**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Criminal Case 5 of 2012**

**REPUBLIC …….....…….....PROSECUTOR**

**VERSU**

**1. JOSEPH WANJOHI NDUNG'U 2. NAFTALI MWAIKA LIMBOLO**

**3. STEPHEN MUCHOI LIMUKI** alias **ASKOFU….....……ACCUSED**

**RULING**

The applicants, **Joseph Wanjohi Ndung'u, Naftali Mwaika Limbolo** and **Stephen Muchoi Limuki** are charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the applicants on 12th January, 2012 at Bissil Trading Centre in Kajiado District within Kajiado County jointly murdered **Joshua Nkuruna.** The applicants entered a plea of not guilty and their trial was scheduled for 31st May, 2012.

On the said date however, the trial did not take off. In the meantime, the applicants under a certificate of urgency filed an application for bail pending trial dated 7th June, 2012. The application was brought under articles 21(1) and 49(1) (h) of the Constitution of Kenya. The grounds in support thereof were that the applicants were by law presumed innocent till proven guilty, it was only fair and in the interest of justice that the application be granted and finally, that the applicants would suffer irreparable harm by staying in custody before the determination of their case.

In support of the application, the 1st applicant swore an affidavit on his own behalf and on behalf of the other applicants. Where pertinent, he deponed that they came from Nyeri County, that remaining in custody had curtailed their freedom, that they had constitutional right to bail as they were presumed innocent until proven guilty and finally, that there were no compelling reasons which would work against them being released on bond.

The State opposed the application. Through an affidavit sworn by **Cpl Onesmus Kyalo Kimeu,** the investigating officer in the case, the State stated that the applicants since being charged with the offence had been supplied with witness statements. Therefore they were aware of the evidence against them as well as the weight of the prosecution case. The applicants resided at Bissil, the same village where the prosecution witnesses resided and or conducted business. The State was therefore apprehensive that the applicants may interfere or tamper with witnesses and in the process prejudice its case. The offence was serious carrying with it a death penalty in the event of conviction. That sentence on its own was an incentive for the applicants to abscond. Though the offence was bailable, the grant of bail was nonetheless not absolute but a matter for the discretion of the court. Finally, the State deponed that considering the serious nature of the offence and the severity of the sentence, this court should find that these were compelling reasons as to why the applicants should not be released on bail.

When the application came before me o 15th June, 2012 for *interpartes* hearing **Mr. Kimeu**, learned counsel for the applicants and **Mr. Mukofu,** learned State Counsel consented to canvassing the application by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

It is trite law that the right to bail under article 49(1)(1) (h) of the Constitution is qualified by compelling reasons. It is upon the State to demonstrate the existence of such reasons. The reasons may include, the nature of the charge, the strength of the evidence in support of 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 the accused interfering with witnesses or suppress the evidence, that may incriminate him, likelihood of further charges being brought against him, the probability of a guilty verdict and detention for his own protection.

The State in opposing the application has relied on the ground that the offence charged was serious carrying with it a death penalty in the event of conviction. This will act as an incentive for the applicant not to surrender themselves for trial. If anything, they will be tempted to escape. The State too believes that the applicants are likely to interfere with the witnesses having been supplied with witnesses statements and being in the know of the strength of State's case.

Having carefully considered the application, rival affidavits and submissions on record, I am satisfied that the application has merit. Ofcourse the applicants are entitled to bail on reasonable terms pending trial, unless there are compelling reasons not to be so released. The burden to show compelling reasons against release if any lies with the State and in the absence of such, the accused is entitled to bail as of right. In my view, the State has not demonstrated to my satisfaction compelling reasons why the applicants should not be released on bail. Yes, the offence may be serious. However, that *perse* cannot be a hindrance to the grant of bail. It is pure speculation by the state that because of the seriousness of the offence, the applicants may be more inclined to escape from trial. Again it is pure speculation that applicants are likely to interfere with witnesses. Even if that assertion was true, the court can still impose terms when granting bail as will make it practically impossible for the applicants to do so.

Accordingly, I allow the application on the following terms:-

§ Each applicant is released on a personal bond of Ksh. 500,000/= plus one surety in the same amount to be approved by the Deputy Registrar of this court.

§ Each applicant shall be reporting to the officer incharge (OCS) of the Police Station that originated the information every Tuesday of every week until the case is heard and determined.

§ Each applicant shall attend the mention of this case every after 30 days. The first of such mention will be on **29th October, 2012.**

**DATED, SIGNED** and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

**ASIKE MAKHANDIA**
**JUDGE**