REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 91 OF 2011

REPUBLIC……..……..... ……..PROSECUTOR

VERSUS

MUSILI DEWROCK KITHOME…….....…….1ST ACCUSED

SIMON KIKWAI MEREBU…….....……2ND ACCUSED

RULING

1. IBRAHIM OMBASA and NYAMBERI OMBASA died on the 23rd day of November, 2011 from bullet injuries sustained at about 3.00 am that day at Kawangware 46 of Dagorreti District within Nairobi. Former Policemen MUSILI DEWROCK KITHOME and his colleague SIMON KIKWAI MEREBU now stand trial for those deaths, being charged with murder of the two deceased persons contrary to the provisions of section 203 as read with those of section 204 of the Penal Code chapter 63 of the Laws of Kenya.

2. The two accused persons have each taken out separate Notices of Motion expressed to be brought under the provisions of Articles 20,22,27,28,29,49 and 50 of the constitution of Kenya and under the provisions of sections 123,124 and 125 of the Criminal Procedure Code chapter 75 of the Laws of Kenya. Those applications are brought under certificates of urgency. They pray that the two applicants be admitted to bond or in the alternative to cash bail upon reasonable terms so that they may be released on bond pending the hearing and determination of the murder trial. The applications are supported by the affidavits of the 1st accused person for himself and by that of NANCY CHEPKORIR KIKWAI the wife of the 2nd accused person for and on behalf of the 2nd accused with his authority. No reason is given as to why the 2nd accused could not swear the affidavit himself but no matter, that affidavit is no less admissible as if it had been sworn by the 2nd accused himself, sworn as it is with his authority and on his behalf.

3. The grounds given in support of the applications are that the offence with which the accused/applicants are charged is bailable under the constitution and the applicants are ready and willing to abide with any bail terms and conditions as may be set by the court. That they are law abiding Kenyan citizens with families in Kenya and that they are not a flight risk and they are ready and willing to attend court or any other place as may be ordered by the court as a condition for granting bail. They further aver that they would not interfere with investigations or the prosecution of the case and that no compelling reasons for their being denied bail exist.

4. The affidavits in support of the applications elaborate those grounds adding that the applicants are bread winners of their families and supporters of their own siblings. That they have never been on the wrong side of the law and have neither previous convictions nor disciplinary past with their

employer. That they acted in self defence and immediately thereafter co-operated with law enforcement officers and now that they have been dismissed from the police force they have no access to guns and are not a threat to anyone. If released on bail they would relocate to their rural homes away from the scene of the incident and witnesses.

5. In opposing the bail applications one of the police investigators CPL JOHN NJERU of the CID Nairobi Area deposed in his Replying Affidavit that the applicants being police officers are a security risk and are likely to interfere with potential witnesses. His other reason for denying bail is that their case is one of much public interest and as such if the accused persons are released on bail they are likely to be injured by members of the public wherever they (applicants) may be, and hence the court should not wish away the accused persons' own security.

6. The court heard and considered all the material placed before it by way of affidavits and oral submissions of all the counsel herein appearing for their respective parties and is now in a good position to render itself, after also giving enough consideration to the authorities the court was referred to.

7. The starting point has to be the provisions of Article 49(1)(h) of the Constitution of Kenya which provides:-

"49(1)(h) 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."

8. There is no denying that the above provision of the Constitution does not confer on an accused person an automatic absolute right to bond/bail and hence the further provision requiring that where compelling reasons exist to deny bail to an arrested or accused person then bond/bail shall be denied. The burden to prove the existence of compelling reasons for the denial of bail/bond always remains the Prosecutor's. In discharging that burden the prosecution must satisfy the court that there are compelling reasons not to admit the accused to bail/bond. It cannot help to merely drop the allegation that there are compelling reasons, they must be stated and explained by the prosecutor to the satisfaction of the court, which at all times retains its judicial discretion to determine whether or not to admit an accused to bail/bond, in all cases the decision of course depends on the unique circumstances of each ease.

9. Case law has established some criteria, not by any means an exhaustive one, which courts must consider when dealing with the issue of the grant or denial of the bail/bond and they are; the nature of the charges, the strength of the evidence which supports the charge, the gravity of the punishment in the event of conviction, the previous criminal record of the accused, if any, the probability that the accused may not surrender himself for trial, the likelihood of further charges being brought against the accused, the probability of guilt, detention for the protection of the accused and the necessity to procure medical or social report pending final disposal of the case – see the Nigerian Supreme court case of **ALHAJI MUJAHID DISKUBO ASARI –VS- FEDERAL REPUBLIC OF NIGERIA SC 20A/2006.**

10. It now is common ground that the paramount consideration – the omnibus one – the mother of all the criteria in paragraph 10 above – is whether or not the accused will present himself/herself at his/her trial see **WATORO – VS – REPUBLIC (1991) KLR 220** at page 283 and the words of Justice Niki Tobi in the Nigerian case of **ALHAJI MUHAHID DUKUBO (Supra).**

