertakes at paragraph 6 to abide by any bond terms and to attend court and the police whenever required. The 2nd applicant avers at paragraph 3 of his supporting affidavit that he is a resident of Dandora Phase 2 and a student at the Good Neighbours Kenya, a Vocational Training Centre. He has filed another affidavit sworn by one Evans Mugatsia Mahasi who avers that the applicant is his nephew and would stand surety for him if released. The 3rd applicant also avers to be a resident of Dandora Phase II where he lives with his mother one Philis Wanjiku who has also sworn a supporting affidavit to confirm the relationship and to undertake to stand surety.

For the 4th applicant Joseph Njenga Thuo, his advocate **Mr. Nyachoti** has sworn an affidavit stating that the applicant will attend court. On behalf of the 5th applicant, **Mrs. Gulenywa** who is counsel on record swore a supporting affidavit stating that he was a Kenyan of fixed abode with relatives willing to stand surety for him.

It is apparent to me from my perusal of the affidavits and the submissions of respective counsel that the accused persons have identifiable places of permanent residence and family contrary to the assertion by the State that they are of no fixed abode. It is my view that if the State wished to establish the foundation of its fears that the applicants have no fixed abode then it would have placed material before court to demonstrate the same. It is not enough for the State to merely suggest to the court that the applicants are of no fixed abode. I reject the suggestion as unfounded on the contrary. To accept the suggestion would imply that citizens from economically challenged backgrounds and residence cannot be trusted not to abscond if released on bail.

The 2nd reason the State opposes bail is that the situation on the ground is volatile and the applicants may be harmed if released. **Mr. Okeyo** submitted to the court that the death of the deceased was a result of a violent confrontation between two rival groups at Dandora dumpsite. While I may not discount such fear, I observe that the incident occurred early in the year and that the situation may have calmed down by now. In any case, the averments by the investigating officer to the effect that the situation is volatile demonstrates that the security agents are already aware of the situation and ought to, as mandated by law, put in place necessary security measures.

The third reason that the State opposes bail is the possibility of interference with witnesses. Other than stating that the witnesses come from the same area with the applicants, the State has not explained and demonstrated to the satisfaction of the court the basis of such fear.

In the premises I do find in this application that the State has not demonstrated to the court the existence of compelling reasons why the applicants cannot be released on bail.

I allow their respective applications on the following conditions:-

- i. Each accused person shall pay cash bail of Five hundred thousand shillings (Kshs.500,000/-) and one surety or in the alternative execute a personal bond of Kshs.500,000/- and 2 sureties of KShs.500,000/- each.
- ii. The accused persons shall not in any manner whatsoever interfere with the prosecution witnesses and any such interference shall lead to the automatic cancellation of this bond.
- iii. Upon release, they shall report to the Investigating Officer at Dandora Police Station once every two weeks until further orders of this court. A compliance report thereof shall be filed with the court by the Investigating Officer through the prosecutor during every routine mention of the case.

iv. The accused persons shall attend court for the mention of their case once before the Deputy Registrar every month. The first of such mentions shall be on 29th January, 2014.

Ruling delivered, dated and signed at Nairobi this 25th day of November, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:

.....:	Court clerk
.....:	1 st Applicant
.....:	2 nd Applicant
.....:	3 rd Applicant
.....:	4 th Applicant
.....:	5 th Applicant
.....:	For the 1 st applicant
.....:	For 2 nd and 3 rd applicants
.....:	For the 4 th applicant
.....:	For the State/respondent