



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 77 OF 2009

REPUBLIC.....

.....**PROSECUTOR**
VERSUS

MOHAMED SAMANA.....

.....**1ST ACCUSED**

GUNA KARISA.....**2ND**

ACCUSED

LELERUK JAMES.....**3RD**

ACCUSED

JOEL NGARE.....**4TH**

ACCUSED

RULING

1. There are four(4) accused persons in this case all of whom jointly face the charge of the murder of three persons, namely Adan Abshir Kassim, Mohamed Iman Kassim and Sammy Kinjoch. The first, second and third accused person, namely **MOHAMMED SAMANA, GONA KARISA AND LELERUK JAMES** took plea on the 17th day of August, 2009 and returned pleas of not guilty on all the three counts of murder. The offences are alleged to have been committed on the 26th day of July 2009 at Eldama Ravine/Mogotio Roads junction in Koibatek District of the Rift Valley Province. The fourth accused person namely **JOEL NGARE** did not take plea with his co-accused persons on 17/8/2009 as the state informed the court that he was at large and his whereabouts were not known then. A warrant for his arrest was issued on the same date, to wit, 17/8/2009 upon application by the state as is evident from the court record.

It is admitted by both sides that the fourth accused later presented himself to court on the 17/03/2010 and was accordingly charged with these offences of the murders of the three deceased persons named above. Fresh pleas were taken by all four accused persons and the hearing began afresh on the said date of 17/03/2010.

2. As at the 9th day of November, 2010 a total of ten (10) prosecution witnesses had given evidence albeit incompletely for the tenth witness who was stepped down for the purpose of obtaining some documentary evidence. In the meanwhile and pursuant to the promulgation of the New Constitution on 27/08/2010, the accused persons took out Notices of Motion under the provisions of part 2 and Article 49(1)(h) of the Constitution of Kenya praying that they be admitted to bond/bail pending their further trial. They have brought/raised the grounds that under the constitution of Kenya an accused person is

entitled to bail/bond pending trial and that they have unqualified constitutional right to be presumed innocent until the contrary is proved, there are no compelling reasons in their case as would result in the denial of bond/bail and that the main consideration whether or not to grant bail/bond is whether an accused will present himself in court during trial. The applicants have supported their applications by their separate Replying Affidavits.

3. The applications are opposed. The investigating officer of the case one CLEMENT MWANGI a police Corporal at CID has sworn separate Replying Affidavits in opposition to the applications for bail and states that, in the case of the first, second and third accused persons, they are police officers and they were charged with murder because there is evidence that will result in a conviction, that bond/bail as provided for in Article 49(1)(h) of the Constitution of Kenya is not absolute rather, it is a matter of discretion on the part of the court and that the right to life guaranteed to the accused persons must be viewed as against those of the victims. That if these applicants are released on bail there is danger that they will interfere with the remaining civilian witnesses leading to their relocation due to apprehension for their safety and this would lead to a miscarriage of justice. There is the further ground that the applicants face a very serious charge whose punishment is death in the event of a conviction and therefore the temptation to abscond is very high.

4. In the case of the fourth accused person the deponent of the Replying Affidavit, in addition to the above reasons given for the denial of bond/bail, adds that this accused person absconded and evaded arrest for a period of eight months following the incident and only re-appeared long after warrants for his arrest had been issued by this court. For all the four applicants the state added that they had prosecuted the case expeditiously and intent to do so until its determination.

5. Learned Counsel Mr Mongeri appearing for the 1st, 2nd and 3rd accused persons submitted that no compelling reasons were given to deny bail/bond. These persons have shown their places of abode, they have families and are civil servants albeit on interdiction and they have no intention to abscond, in the first place they surrendered themselves to the police after the incident, which they say happened in the course of duty as they quelled a crime. That it was not shown how they would interfere with formal witnesses, doctors and police officers, as the civilian witnesses had given evidence. Counsel concluded that his clients were not wealthy and they just cannot leave this country.

6. Learned counsel for the 4th accused Mr Ombetta submitted that his client is a Kenyan police Constable who is currently interdicted from duty because of this case. That his client will attend court when required if he is released on bond/bail. He knows the consequences of absconding and so he would avoid that course of action. Counsel added that his client willfully presented himself to court and not because of any warrants for his arrest which warrants were in any case not attached to the Replying Affidavit as proof of absconding. That his client reported to the police every 14 days and was not arrested. That nobody (witness) complained that the 4th accused interfered with them and in any event interference with witnesses has its consequences and the 4th accused would avoid those. Counsel added that mere imagination and suspicion do not make for compelling reasons and that the rights of accused persons should be as protected as those of the deceased and that time spent in incarceration is not capable of being compensated.

7. Mr Imbali learned Prosecuting counsel strongly opposing the applications relied entirely on the replying Affidavits adding that the State has a further 8 civilian witnesses whom the applicants can interfere with if released as well as some 40 police officer witnesses who because of being the accused persons colleagues would be easy to influence. Counsel did not think that much wealth is needed for one to abscond and as for the 4th accused, he only came to court once he was aware that he was being sought by the police, counsel concluded.

8. Things have changed. Whereas prior to 27/08/2010 those facing capital charges would not dream of thinking of bail/bond, post 27/08/2010 all criminal offences becameailable provided that the minimum threshold was met, to wit, absence of compelling reasons, thanks to the provisions of Article 49(1) (h) which states:-

“49(1)(h) An arrested person has the right to be released on bond/bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.”