11. In the case under consideration the reasons given by the prosecution for the denial of bail/bond are that the accused persons are police officers and hence security risks and likely to interfere with potential witnesses if admitted to bail/bond. In the submissions of counsel for the state it was urgent that these accused persons can access guns with ease and that the case is of great public interest and they must be held in custody for their own safety as it has been known for persons on bail/bond being murdered. The court was also told that the suffering of the victims' families and their anguish must be considered and that now that the accused persons have tasted jail (must have meant prison custody!) the accused persons may never come back for trial. This court's answer to the above is that, it is not enough to allege, the prosecutor must prove the existence of compelling reasons for the denial of bail/bond. That is the least that the Constitution requires. I do not understand 'compelling' to mean a likelihood that may or may not

be, guesswork or a fear or doubt that the accused will not attend trial. 'Compelling' means the opposite of all that, it is the opposite of whimsical thought or imagination, it means powerful, irresistible, obliging, overpowering, forceful, constraining and providing a strong motive. To my mind therefore the prosecution must give such reasons as carry the above adjectives so as to have bond/bail denied. Again, it cannot help to merely drop an allegation that there are compelling reasons, to me these allegations must be substantiated to the satisfaction of the court for bond/bail to be denied. I doubt that the intention of the drafters of the 2010 Constitution were that it would be enough for the prosecutor to state "compelling" and thereby bond/bail is automatically denied. That beats common sense.

12. That the applicants are security risks has not been shown to be so. Nothing more was said after the mere making of the statement. The Replying Affidavit sworn by PC NJERU was sworn on 15th December 2011 by which time the applicants had long been dismissed from the Police Force on 5th December 2011 as per the annexture marked "DMK – 1" which Corporal Njeru ought to have seen by the time of swearing his Replying Affidavit.

Additionally, I am not aware of any provision of the law that states that a policeman per se is a security risk. There must be equality before the eyes of the law. These accused persons should not, indeed cannot be discriminated against merely because they are (in this case were) policemen. They shall remain presumed innocent until and/or unless the contrary is proved as required by Article 50(2) of the Constitution. The ground of security risk must fail and is hereby declared a non issue in this case.

13. The court was told that this case is of great public interest and that members of the public would harm the applicants, wherever the applicants would be, if they are released on bail. Firstly, that sort of thinking in this day and age is medieval stone-age thinking. Everyone is obliged to obey the law and no self respecting law abiding citizen would take any cause of action that is unlawful. And should a misguided Kenyan do that, then of course the law would take its due process and course. Further, Articles 29(C) and 238 of the Constitution enjoin all security organs to secure the safety of all kenyans, their state in life notwithstanding. Additionally, public interest in a case cannot surely override the clear provisions of the law [read article 49(1) (h)] and bring about discrimination. Nor can the anguish and suffering of the victims' families obliterate the presumption of innocence of the accused/applicants. An accused person can only be tried by a court of competent jurisdiction and not by a public devoid of the requisite power so to do.

14. The issue of interference with witnesses in this case is not a difficult one to handle. Firstly the accused persons state that now that they have been dismissed from the police force they have no business remaining in Nairobi and will relocate to their known respective rural homes if released on bail. I want to add that interference with witnesses is itself a criminal offence with consequences. It has not been shown by the prosecutor that these applicants have a past indicative of criminal activity or that they have the propensity to interfere with the path of justice.

15. In the result I come to the only conclusion available in the circumstances of this case that no compelling reasons have been shown to exist for the denial of bond/bail in this case. I find that the interest of justice, and justice cuts both ways, would require that these two accused persons be admitted to bond/bail pending their trial and I hereby do so admit them to bail on the following conditions:-

1 (a) Each of the accused person/applicant shall pay a cash bail of Kenya shillings one million and five hundred thousand shillings (Kes 1,500,000/=) or in the alternative,

(b) Execute a bond of Kenya Shillings three million (Kes. 3,000,000) with a surety of a similar amount,

2. Deposit his passport and/or travelling documents with this court,

3. Will not leave the jurisdiction of this court save with the prior leave of the court being first had and obtained,

4. Shall not have any contact with the prosecution witnesses whatsoever.

5. Will attend this court for mention once a month until the case against him is heard and determined. The first such mention shall be on 16th day of February, 2012.

6. A violation of any of the above conditions shall automatically discharge and cancel the bail/bond herein above granted.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI

THIS 16TH DAY OF JANUARY 2012

P.M. MWILU
JUDGE

IN THE PRESENCE OF:-

…….. Advocate for the 1st accused/applicant

…… Advocate for 2nd accused/applicant

…….. State Counsel

…….. Court Clerk

P.M. MWILU
JUDGE