



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Nyakundi & 13 others (Criminal Case 27 of 2021)
[2023] KEHC 17866 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 27 OF 2021
PN GICHOHI, J
MAY 22, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

AMOS NYAKUNDI ALIAS SONKO 1ST ACCUSED
CHRISPINE MAKWARO OGETO 2ND ACCUSED
PETER ANGWENYI KWANGA 3RD ACCUSED
BRIAN MECHA NYAKUNDI 4TH ACCUSED
RONALD OMBATI ONYONKA 5TH ACCUSED
JUSTINE MORARA 6TH ACCUSED
HESBORN ONGONDI GICHANA 7TH ACCUSED
NELSON CHOGORO TUMBO 8TH ACCUSED
JUSTINE AKIYA TUMBO 9TH ACCUSED
HENRY AMWOMA MATOKE 10TH ACCUSED
EVANS OGETO OKARI 11TH ACCUSED
JOSPHINE MORARA NYANKIEYA 12TH ACCUSED
ALIAS MELLEN 13TH ACCUSED
JOSEPH ABUGA MIRONGA 14TH ACCUSED



RULING

1. As per the current information presented before this court on December 7, 2022 and which was read to accused persons on March 1, 2023 and to which each of them denied, the Fourteen (14) accused persons jointly face Four (4) counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charges in Count 1 are that on the 17th day of October 2021 at Mbanda Sub- location , Marani Sub -County within Kisii County with others not before court, murdered Sindege Mayaka.
2. In count II, the particulars are that on the 17th day of October 2021 at Mbanda Sub- location , Marani Sub -County within Kisii County with others not before court, murdered Rael Sigara Onkware.
3. In count III, the particulars are that on the 17th day of October 2021 at Mbanda Sub- location , Marani Sub -County within Kisii County with others not before court, murdered Agnes Morara Ototo.
4. In count IV, the particulars are that on the 17th day of October 2021 at Mbanda Sub- location , Marani Sub -County within Kisii County with others not before court, murdered Jemimah Nyangate Mironga.
5. The court record further shows that the accused persons were arrested at different dates and presented to court for plea and to which a plea of “Not Guilty” entered. Their application to be released on bond was opposed by the Prosecution and upheld by the court for reasons on record. Each time more suspects were arrested, their case was consolidated. In the meantime, four (4) witnesses were heard between March 1, 2022 and March 17, 2022 in respect of the accused persons arrested at the time until the current consolidated charge to which each of them pleaded “Not Guilty.”
6. Upon the consolidation, the accused persons through their respective advocates they have again applied that the accused persons be released on bond. Mr. Anyona appeared for the 1st Accused and also held brief for Mr Asuma for the 3rd accused and intimated that Mr Asuma relied and adopted the application dated July 14, 2022. He further added that if at all it would be risky for the 1st Accused to stay at home, he (1st accused) has since got an alternative place of abode in the cause of these proceedings but they do not wish to disclose where. Further, counsel added that the 1st accused has found a surety and that he will attend court and abide by the conditions set by court.
7. While associating himself entirely on the Application dated July 14, 2022, Mr. Kaba for the 2nd , 4th , 5th , 6th and 14th Accused submitted that the accused persons are not a flight risk, have well known fixed abode, well known relatives with several alternative places of abode, and that the accused person will not in any way interfere with witnesses.
8. Further, counsel submitted that the Prosecution has already placed those witnesses they needed to on protective custody even as the previous hearing proceeded. He further submitted that there are no compelling reasons to deny the accused persons bond, as seriousness of the offence is not a compelling reason.
9. As he also held brief for Mr. Kimaiyo for the 10th , 11th , 12th and 13th accused, Mr. Kaba further submitted that the four accused persons were only arrested recently while living in Marani and there was no hostility there. That they are bread winners of their families and further, he submitted that the 12th Accused is elderly and has a hearing problem which cause him to be disadvantaged while in custody.



