REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Criminal Case No. 14 Of 2010

REPUBLIC..... PROSECUTOR

VERSUS

AHMED MOHAMMED OMAR.....1ST ACCUSED

AHMED ABDALLAH SHAFFI .....2ND ACCUSED

MICHAEL NGUNGU LEWA .....3RD ACCUSED

MOSES LOCHICH .....4TH ACCUSED

NELSON KIPCHIRCHIR TOO .....5TH ACCUSED

ERICK EBERE MELCHIZEDEK .....6TH ACCUSED

ALEX MUTETI MUTISYA ..... 7TH ACCUSED

RULING

Six of the seven accused persons have filed applications for bail pending trial. The six are **AHMED MOHAMMED OMAR; MICHAEL NGUNGU LEWA; MOSES LOCHICH; NELSON KIPCHIRCHIR TOO; ERICK EBERE MELCHIZEDEK; and ALEX MUTETI MUTISYA.**

The second accused, **AHMED ABDALLAH SHAFFI**, did not file any application.

Mr. Esmail advocate argued the application for the 1st accused, whilst Miss Machuki advocate argued the application for the 3rd, 4th, 5th, and 6th accused. Mr. Esmail also held brief for Mr. Muoki, the learned advocate for the 7th accused.

However, as the application for the 7th accused was yet to be served upon the respondent by the date when the other applications were being canvassed, it does not form a part of this Ruling. In other words, this Ruling is in relation to the applications by the 1st, 3rd, 4th, 5th and 6th accused persons.

The 1st accused pointed out that he has a permanent residence in Nairobi. He is married and they have two children.

His immediate family together with his parents, both of whom were over 80 years old, were said to depend on him for their sustenance.

Meanwhile, although he was a member of the Kenya Administration Police Service, he had been interdicted because of the criminal case herein. Therefore, the 1st accused says that he has no access to firearms.

He therefore submitted that he ought to be granted bail as the prosecution had failed to provide any compelling reasons to warrant a denial of bail.

It was further submitted that because the death penalty was not the only sentence available for a person convicted for the offence of murder, it cannot be argued that such a sentence would, of itself, be a compelling reason.

The 1st accused also pointed out that the prosecution had failed to provide this court with any evidence to show that a widow had been threatened by him.

Finally, the court was told that all civilian witnesses had now testified. Therefore, the 1st accused believes that there is no real ground to fear that any of the remaining "formal" witnesses could be influenced or intimidated.

He asked the court to grant him bail, on reasonable terms. He then gave an undertaking that he would present himself for trial whenever he was required by the court.

Meanwhile, the 3rd, 4th, 5th and 6th accused persons raised issues which were largely similar to those raised by the 1st accused.

They emphasized that in law, they are all presumed innocent until the prosecution proved otherwise.

Therefore, the accused persons feel that their continued stay in custody amounted to punishment before conviction.

As far as they were concerned, their right to liberty ought not to be curtailed when the law says that they are presumed to be innocent.

Each of the applicants is a citizen of Kenya. Their respective nuclear as well as extended families are said to be resident in Kenya. They therefore submitted that they have no reason to abscond.

Even though the law provides that if convicted for the offence of murder, a person may be sentenced to death, the applicants argued that they have the belief that their innocence would lead to an acquittal; not a conviction.

If, as the prosecution asserted, any witness had been threatened, the applicants contend that such threats should have been investigated and then appropriate action taken against any person responsible for such threats. Meanwhile, the applicants deny being responsible for any threats to any prosecution witness.

As the applicants believe that the prosecution has failed to make available any compelling reasons to warrant a denial of bail, they asked me to grant them bail, so that they could enjoy their presumption of innocence.

Mrs. Aluda, learned state counsel, opposed the applications. She placed reliance upon the Replying Affidavits sworn by the Investigating Officer, PC Josephat Muriuki.

First, the respondent pointed out that the charges were only preferred against the accused persons after the state had given consideration to all the evidence available. In the mind of the Respondent, the evidence available was sufficient to lead to the convictions of the applicants.

This court was invited to exercise its discretion to either grant or reject the application for bail in a manner that recognized the victim's right to life.

Indeed, the Respondent pointed out that its the state which spoke for the victims, who were already in their graves.