‘Compelling reasons’ have not been defined but applying that word’s ordinary meaning “compelling” will not mean mere imagination, suspicion, apprehension, speculation or a fear and doubt. To my mind there must be some cogent evidence obliging a refusal of admission to bail/bond. The burden of showing the existence of such compelling reasons shall always remain with he that alleges their existence, the State. That burden would not shift to the accused applicant.

9. The issue this court has to resolve is whether the prosecutor has shown the existence of compelling reasons that would lead the court to deny admitting the applicants to bond/bail. And it will be borne in mind that an accused person’s right to bail/bond is not absolute for should there be compelling reasons to refuse bail/bond then naturally the same would not be availed to the accused/applicants.

The State’s case is that there is evidence that will lead to a conviction. Of course the weight of evidence against these accused persons is a primary consideration to be borne in mind for if there is evidence taking the direction towards a conviction then that would be a compelling reason to deny bond/bail for it is only natural and human that one would not willingly and sheepishly walk towards a sure conviction. Human nature would lead such an accused to bolt. Only ten (10) witnesses have given evidence this far and whilst I would not say that such evidence is a sure direction towards a conviction, I do not know what the remaining 49 witnesses have to tell the court about the accused persons’ guilt.

10. The ground that the accused persons would interfere with witnesses is not supported by antecedents on the part of the applicants. The incident occurred on 26/7/2009 and the accused/applicants were taken into custody beyond ten days later and there is no complaint received or given to court that witnesses who may have been known by that period were interfered with. In the case of the 4th applicant he was out for eight months and the court was not told what witnesses he interfered with.

The punishment of murder is still death as per the provisions of section 204 of the Penal Code. Severity of sentence is a major consideration when discussing bond/bail pending trial. However, the framers of the Constitution recognized the death penalty in Article 26 and preserved it there and nevertheless provided for bail/bond under article 49(1)(h). Even where the evidence against the applicant is truly water tight, death may not be the only available penalty for the offence of murder as there are those persuaded by the authority of **GODFREY NGOTHO MUTISO VR (2010) e KLR** to the effect that other sentences, and not just death, may be passed even where one is found guilty of murder. So that it is really not enough for the prosecutor to state that the penalty of death would make an accused person who seeks bail/bond a flight risk. There must be accompanying conditions to have bond/bail denied.

11. Any accused person who would be so foolhardy as to interfere with witnesses would do so at the risk of facing the legal consequences of his unlawful actions as already stated above. It appears to me that the above reasons are now shown not to be sufficiently compelling for the denial of bail in the circumstance of this case and particularly in respect of the 1st, 2nd and 3rd accused persons.

12. There is the omnibus criteria for the court’s consideration – the major one and it is whether the accused person if released on bail, will attend at his trial. This is the paramount reason which if it was shown that an accused would skip his case if released on bail, then bond/bail would most definitely be denied – see the cases of **WATORO –VS- REPUBLIC (1991) KLR 220** and the Malawian one of **ROY MONGAME VR MSCA Criminal Appeal no. 27 of 2005**. Nothing has been shown, in respect of the first three accused persons, that they would not attend court at their trial. Not so for the 4th applicant.

13. The 4th accused has it on record that he presented himself to court on 17/3/2010 for an offence that occurred on 26/7/2009 and which was widely publicized. His Counsel submitted that the 4th accused presented himself regularly to the police for reporting as required of him and although it was said that a warrant for his arrest was out since 17/8/2009 he was not arrested. If indeed a warrant for his arrest as ordered issued by the court on 17/8/2009 was indeed taken out as ordered, then it would appear that either

the 4th accused was not arrested because he could not be found as alleged by the prosecution or that he influenced his non-arrest. And whereas the 4th accused has no burden to discharge as to the existence or otherwise of a compelling reason for the denial of bail, his absence from court for a period of a whole eight (8) months in a case where his colleagues on duty on 26/7/2009 were standing trial for what happened that night, and the publicity given to the case, and the fact that all the four accused persons were police officers in the same station, and the 4th accused would surely have known what befell his colleagues whom he worked with the fateful night, leads this court to one conclusion, that the 4th accused knowingly stayed away from the due process of the law and his such conduct must be taken against him. The interest of justice must require that to be done.

In the end this court orders as follow:-

The first, second and third accused persons are hereby admitted to bond/bail on the following conditions:-

- (a) Each of them will pay a cash bail of Kenya Shillings five (5) million or in the alternative,
- (b) Execute a personal bond of Kenya Shillings five (5) million with two sureties of a similar sum,
- (c) Report to Nakuru Police Station on every second Tuesday of the month with effect from 14/02/2012 and attend court for mention once a month with effect from 29/2/2012.
- (d) They will make no contact whatsoever with any witnesses in this case including those that have already given evidence.
- (e) Default/breach of any of the terms/conditions above will result in an automatic recall of the bond/bail herein granted.

For the reasons already given above bond/bail is refused in respect of the 4th accused/applicant.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI,

THIS 16TH DAY OF JANUARY 2012.

P.M. MWILU
JUDGE

In the presence of:-

..... Counsel for the State
..... Counsel for the 1st, 2nd and 3rd
..... Accused
..... Counsel for the 4th Accused
..... Court Clerk

P.M. MWILU
JUDGE