



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Criminal Case 22 of 2012**

**MOHAMED MOHAMUD ABDI.....1<sup>ST</sup> APPLICANT**

**ABDI ALI ABDI.....2<sup>ND</sup> APPLICANT**

**ADAN ISSAK DIMA.....3<sup>RD</sup> APPLICANT**

**ABDI GUSLEY.....4<sup>TH</sup> APPLICANT**

**MOHAMUD ISAK SOFA.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This is a bail application by the four accused persons. They all face the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge show that the offence is alleged to have been committed between 19<sup>th</sup> and 20<sup>th</sup> May 2012 at Lagbadhana area in Konoramadha Sub-location Bura in Tana River District of Tana River County. The victim of the alleged crime is one Abukar Aden. The application is based on the provisions of Articles 49 (1) (h) and 50 (2) (a) of the Constitution of Kenya 2010.

2. The application was filed on behalf of the applicants by learned counsel who has deposed in the supporting affidavit sworn on 14<sup>th</sup> September 2012 that accused number one lives with his wife and six children in their property at Madongo; that accused number two is a shopkeeper and lives in his family home in Madogo where he has deep family roots; that accused number three has family roots in Mandera where his parents live and at the time of his arrest he was living and working as a farm-hand in Madogo; that accused number four is a refugee who at the time of arrest was working as a farm-hand within Madogo and that accused number five has family roots in Mandera, is divorced with one child. In addition to the supporting affidavit learned counsel for the applicants made oral submissions that the current law permits bail for murder suspects on certain conditions to be set by the court unless there are compelling reasons not to allow bail; that the responsibility of demonstrating the existence of those compelling reasons is placed on the prosecution; that the reasons advanced by the prosecution in the

replying affidavit that some of the witnesses are related to the accused persons and their security might be compromised does not qualify to be compelling reasons; that the basic principle to be considered in bail applications is whether the accused person will turn up for the hearing of his case and the issue of interfering with witnesses or security of witnesses has not been considered reasons enough to deny bail; that there is no evidence that any of the accused persons has interfered or has attempted to interfere with witnesses.

3. The application has been opposed by the state. In the replying affidavit sworn 16<sup>th</sup> October 2012 the investigating officer Chief Inspector Joseph Osugo deposes that the accused persons have been adversely mentioned by majority of witnesses who are also known to the accused persons; that if released on bail they may interfere with the witnesses and that the security of the witnesses cannot be guaranteed. In addition to the replying affidavit learned state counsel submitted that the witnesses, too, have a constitutional right to security and fair administrative action; that it has not been demonstrated that the accused persons will co-exist peacefully with the witnesses if released; that there are compelling reasons to deny the accused persons bail.

4. The current position in our country is that bail is a fundamental right guaranteed in our progressive constitution to all the accused persons. This right is however not absolute. It can be denied by the court if there is proof of compelling reasons. A compelling reason is a reason that is convincing and that makes one feel that some action must be taken about it. It is a forceful reason that demands attention. Courts have granted or denied to grant bail after considering the following:

- i. Whether an accused person will turn up for the hearing of her/his case until the matter is concluded.
- ii. The nature of the charges facing the accused.
- iii. The strength of the evidence supporting the charge.
- iv. The gravity of punishment in the event of conviction.
- v. Any previous criminal records of the accused.
- vi. Presumption of innocence of the accused until she/he is proved guilty.
- vii. Safety of the accused person upon release.
- viii. The likelihood that the accused will interfere with the witnesses.

5. Our courts have placed more weight on whether an accused person will turn up for the hearing of her/his case until the matter is concluded as a consideration of paramount importance. In this case the prosecution rely on security of witnesses and the likelihood that they will be interfered with. Interfering with witnesses is not a compelling reason in my view especially where there is no evidence to prove the same. Accused persons are members of society just like witnesses and where there is a crime committed the two will in most cases be connected. There will always be the offender or suspect and someone who says that is the offender or suspect. Cases come to court so that evidence can be adduced to confirm or otherwise if the suspect is the offender. This is where the doctrine of innocence until proven guilty comes in. If courts were to deny bail because suspects and accused person will interfere with witnesses for reasons that they have been adversely mentioned with no proof of the same no accused person would be released on bail/bond. The view I take is that unless the State presents factual evidence that the suspect/accused has interfered with witnesses either by threatening them or in any other manner then it is not enough to claim this is the case. There will always be fears of interference of witnesses but without evidence these will remain unconfirmed fears.

6. The same reasoning goes for the security of witnesses. There must be factual evidence to support such allegations. For instance the offence in this case is alleged to have been committed between 19<sup>th</sup> and

20<sup>th</sup> May 2012. The accused persons were arraigned in court on 18<sup>th</sup> June 2012. Unless I am told that they were kept in police custody from 20<sup>th</sup> May 2012 to the date they were presented in court, it goes without saying that they lived in the same neighbourhood with the witnesses. That was enough time to interfere with the witnesses.

7. I want to address my mind to the paramount consideration of attending trial but before I do so I want to caution that the burden of proof as to whether the accused persons will co-exist peacefully with witnesses lies with the prosecution. It does not shift to the defence as alluded to by learned state counsel when he submitted that it has not been demonstrated that the accused will co-exist peacefully with the witnesses. It is his duty to tender evidence that this will not be the case. That evidence is lacking. I wish to also state that the learned state counsel did not address the paramount issue of availability of the accused persons to attend trial. My view is that despite this omission this court has a duty to address all circumstances surrounding grant or denial of bail.

8. Will the accused persons attend court if released on bail? I have considered the supporting affidavit, especially in respect of the family backgrounds of the accused persons. I wish to state that their background information is not enough. Other than the accused one whom we are told lives in Madogo with his family and accused two who also is said to live in Madogo, the accused three and five are said to come from Mandera with scanty information. Accused four is said to be a refugee working as farm hand in Madogo. I am afraid this information leaves a lot undisclosed. Although this court can put conditions of bail, it would be very difficult in my view to monitor people who do not have firm residence or without family background within the precincts of Madogo Police Station.

9. The application was presented on behalf of all the accused persons and in my view it would be discriminatory to consider any of them to be suitable candidates for bail and deny the others. They all face same charges and all will be treated equally in respect to bail until that time when there will be evidence to prove their involvement or otherwise. At that time the court will be justified in treating them individually as regards their culpability depending on the available evidence. The upshot of this is that bail is denied in respect of all the accused persons for the reasons I have given in this ruling. They will remain in custody until this matter is heard and finalised unless they are otherwise released following a court order. This matter has a hearing date and I direct that all parties prepare for the hearing of the case as scheduled on 26<sup>th</sup> November 2012.

10. I wish to mention another issue closely linked to the charges facing the accused persons. Learned counsel for the accused informed the court that there was information pointing to the issue of the deceased as having been spotted alive somewhere in El Wak. This court gave its ruling on that issue on 3<sup>rd</sup> October 2012 and this court is still waiting for a report of investigation through the office of the State Counsel. As I stated in that ruling the results of that investigation if found to be true would change dramatically the course of this case. This court still awaits that report.

Orders are made accordingly.

**Stella N. Mutuku, Judge**

Dated and delivered this 13<sup>th</sup> day of November 2012