



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO. 96 OF 2013

REPUBLIC PROSECUTOR

VERSUS

DAVID OCHIENG AJWANG alias DAUDI 1ST ACCUSED
ERIC OTIENO OJWANG alias FORD 2ND ACCUSED
NICHOLAS OTUNGA OTIENO alias ANEKO 3RD ACCUSED
BENARD SAMUEL MBOYA alias BENARD HUSSEIN 4TH ACCUSED
DANIEL OWINO OGANYO 5TH ACCUSED
JULIUS MAKAMBO OBADE 6TH ACCUSED
KENNEDY KISA OMWERI 7TH ACCUSED
JULIUS OTIENO DEYA ALIAS OGENDO 8TH ACCUSED
JANES OGALO OKETCH OLENGO 9TH ACCUSED
JOSEPH ODHIAMBO MAJIWA ALIAS JOSY..... 10TH ACCUSED
JOSEPH KEYA OMWERI 11TH ACCUSED
PAUL KOI ODEKO 12TH ACCUSED

RULING

1. The 12 accused persons herein, David Ochieng Ajwang alias Daudi, Eric Otieno Ajwang alias Ford, Nicholas Otunga Otieno alias Aneko, Benard Samuel Mboya alias Benard Hussein, Daniel Owino Oganyo, Julius Makambo Obade, Kennedy Kisa Omweri, Julius Otieno Deya alias Ogendo, Janes Ogalo Oketch Olengo, Joseph Odhiambo Majiwa alias Josy, Joseph Keya Omweri and Paul Koi Odeko are before this court charged with various counts of murder contrary to **section 203** as read with **section 204** of the **Penal Code**.
2. In Count I, all the 12 accused persons are charged with the murder of Elikana Gondi Syiongoh, the particulars being that on the 12th day of August [2013] at Nyarogi sub location in Migori County,

- jointly with others not before court, they murdered Elikana Gondi Syiongoh.
3. In Count II, it is alleged that on the same date and at same place all the 12 accused persons together with others not before the court, murdered Moses Magiri Amek. In Count III the 12 accused persons, together with others not before the court, and on the same date and in the same place, allegedly murdered Simon Gumbe Kalkacha.
 4. All the 12 accused persons pleaded not guilty to all the 3 counts and are now awaiting trial. All the 12 are represented by Kipkoech Bernhard Ngetich, Advocate who is duly instructed by the firm of Gordon Ogola, Kipkoech & Co. Advocates.
 5. In the meantime, and pending trial of their case, the 12 accused are seeking to be released on bail/bond on such terms as the court may determine.
 6. During the hearing of the application, Mr. Nyagwencha, for Mr. Kipkoech for all the accused persons urged the court to grant the application on grounds that:-
 - *bail/bond is a constitutional right unless the state can show that there are compelling reasons to disentitle the accused from being granted bond;*
 - *the mere fact that the situation on the ground may be volatile should not be used as an excuse to deny the accused persons their right to bond pending trial;*
 - *in any event, the State has a duty to protect all its citizens, among them the accused persons herein;*
 - *the fact that other suspects are still at large cannot be a reason to deny the accused persons their right to bond;*
 - *all the accused persons have families which wholly depend on them;*
 - *some of the accused persons and in particular A4, 7 and 11 are orphans and need to be released on bond;*
 - *A3, 6, 8 and 10 are sick from various diseases.*
 7. Counsel cited some 2 authorities to support the contention that there are no compelling reasons why the accused persons may not be released on bond. The court has carefully read those authorities namely **Nairobi High Court Criminal Case No.793 of 2010 – Aboud Rogo Mohamed & another –vs- Republic[20011] e KLR** and **Bungoma High Court Criminal Case No.55 of 2009 – Joctan Mayende & 3 others –vs- Republic** whose import is that in the absence of compelling reasons, an accused persons should be released on bond.
 8. The application is vehemently opposed vide the Replying Affidavit sworn by Number 231199 Chief Inspector Evans Sang on 29th August 2013. Among the reasons advanced against the bond application are:-
 - *the situation on the ground is extremely volatile following the brutal death of the deceased persons;*
 - *if the accused persons are released on bond, the release may result in negative anxiety in the community and same may result in violence;*
 - *the offence of murder is a very serious crime which carries the death penalty upon conviction;*
 - *there is high likelihood of the accused persons absconding if they are released on bail/bond;*
 - *there is a high likelihood of the accused persons interfering with witnesses if they are released on bond; and some witness interference has already been witnessed on the ground;*
 - *some witnesses may fear to testify if they see the accused persons roaming freely in their midst upon release on bail/bond;*
 - *the right to be released on bail/bond is not cast in stone as the same is subject to the discretion of the court;*
 - *the right to life is not a preserve for the accused persons but was also meant to be enjoyed by the victims in this case;*
 - *in considering whether or not to grant bail/bond, court ought to consider the huge public interest that this case has elicited;*
 - *the status of the accused persons is irrelevant in determining whether or not to grant bail/bond*
 9. Prosecution counsel Mr. Imbali relied on 2 authorities to support his arguments against the application. In **Nakuru High Court Criminal case No.90 of 2012 – Republic –vs- Sylas**