If the applicants were granted bail, the Respondent fears that the said applicants may manipulate or intimidate their colleagues who are yet to give their evidence. If that happened, the Respondent submitted, there would arise a miscarriage of justice.

This court was told that some witnesses had already been intimidated, so that they had refused to record statements, because they feared for their lives.

Meanwhile, the prosecution pointed out that it had always acted in a manner which had made it possible for the applicants' trial to proceed expeditiously. If there had been any delays, the same were said to have been caused by the advocates for the accused persons.

The Respondent said that they have only six (6) more witnesses to testify for the prosecution. Therefore, they expect that the prosecution would close its case when the case next came up for further hearing.

The Respondent also submitted that much as the applicants wish to attend to their respective families, the victims left behind widows and orphans who had nobody to take care of them.

Finally, the prosecution asked this court for an opportunity to conclude the case without the possibility of any interference in the flow of the said case.

When called upon to reply to the Respondent, Mr. Esmail advocate submitted that the prosecution had not demonstrated how the grant of bail would result in any interference.

It was also emphasized that it is only the court, (and not the prosecution), which had the role of determining the question as to whether or not bail ought to be granted in any particular case.

On her part, Miss Machuki advocate asserted that the prosecution was seeking to condemn the accused persons before they were convicted.

Even though there were 7 victims who left behind their widows and children, the applicants say that they were not responsible for the deaths of the said victims.

In determining these applications, I must begin by placing them within perspective.

The applicants are all members of the Kenya Adminisstration Police. They have each been charged with 7 counts of murder. They are said to have committed the offences along

Naivasha Road, Kawangware, on 11th March 2010.

Each of them pleaded "Not Guilty" to all the charges. The said pleas were taken on 17th March 2010. The case was then set down for hearing on 27th, 28th, 29th and 30th September 2010. Meanwhile, the court ordered that the accused persons be held in custody.

On 27th September 2010, three witnesses testified. On the next day, four more witnesses gave their evidence.

On 29th September 2010, two witnesses gave evidence. As the court was not going to be available on 30th September 2010, the case was adjourned to 14th October 2010, for mention, when the court expected to fix dates for further hearing.

On 14th October 2010, the 1st accused canvassed his first application for bail pending trial.

The Ruling on that application was delivered on 8th November 2010, when the court rejected it.

The case was then fixed for further hearing on 14th, 15th,16th and 17th of February, 2011.

As fate would have it, the Judge who was handling the case was moved from the Murder Section to the Appeals Section of the Criminal Division of the High Court. It therefore became necessary for appropriate Directions to be given on the manner in which the further hearing of the case would be conducted.

Regardless of the fact that the trial Judge had been assigned the responsibility of hearing appeals, it was directed that he would also continue to hear this case. Consequently, the case was set down for hearing on 30th and 31st May, 1st and 2nd of June, 2011.

Regrettably, however, the prosecution failed to bond any witnesses for 30th May 2011.

The case was then put-off to 26th September 2011, for further hearing. But because the Judge was assigned to also hear appeals on that date, it became necessary for him to consult the learned Principal Judge on how best to proceed.

After the requisite consultations, it became possible to fix dates for further hearing, because it was decided that when this case was listed for hearing, the trial Judge would not be assigned other cases on the same dates.

On 17th November 2011, a total of five prosecution witnesses testified. Thereafter, the case was put-off to 6th February 2012.

Three (3) witnesses testified on 6th February 2012.

On the next day, the prosecution had 5 witnesses in court. However, because Mr. Ombeta, the learned advocate for the 2nd, 3rd, 4th, 5th and 6th accused persons was indisposed, the trial could not proceed.

On 8th February 2012, three witnesses gave evidence. Thereafter, the accused persons applied to the court for orders terminating the proceedings. The application was premised on some discrepancies between the witness statement provided to the defence and the original which the prosecution had.

In a considered ruling, the court rejected the application.

On 9th February 2012, the prosecution was ready to proceed, but Mr. Muoki, the learned advocate for the 7th accused, was absent until about 9.30a.m.

The cross-examination of **PW 20** was concluded. Thereafter, two other witnesses testified.

On 14th March 2012, the applications for bail pending trial were canvassed. It is those applications which are the subject matter of this ruling.

