



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL CASE NO. 24 OF 2010**

REPUBLIC .....PROSECUTOR

**VERSUS**

**JOHN KAMWARO MUTHIGA.....1<sup>ST</sup> ACCUSED**  
**BERNARD GITHAE WANJIRU..... 2<sup>ND</sup> ACCUSED**  
**GEORGE KAIRU WAWERU..... 3<sup>RD</sup> ACCUSED**  
**LYDIA WANGUI MUIGA..... 4<sup>TH</sup> ACCUSED**  
**MARGARET WANJIRU MUNUHE.....5<sup>TH</sup> ACCUSED**

**RULING**

John Kamwaro Muthiga, Bernard Githae Wanjiru, George Kairu Waweru, Lydia Wangui Muiga and Margaret Wanjiru Munuhe are all charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are set out in the charge sheet in count one with the murder of JOHN MUIGA and in count 2 with the murder of STEPHEN WAITHAKA WAMUGUNDA.

All the accused persons have pleaded not guilty to the charge and their trial is set for today (10/11/2011).

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons have now filed applications before this honourable court seeking to be admitted to bond pending the hearing of their case as stated above. It should be noted that the 1<sup>st</sup> and 5<sup>th</sup> accused persons have not filed any application. All these three applications are founded upon Article 49(1)(g)(h) of the Constitution of Kenya 2010 and for the 3<sup>rd</sup> accused person in addition to Article 53(1)(E)F.

The Applicants have moved to this court to enforce the right which have been granted under the said Constitution 2010 which now grants the right to an accused person to be admitted to bond.

Article 49(1)(h) states  
***“to be released on bond or bail on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released.”***

It should be noted at this stage t hat the said right is not absolute as is in the case in Article 49(2) which reads:

***“A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”***

It should therefore be noted that the accused persons right to bond is not absolute as the Constitution states that if there are compelling reasons then they can be denied bond. It should also be noted that the main consideration in granting bond or bail is whether the accused persons will turn up for the trial as was stated in **WATORO vs REPUBLIC (1991) KLR 220 at page 283** wherein Porter J. Stated

***“I think I have made it clear over a number of ruling in bail application that I take the view on authority that the paramount consideration in bail application is whether the accused will turn up for his trial”***

The Constitution of Kenya 2010 states that the accused person are entitled to be released on reasonable conditions but does not state what those reasonable conditions are.

In Nairobi Criminal Case No. 65 of 2010 Justice FRED A. OCHIENG stated in pages 3 -4 and I quote:

***“the question as to whether or not any particular case disclosed compelling reasons to deny an arrested person his right is to be determined by the court.***

***In my considered view, the chapter of the Constitution have done well to leave it open to the discretion of the court. Although the Constitution does not cite the seriousness of the offence with which an accused is charged as a factor I believe that it is undoubtedly a relevant factor.***

***Secondly the sentence which the offence attracts is also a factor to be taken into account.***

***Thirdly the relationship if any between the accused person and the potential witnesses is another factor”***

Having set out the general guiding principles I now turn to the application before this honourable court.

The second accused person through his advocate has stated that all the prosecution witnesses have recorded their statements and supplied to his advocates and that he will honour the terms and conditions of bond to the latter and shall avail himself to the jurisdiction of the court when and if required.

The third accused person also states that he is willing to abide by all bond terms that may be set and that the same has been supplied with witness statements and documentary exhibits which means that no further investigations are pending.

The fourth accused person also has stated that it is almost a year since she was arrested and has also been supplied with witness statements and information and is therefore prepared to defend the charge. She states that she has young children who are now suffering in her absence and she is ready to abide by all bail terms.

The state is opposed to this application and has filed an affidavit sworn by Cpl James Mwangi the investigating officer who states that the 1<sup>st</sup> deceased John Muiga was the husband of the 4<sup>th</sup> accused person while the second deceased was their immediate neighbour at Karundas area. He deponed that the families of the two and the community have not healed from the violent death of the two and releasing the accused could worsen a potentially volatile situation. He has given reasons which he believe are compelling enough to deny the Applicants bail at this stage as set out in paragraphs 3 – 11 of his affidavit.

Miss Mandu for the state support the statement of the investigating officer while the applicants’

advocates urge the honourable court to disregard the same as being very general and not specific as to the allegation of interference with witnesses and accessibility to the weapon allegedly used in the commission of the offence.

I have considered the affidavits before the court and the submission of counsels. I have also considered the circumstances of this case and appreciate the fact that the accused persons are presumed innocent until proved guilty and that the burden of proving compelling reasons to deny them bail rests with the state. I have taken into account the fact that the offence they are facing is that of murder and that there were two alleged victims of the crime. I have also looked at the affidavit of the investigating officer and is of the view that the same should not be dismissed without further inquiry so to the suitability of the accused persons being admitted to bond. I have taken into account the fact that the accused persons now know the witnesses who are likely to testify against them and what the state says that the family of the deceased persons and the community have not healed from the violent death of the two and that releasing the accused persons on bail could worsen a potentially volatile situation and the possibility of interference with the named witnesses. Justice should look at both sides.

Taking into account the fact that this trial starts today, I will at this stage decline to admit the applicants on bail but order that the probation officer in charge of the area carry out an assessment of the suitability of the accused persons being admitted to bail which report should be submitted to this honourable court within 30 days for further orders.

Dated and delivered at Nyeri this 10<sup>th</sup> day of November 2011.

J. WAKIAGA  
JUDGE