



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL NO. 123 OF 2010

NICHOLAS KIPSIGEI NGETICH.....1ST
APPLICANT

JOHNSTONE KIPKURUI SIGEI.....2ND
APPLICANT

STEPHEN KIAMBA MWANZIA.....3RD
APPLICANT

VERSUS

REPUBLIC.....RESPONDE
NT

RULING

The three applicants, Nicholas Kipsigei Ngetich, Johnstone Kipkurui Sigei and Stephen Kiamba Mwanzia were arrested separately and are now charged jointly in this file with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Pending their trial, the applicants have approached the court to admit them to bail.

The respondent through the state counsel has strongly opposed the application. The objection is based on an affidavit sworn by S.P. Abdi Salat, the Divisional Criminal Investigations Officer, Nakuru in respect of the 1st applicant but which was clearly meant for three applications. It is averred in the affidavit that the

deponent (S.P. Salat) as the investigating officer is apprehensive that the applicants may abscond as the charges against them are serious; that it is not in the applicants' interest to be released on bond as their lives will be threatened due to the prevailing tension; that the applicants may interfere with, manipulate and compromise the witnesses as some of the prosecution witnesses have been threatened; that should the applicants be released on bond, ethnic violence may erupt.

I have carefully weighed the arguments in this application as well as the authorities cited, namely **Republic Vs. Oby Tylene Oyugi and 11 others**, Nyeri High Court Criminal Case No.38 of 2010 where Seron, J, on 17th December, 2010 conditionally released all the 12 applicants on bond; **Republic Vs. Danson Mgunya & Kassim Sheebwana Mohamed**, Msa High Court Criminal Case No.26 of 2008 in which Ibrahim, J also admitted the applicants to bail and **Republic Vs. Dorine Aoko Mbogo & Brenda Atieno Mbogo** Nakuru High Court Criminal Case No.36 of 2010, where Emukule, J granted bond to the applicant (the 2nd accused person). Of course there have been several other decisions since the passage of the Constitution in which the courts have granted bail to accused persons charged with murder.

See, for example the decision of Kasango, J in Meru H.C.Cr. case No.19 of 2010 in **Republic Vs. Eustace Bundi Rufus**. And therefore, with the new Constitution, it must now be accepted that by dint of **Article 49(1)(h) of the Constitution**, every person accused of committing a crime of any nature has the right to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons for him not to be released. Whether an accused person is to be released on bond will depend on the circumstances of each case. The burden of demonstrating the existence of compelling reasons is upon the prosecution.

The right sought to be denied being constitutional and the word used being "*compelling*", the burden the prosecution has is heavy and the standard of proof is high. The prosecution, as I have noted is relying on four grounds.

The first ground, it is contended that the applicants may be tempted to abscond due to the seriousness of the charges they are facing. No doubt the charge of murder is indeed serious. However, that alone cannot be a ground for denying the applicants their fundamental rights. The offence will not cease to be serious. Does that mean the applicants can never be released on bond? That in itself will go against both the spirit and the letter of the Bill of Rights.

Second ground is to the effect that the applicants' lives will be endangered, if granted bail, due to the tension on the ground. First and foremost, it must be borne in mind that the main pillar of the right of a person arrested in connection with a criminal offence is the right to be presumed innocent until the

contrary is proved (See **Article 50 (2) (a)**).

It must be remembered that by releasing the applicants on bond, the court has not cleared them of the charges. They are yet to be tried. It is the duty of the state in terms of **Article 29(c)** and **238** of the **Constitution** to ensure the security and safety of the applicants, a duty from which the State cannot run away or abdicate.

It cannot be in the mouth of a State official charged with this duty to imply that Kenyans will only be safe in prisons.

Thirdly, from the statements annexed to the replying affidavit, it is not in doubt that some of the witnesses have been threatened. However, the police have not linked the applicants with those threats. The police have the means and technical know-how to be able to trace the source of the threats. The paramount consideration as to whether or not to release any person charged with a criminal offence is whether he will attend the court on the date and place as directed by the court and whether the suspect is likely to interfere with the witnesses.

From the foregoing, I am not persuaded that there are compelling reasons to deny the applicants their fundamental Constitutional freedoms. They are granted bail on the following terms:

- i) they will each execute a bond of Kshs.500,000/= with two sureties of the like sum
- ii) they will deposit their passports (for those who possess) with the court
- iii) they will not leave the jurisdiction of the court without leave of the court
- iv) they will not have any contact with any of the prosecution witnesses
- v) Once a month with effect from 28th February, 2011, they will present themselves before the court

vi) If any of the above conditions is violated, the bond shall be cancelled forthwith.

Dated, Delivered and Signed at Nakuru this 28th day of January, 2011.

W. OUKO

JUDGE