



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 82 of 2012

REPUBLIC.....PROSECUTOR  
VERSUS

LAWRENCE SEBASTIAN LORUNYEI.....1<sup>ST</sup> ACCUSED

CHRISTOPHERE LOKARACH.....2<sup>ND</sup> ACCUSED

LUSIKE EWOI.....3<sup>RD</sup> ACCUSED

AMOJONG LOTURO SAMMY.....4<sup>TH</sup> ACCUSED

JEREMIAH EKURAO.....5<sup>TH</sup> ACCUSED

LOOMWA LOOYEN.....6<sup>TH</sup> ACCUSED

EKAI LOYEE.....7<sup>TH</sup> ACCUSED

### RULING

The seven applicants; **Lawrence Sebastian Lorunyei, Christopher Lokarach, Losike Ewoi, Amojong Loturo Sammy, Jeremia Ekurao, Loomwa Looyen, Ekai Loyee** are charged with twelve counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. They have denied all the charges and their counsel, Mr. Wamwayi made an oral application to the court to have them released on bond. Mr. Wamwayi also made oral submissions and relied on the following decisions:-

1. **Thomas Kipkemoi Kipkorir and 2 Others v Rep. HCR 29/2012;**
2. **Jackson Maina Wangui v Rep. HCR App. 35/2012;**
3. **David Njoroge Nyanjui v Rep HCRA 298/2011.**

Mr. Wamwayi submitted that **Article 49(1)(h)** of the **Constitution** as read with **Section 123** of the **Criminal Procedure Code** entitles the applicants to bail on reasonable terms unless there are compelling reasons to deny them bond. He submitted that the reason for bail is to ensure that the applicants attend the trial and should not be so excessive as to deny the applicants bail. He further submitted that the replying affidavit sworn by the Investigations Officer, Charles Mwaizinga, a Superintendent of Police does confirm that the applicants have a fixed abode; they are officers of the Government and it is easy to trace them; that they will abide by the terms of the bond; that they had been charged with offences of robbery with violence after arrest on 13/11/2012 and it was presumed that the investigations were complete by the

time charges were preferred. Counsel also urged that if released on bail, the applicants will be better placed to prepare their defences and promise not to interfere with witnesses.

As regards the allegation that there is still tension in the area, Mr. Wamwayi asked the court to take judicial notice of the fact that the Government had sent the Army and Police to the area and there was relative calm and the applicants are not likely to be a security risk. Counsel further urged that they have so far not been given any of the witness statements and the applicants are mere suspects and are innocent till proved otherwise. Mr. Wamwayi in relying on the case of **Thomas Kipkemboi Kipkorir** and **David Nganga** (supra) said that although the applicants therein were charged with serious offences, the court held that they were innocent till proved guilty and the court respected their rights to freedom. In **Jackson Maina** case, the court considered the fact that the trial may take long to determine and hence need to grant the accused bond.

Mr. Omutelema, Learned Counsel for the State opposed the application for bond and relied on the affidavit sworn by the Investigations Officer, Superintendent of Police, Charles Mwaizinga who gave the background to this case. He deponed that there was a raid on a Samburu manyatta where 501 head of cattle were stolen. A report was made, the police pursued the raiders who were suspected to be from the Turkana Community. The cattle were driven towards Kawap and Nachola Locations then to Loulope Manyatta. The security officers who pursued the cattle were forced to retreat after raiders outnumbered them and were heavily armed. After the raid the applicants handed to the Security Committee 36 out of the 501 stolen cattle but could not account for the rest nor did they disclose where they found them. On 30/10/2012, some Samburu men with Keriya Police Reserves went to Lombok manyatta in an attempt to recover the cattle but 12 of them were killed and it is then the 1<sup>st</sup> application filed in Nakuru HCR Misc. Appl. 70/2012 on 5/11/2012 seeking anticipatory bail to avoid arrest was granted. After that bail, on 10/11/2012, is when the deceased persons were murdered. The deponent said that the applicants work closely together and were in constant communication with the raiders but have refused to identify the raiders or disclose their whereabouts and if released on bail, they will jeopardize security operations and investigations and more deaths or retaliatory acts may occur. Mr. Omutelema urged that all the facts deponed to have not been controverted. Counsel urged the court to consider the circumstances under which the offences were committed which is in the public domain; that the investigations are ongoing and that though it is the applicants' right to be released on bail, the court still has the discretion whether or not to grant bail and whether it will bring the administration of justice into disrepute. Mr. Omutelema also asked the court to consider the history of the case involving attacks and counter attacks and that bail should be denied.

Under **Article 49(1)(h)** of the **Constitution**, any arrested person has the right to be released on bond or bail on reasonable conditions pending trial, unless there are compelling reasons not to be released. The above provision is based on the rebuttable presumption encapsulated in **Article 50(2)** of the **Constitution**, that every accused person has the right to be presumed innocent until proved otherwise. It is the duty of the State to demonstrate to the satisfaction of the court that there exist compelling reasons (strong, forceful) to deny the accused bond. It is left to the discretion of the court to determine whether to grant or deny bond based on the material before the court.

The Nigerian case of **Al Haji Mujahid Durubo Asari v Federal Republic of Nigeria SC 208/06**, set out some of the considerations to be taken into account by the court on whether or not to grant bond. The Kenyan courts have applied these considerations too and they are:-

1. **The nature of the charges;**
2. **The strength of the evidence which supports the charge;**
3. **The gravity of the punishment in the event of conviction;**
4. **The previous criminal record of the applicant;**
5. **The probability that the accused may not present or surrender himself for trial;**

6. **The likelihood of further charges being brought against the accused;**
7. **The likelihood of accused interfering with the witnesses or may suppress any evidence that may incriminate him;**
8. **The probability of finding the applicant guilty as charged;**
9. **The detention for the protection of the accused;**
10. **The necessity to preserve medical or social reports pending final disposal of the case.**

The above list is not exhaustive because each case may present its own peculiar circumstances.

