



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL CASE NO. 17 OF 2010

REPUBLICPROSECUTOR

VERSUS

THOMAS ATANCHA NYAMASEGE.....1ST ACCUSED

RICHARD BORIGA AENGA.....2ND ACCUSED

RULING

THOMAS ATANCHA NYAMASEGE, the first accused in this case, applied for bail on 23/3/2011. He faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Cap 63** of the laws of Kenya. He is charged along with one Richard Boriga Aenga. The particulars of the charge are that “*on the 10th day of October, 2010 at about 9.00pm at Chebangany Trading Centre in Buret District within Kericho County jointly murdered Charles Kiprotich Milgo*”. He pleaded not guilty to the charge on 23rd November 2011 and the case was fixed for hearing on 18th and 19th May 2011.

Mr. G. M. Maengwe, learned Counsel for the 1st accused, urged the Court to admit the 1st accused to bail and submitted that the 1st accused is a Kenyan with a family and dependants. The 1st Accused, he said, is prepared to furnish sureties and to obey whatever conditions the court may impose.

In his affidavit sworn on 21st March 2011 in support of the application, the 1st Accused averred that the case may take a long time to finalise. He further averred that his parents and children all have been dependent on him. He hails from Nyamira South, he averred, from a village known as Nyagachi. His occupation is farming.

Mr. Kivihya, the learned State Counsel did not oppose the application for bail.

Under **Section 49 (1) (h)** of the new Constitution, the burden showing that there are compelling reasons not to grant bail reposes on the prosecution. But the Court has a duty to infer from evidence whether there are compelling reasons to deny bail regardless of whether bail is opposed or not. It is the duty of the Court to look at the evidence and submissions relied on and the material before it so as to discern if there are compelling reasons to deny bail. Under the Constitution, an accused person has a right to bail. The right is not absolute. It is discretionary. The right to bail is dependent on whether there are compelling reasons to deny bail. Compelling reasons to deny the accused bail must show that the accused will not turn up to stand trial. They are determined on the criteria indicated in the case of R V. Joshua Kibet Cheruiyot (Kericho Cr. C. No. 6 of 2010) (unreported). Compelling reasons to deny the accused bail must show that the interest of justice will be better served by denial of bail. Where the prosecution has failed to satisfy the Court that there are compelling reasons not grant bail, the accused must be admitted to bail on reasonable conditions unless the court from the material before it infers existence of compelling reasons to deny bail. Where the Court cannot infer compelling reasons from the material before it regardless of

whether the State remains mum or objects or does not object, the Court must grant bail.

In this application, the 1st accused is a Kenyan. He hails from Nyagachi Village, Nyamira South. He is a farmer. He has a family and parents. His four children attend Riamandere DEB Primary School and Riosio Secondary School.

From the material before me, I am satisfied that there are no compelling reasons to deny the 1st accused bail. Accordingly, I admit the first accused to bail on condition that he signs a bond of Kshs. 100,000 and furnishes two sureties each of Kshs. 100,000. In addition, he shall attend Court for mention of this case once every month until the case is finalised

DATED at KERICHO this 6th day of April, 2011

G.B.M KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING

Mr. G.M. Maengwe, Advocate, for the 1st Applicant
Mr. Kivihya, Advocate, for the state
Mr. N. Bett, Court clerk