



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 35 OF 2010

REPUBLIC.....	VERSUS	PROSECUTOR
NANCY NJOKI NG'ANG'A.....		1 ST
	ACCUSED	
SAMUEL NG'ANG'A KARIUKI.....		2 ND
	ACCUSED	
BENARD GATHUMBI KANGI alias WARUI.....		3 RD
	ACCUSED	

RULING

This Ruling relates to an application by way of a Notice of Motion dated 30th March 2011 and filed on 1st April 2011 (*the Application*) in which the three Applicants sought orders to be released on bail or bond on reasonable conditions pending the hearing and determination of this case.

The application was supported by the identical Affidavits of the Applicants, all sworn on 30th March 2011 and the identical grounds on the face of the Application.

These grounds were reiterated by Mrs Nancy Njoroge (*counsel for the 1st accused*), Mr. Orege (*counsel for the 2nd - 3rd accused*), citing the decisions of my brothers in **NICHOLAS KIPSEGEI NGETICH & 2 OTHERS VS. REPUBLIC** (*Nakuru Criminal Case No. 123 of 2010*), **REPUBLIC VS. OBY TYLENE OYUGI & 11 OTHERS** (*Nakuru HC Cr. Case No. 38 of 2010*), **REPUBLIC VS. DANSON MGUNYA & KASSIM SHEEBWANA MOHAMED** (*Mombasa HC.Cr. No. 26 of 2008*) where murder suspects were released on bail, pending the hearing of their cases.

Mr. Omwenga State Counsel strongly opposed the applications for bail. He acknowledged that the people of Kenya passed a Constitution but that the Constitution also set limitations that there are other provisions besides Article 49(1)(h) of the Constitution. Counsel referred to Article 20(4)(a) & (b) as an example of the limitations.

Counsel submitted that the applicants face a charge of murder, the punishment for which is death, a sentence which is grave, the chances of absconding are real. The Constitution requires attendance in court if bail is granted. It would be difficult to maintain confidence in the criminal justice system if the accused jumped bail and escaped. Those aggrieved by the loss of their loved ones, may well resort to self-help, and this means revenge and the law of the jungle.

State Counsel submitted that in view of the gravity of the offence, and the risk of failure to attend

court, faith in the justice system would wane and disappear.

Both Mr. Orege and Ms Nancy Njoroge urged me to depart from my decision in the case of **REPUBLIC VS MILTON KABULIT & 6 OTHERS** (*Nakuru H.C.Cr. Case No. 115 of 2008*), on the grounds that there were persons willing to stand surety for the applicants, and that because all the applicants are Kenyan, the Police had machinery enough to ensure the applicants attended court when required to, and that the gravity of the offence or sentence is no ground for declining to grant the applicants bail, and that on the contrary, the release of the applicants would create confidence in the system of justice.

These arguments were regurgitated by Mr. Orege counsel for the accused, that the offence of murder does not deny the applicants the right of equality envisaged in Article 50(2)(a) that the applicants are presumed innocent until proved guilty, and that the State remains the custodian of the accused and have all their particulars, and urged me to allow the application.

In the case of **REPUBLIC vs MILTON KABULIT** (*supra*) I gave the following reasons for declining bail -

- (1) *that the mandate of the High Court is to ensure the existence of a society where justice, fairness, equality and equity is the foundation and hallmark of the daily lives of the citizen,*
- (2) *the offence murder is grave,*
- (3) *the sentence if found guilty is the ultimate penalty death (and not a fine or six or more months of imprisonment),*
- (4) *there is no clear change in legal policy that suspects on capital offences be left off at liberty to access and tamper with witnesses,*
- (5) *a legal policy otherwise is an abuse of the values and mores of the people of Kenya, and more so of the surviving relations of the deceased, and the memory of the deceased,*
- (6) *a change of such legal policy is not justifiable in a free and open and democratic society, and may encourage calls for self-help and revenge and thus worsened a potentially volatile situation,*
- (7) *public interest considerations militate against the grant of bail of pending their trial, in capital offences,*
- (8) *there are no compelling or exceptional circumstances for the release of the petitioners on bail. The principle of innocence until proof to the contrary is established is a principle in support of due process in conformity with the principle of human dignity as envisaged under 24(1) of the Constitution.*

I have considered the authorities cited to me, and the decisions by my noble and learned brothers, but I can see no reason for departing from my decision in **Republic vs. Milton Kabulit & 6 Others**. For those reasons I dismiss the application herein.

I direct that the case proceed to hearing as scheduled.

Dated, signed and delivered at Nakuru this 10th day of June 2011

M. J. ANYARA EMUKULE
JUDGE