Kongor Kimeto, the court held that where the situation on the ground was volatile, it was safer to keep the accused person in custody for his own safety. It has also been the position of this court in **Kisii High Court Criminal case Number 72 of 2011 – Republic –vs- Joyce Kemuma Monchere & 2 others** that where the situation on the ground is said to be volatile, it is better to keep an accused person behind bars. Though this court appreciates the fact that it is the duty of the State to provide security to all its citizens it cannot shut its eyes to situations which are said to be volatile simply because the law provides that accused persons of whatever description have a right to bond. When the situation demands, the court may have to refuse the plea for bond in order to safeguard the lives of those who appear before it.

10. In the other case being **Nakuru High Court Misc. Criminal Application No.31 of 2011 – Joyce Wairimu Njuguna –vs- Republic**, the court set out the factors to be considered in an application for bond, namely:-

- *the seriousness of the offence;*
- *if the case is partly heard, the weight of the evidence so far adduced;*
- *whether the applicant will interfere with witnesses;*
- *the protection or safety of the applicant;*
- *whether the applicant will turn up for trial;*
- *whether there are any compelling reasons not to grant bond.*

11. In **Machakos High Court Criminal case No.70 of 2010 – Republic –vs- Kiteme Maangi**, the court quoted from the case of **Alhaji Dukubo-Asari –vs- Federal Republic of Nigeria, S.C. 20 A/2006** in which it was stated as follows:-

“The main function of bail is to ensure the presence of the accused at the trial ----. Accordingly, this criteria is regarded as not only the Omnibus one, but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.”

12. The Nigerian Court went on to say that the other considerations to be taken into account in considering applications for bond are not themselves reasons for granting or refusing bail, but are indicators of the possibility or otherwise of the defendant’s appearance; and that the greater the gravity of the offence, the more likely it is for an accused person to jump bail.

13. What then is the position in this case? It has been argued on behalf of the accused persons that because the right to bond is engraved in our Constitution, the court ought to grant the application herein. As already noted, the right to bond is not cast in stone, so that where circumstances dictate otherwise, bond shall be refused. In the present case, the prosecution is apprehensive that if the accused persons are released there is likelihood of:-

- *interference with witnesses;*
- *jumping bail;*
- *chaos and animosity in the community.*

14. In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the **Kiteme Maangi case** (above),

“Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being.

That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight----.

Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.”

15. I could not agree more with the learned judge’s view on the matter.

16. Other courts have reached similar conclusions where it was clear that the applicants for bond were a flight risk. See Nairobi High Court Criminal Revision NO.373 of 2012 – Republic –vs- Ahmad Abolafathi Mohammed & another, Hon. Achode J quoted a passage from the ruling of Warsame J (as he then was) in the case of Republic –vs- Muneer Harron Ismael & 4 others – Nairobi High Court Criminal Revision No. 51 of 2009 to the effect that:-

“In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused persons to answer the charges brought against him. The court was to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public.” Also see Aboud Rogo Mohamed & another –vs- Republic case (above)

17. Justice Achode also borrowed a leaf from South Africa where under section 60 (4) of their Criminal Procedure Code the courts would not be in a hurry to release accused persons on bond if the accused persons would on being released on bond:-

- a. **Endanger the safety of the public, or any person, or will commit a certain specified offence;**
- b. **Attempt to evade trial;**
- c. **Attempt to influence or intimidate witnesses or to conceal or destroy evidence;**
- d. **undermine or jeopardize the objectives or the proper functioning of the criminal justice system; or**
- e. **Where in exceptional circumstances there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security.”**

18. In the instant case, Chief Inspector Evans Sang who is the Investigating Officer has stated clearly in his affidavit that the lives of the accused persons will be in danger if they are released on bond because the situation on the ground is very volatile, and that on the 26th August 2013, an incident of animosity between the families of the deceased persons and the accused persons was reported to the police vide OB NO:17/26/8/2013 where one of the star witnesses was threatened with eviction by one Ojwang, father to the 2nd accused herein, Eric Otieno Ojwang alias Ford.

19. In my humble view and for the reasons above stated, the applications by the 12 accused persons to be released on bond pending trial have no basis and the same are accordingly dismissed.

20. The court will now proceed to fix the case for hearing.

21. Orders accordingly.

Dated and delivered at Kisii this 18th day of December, 2013

R.N. SITATI

JUDGE.

In the presence of:

Mr. T. Imbali for State

Mr. Nyangwencha for all 12 accused persons

Mr. Kasera - Court Clerk