I have first set out the history of the trial so far, to bring into perspective the applications before me.

As the prosecution pointed out, they have only six more witnesses, after the other twenty-two testified. Secondly, the further hearing of the case is scheduled for the 14th, 15th,16th and 17th of May 2012.

Given the history of the trial so far, I believe that it should be possible to conclude the prosecution case within a period of 2 days. However, the court deliberately allocated 4 days for the remaining six witnesses, because I want to make sure that the prosecution concludes its case when the trial resumes.

In the Ruling dated 8th November 2010, I restated the following words of Fariss C.J. from the case of REX Vs HAWKEN (1944) 2 DL 12 116;

"The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent, and the object of keeping him in custody prior to trial is not on the theory that he is guilty, but on the necessity of having him available for trial. It is proper that bail should be granted when the Judge is satisfied that the bail will ensure the accused appearing at his trial."

Therefore, when the court denies bail to an accused person pending his trial, the court is not to be deemed to be punishing him before he is convicted. The court would only have been taking a necessary step to ensure that the accused person would be available at his trial.

Meanwhile, it is evident from the Ruling I delivered on 8th November 2010 that one of the main reasons why the 1st accused was denied bail was that civilian witnesses had reason enough to have genuine fear, if the said accused was granted bail because he would then be moving around freely in circumstances in which he could have access to a gun.

But all the applicants now say that they were interdicted from their jobs, after being charged in this case. They therefore say that they will have no access to guns, even if they were granted bail.

In any event, the applicants said that civilian witnesses have all testified.

But the respondent invited this court to find that there is still a danger that the applicants would manipulate or intimidate the remaining six witnesses. In an endeavour to demonstrate the basis for that fear, the Investigating Officer deponed that even the witnesses who were Administration Police Officers could be manipulated or intimidated, as had allegedly happened to **PW 17**.

But in the same vein, the Investigating Officer appeared to have been suggesting that the said **PW 17** was simply;

"trying to distort the truth with an attempt of helping the accused persons by poisoning the court's mind by contradictions. . . "

If the contention of the Investigating Officer be true, this court would have expected particulars of the steps taken against **PW 17**. I say so because the assertions being made against that witness suggest that he might be culpable for the offence of Conspiracy to defeat justice.

Curiously, however, the respondent did not point at any particular accused person as the person conspiring with **PW 17**.

If anything, the position taken by the respondent appears to suggest that the respondent simply has some fears or suspicions against the accused persons, for some role in the manipulation or intimidation of witnesses.

Fear or suspicion can never be a substitute for evidence. In other words, it is not enough for the prosecution to say that there was a danger, without offering some reasonable foundation for the position taken by the prosecution.

The Investigating Officer did say that one of the widows had reported to him that she had received threatening calls.

Not only was the identity of the widow kept away from the court, but the prosecution did not also indicate which of the accused persons is alleged to have made the calls.

If the prosecution chooses to remain opaque, it would have only itself to blame if the court should find that the prosecution had failed to demonstrate compelling reasons that would warrant a denial of bail.

As the applicants pointed out, it is not the prosecution that has the mandate to determine what constitutes a compelling reason. The mandate to make that determination vests solely on the court. And when evidence is withheld from the court, it cannot form the basis for the court's decision on an application for bail.

I have no reasons in law or in fact for finding either that any of the accused persons had manipulated or intimidated **PW 17**; or that any of the accused persons had made threatening calls to one of the widows to the 7 deceased persons connected to this case.

Had those been the only matters to be taken into account in determining the applications, I would not have hesitated to grant bail.

However, there is already before me the evidence of 22 witnesses. Without purporting to determine (prematurely) whether or not there was sufficient evidence to warrant placing the accused persons on their defence, I can state, without any fear of contradiction that the lines of cross-examination adopted by the accused so far, suggests that they confirm having been present at the scene of crime when the 7 victims were shot dead.

They only appear to be suggesting that their actions were justified, in the circumstances prevailing.

In my considered view, those factors, coupled with the fact that within the next few days the applicants will probably know whether or not they had a case to answer, militates against the grant of bail.

Accordingly, the applications for bail pending trial are rejected.

Dated, Signed and Delivered at Nairobi, this 2nd day of May, 2012.

.....
FRED A. OCHIENG
JUDGE