In the instant case, the applicants are people of a known and fixed abode. The respondent described them in paragraph 6 of the replying affidavit: 1<sup>st</sup> accused is the Councilor of Nachola Ward; the 2<sup>nd</sup> accused is the Chief Nachola Location; the 3<sup>rd</sup> accused is the Assistant Chief, Nachola sub-location; the 4<sup>th</sup> accused is the Chief Kawap Location; the 5<sup>th</sup> accused is the Assistant Chief Nakuei Sub-location in Kawap Location while the 6<sup>th</sup> and 7<sup>th</sup> accused are Police Reservists. They are people who can be traced easily.

The applicants were arrested at their places of work. Infact, when arraigned before this court, they were still clad in their uniforms. The conduct of the applicants is not such that they are likely to abscond if released on bond.

The offences which the accused face are very serious indeed. Each faces twelve counts of murder which attract a death sentence. The respondent indicated that they are likely to face other charges. It is a matter within the public domain that many police officers estimated at 40, died in the same incident. This was a very unfortunate incident indeed. Although the court is supposed to consider the seriousness of the offence and likely sentence, that must be considered with other antecedents of the applicants because if the court were to uphold that argument alone, then no person charged with a serious offence would ever be granted bail and that would negate the very essence of the **Bill of Rights**. In any event, the court can ensure that the accused person does not abscond by imposing strict conditions to ensure they attend court.

It was admitted that the witnesses statements have not yet been prepared because the investigations were still ongoing. Of course due to the number of casualties involved, the manner in which the victims met their death, the remoteness of the area, it is likely that investigations will take longer than usual. The fact that the applicants had been charged by 13/11/2012, in the lower court, was not indicative of the fact that the investigations were over. **Article 49(1)(f) of the Constitution** requires that a person arrested be brought before a court as soon as is reasonably possible but not later than 24 hours. This court cannot close its eyes to the reality that in many cases and especially one that involves so many deaths, the remoteness of the scene of crime, it would not have been humanly possible to complete investigations within that short period. However, it is now over three weeks since the applicants were arrested and with the presence of the Army and Police in the area, it is expected that the investigations should be complete. The Investigation Officer has alluded to the evidence that they may bring. But so far no witness statements have been availed to show the role of the applicants in the murders.

The charges are many. The court is aware that even if all witnesses were brought to court, this matter would not be heard and determined within the next eight months, at the earliest. It will take long to conclude this case and it would only be proper that the applicants be allowed their freedom unless powerful/strong/convincing reasons (compelling) are given.

The main reason for the prosecution opposing bail is that there is tension on the ground and the applicants are likely to interfere with ongoing investigations. It is in the public knowledge that security forces including the Army and the Police are on the ground in Baragoi and calm has been restored. There is no possibility of retaliatory attacks in the presence of the security forces in the area.

I have considered the decisions relied upon by Mr. Omutelema, counsel for the respondent which are only of persuasive value. In **Mario John Lessard v Regina**, Supreme Court of Columbia, the petitioner was charged with 16 offences related to breaking and entering a dwelling house, theft and unlawful confinement. The court observed:-

**“a person should only be detained in custody pending trial if he/she is unlikely to appear for trial if released, or if there is a substantial likelihood that he/se will commit another offence or interfere with the administration of justice while awaiting trial in such a manner that he/she will endanger the safety of the public rendering it necessary to detain them in order to protect the public.”**

The court found that the petitioner posed a substantial risk to the public and the administration of justice. The court observed that the petitioner made a living out of theft and had committed criminal offences while on probation and there was all likelihood that he would commit other offences if released. The case is not applicable to the present case because there is no evidence that the applicants have criminal records or that they have shown any antecedents of criminality.

In the case of **Regina v Sean Brian Lee**, Court of Appeal of Columbia, the applicant had been charged with murder. The court considered the history and circumstances surrounding the applicant. The court found that he had other counts for robbery, possession of restricted weapons and associated with undesirable individuals. The court noted:-

**“I recognize that a charge of first degree murder is not, in itself, an impediment to release on bail. In this case, however, the other circumstances to which I have refereed lead me to the conclusion that there is a risk that Mr. Lee (applicant) would commit further criminal offences if released on bail.”**

Bond was denied. Again, the circumstances in that were very different from the instant case. The applicant was a habitual offender. The applicants are all still Government employees with no history of criminality.

The main purpose of bond is to ensure that the accused person attends trial. The amount of bail depends on the special circumstances of every case and it should not be so excessive as to be a denial of bond. As observed earlier, the accused persons are innocent till proved otherwise. So far the court has no idea what the evidence against them is, save for what the Investigations Officer alleged in his affidavit.

Having considered all the material before me, submissions of counsel, I believe that the applicants' court attendance will be secured by the court granting reasonable bond and I do allow the application on the following terms:-

- 1. Each accused may be released on his own bond of Kshs.2,000,000/-, plus two sureties of the same amount;**
- 2. The applicants will report to the Officer Commanding Station, Baragoi Police Station every Monday of the week till further orders of this court;**
- 3. The applicants shall undertake not have any contact with the prosecution witnesses either directly or indirectly;**
- 4. They will attend court when and as required;**
- 5. The applicants to be of good conduct and if any violates any of the above conditions, their bonds will be cancelled forthwith;**
- 6. If released on bond a mention on 7/1/2013 before the Deputy Registrar.**

**DATED and DELIVERED this 6<sup>th</sup> day of December, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Tombe holding brief for Wamwayi for the accused/applicants

Mr. Omari for the respondent

Kennedy – Court Clerk