10. On his part, Mr. Magara for the 7th accused urged the Court to release the accused person on the grounds that since the accused was arrested two years ago, the Prosecution never filed an affidavit to show any compelling reason why he should not be released on bond.
11. Mr. Momanyi for the 8th accused relied on art. 24, 49 (1) (h), Art 159 (2) of the Constitution and section 123 of the Criminal Procedure Code. He submitted that the accused person, who is 83 years of age, had been operated on and was coming from hospital when he was arrested and that he may be required to go back for check-up. Arguing that the witnesses in this case are known as they are listed but already under Witness Protection Unit, counsel submits that the accused person is law abiding, not a flight risk and is willing to abide by the conditions given by this Court.
12. On behalf of the 9th Accused, Mr. Mochiemo who was being assisted by Mr. Chuma urged the court to release him on bond on the grounds that the accused person has been in custody for about one year and six months since his arrest on October 29, 2021, that his mother has only one hand and that one of his siblings is mentally challenged and therefore, the family has suffered while the accused remains in custody. They further submitted that the 9th Accused has an aunt who wishes to give him accommodation.
13. In his response on oath, the Investigating officer No. 50917 Cpl Zebediah Wawire of DCI Marani Sub- County told the Court that the lynching of the four elderly mothers was terrible and horrible having been done before public of different ages, young children and the elderly. That this act raised nationwide concern and therefore denying the accused persons bond will send a strong message to all those intending to do a similar act.
14. Further, he told the Court that; there was a likelihood of the accused persons interfering with witnesses on the ground that not all witnesses are under witness protection; the relationship between the families of the accused persons and those of the deceased is bitter and therefore, there is likelihood of conflict if the accused persons are released on bond and that the accused persons are likely to abscond and interfere with the smooth hearing of this case thus delaying it.
15. In support of the Investigating Officer's statement, Mr. Ayondo added while citing Judiciary guidelines on Bail and Bond, that public order, peace and security, severity of the sentence if accused persons are convicted, their likelihood to abscond and the bitterness on the ground are compelling reasons to deny the accused persons herein bond. Further, he relied on section 10 of the Victim Protection Act that while giving bond, the safety of the victims and their families should be considered. He further submitted that this being a public interest case, release of the accused persons on bond is not proper.
16. He submitted that a similar application was made before Justice Ougo and the same reasons were given backed by social inquiry and the accused persons were denied bond. Lastly, he relied on the case of R v Robbert Kipkorir Tanui High Court Criminal Case No. 001 of 2020 and R v DKN [2021] eKLR and urged the court to deny the accused persons bond and as the prosecution endeavours to have the case heard on priority basis.
17. In a quick rejoinder, Mr. Kaba cited the case of R v Jackton Maende & 3 others [2012] eKLR and submitted that the Prosecution had not met the conditions to justify that there is likelihood of accused persons interfering with witnesses. That by arguing that the accused persons be denied bond so as to send a message to the public, the Prosecution is presuming the accused persons guilty. He submitted that no accused person has intimated that his life is in danger and further, a case being of public interest is not a compelling reason to deny accused persons bond. Counsel further submitted that the ruling by justice Ougo has been overtaken by events and there are now more accused persons. He argues that the application dated 14th July 2022 was not responded to.



18. While supporting the arguments by Mr. Kaba, Mr. Momanyi submitted that the authorities cited by the prosecution are not Court of appeal decisions and therefore, they are just persuasive. He submits that the Prosecution had indicated to court that he has arraigned 17 witnesses yet the information contains 10 witnesses and therefore out of the 10, only three are not protected. He wondered which witnesses are to be protected.
19. On his part, Mr Magara further submitted that bond should not be used for retribution at the stage of bond application.

Determination

20. I have considered the application dated July 14, 2022 and the submissions by parties and the court record. I have also considered the court decisions cited by the parties herein . They were rendered by courts of concurrent jurisdiction and therefore not binding to this court. I also bear in mind that the circumstances in those cases are different from those in the case at hand.
21. Despite the lengthy submissions by parties, the issue before court is whether or not to admit accused persons on bond bearing in mind that the purpose of giving the accused person bond is primarily to enable him to attend court for hearing of his case while still free to go about the normal and ordinary duties including working, studying and tending for his family and so forth whenever he is required by court and until the conclusion of his case or unless otherwise discharged or released by the court. That is pursuant to the principle that an accused person is innocent until proved guilty. Bond is therefore one of the Constitutional rights of an accused person under Article 49 but it can be denied where “there are compelling reasons not to be released.”
22. The issue then is whether there are compelling reasons to deny them bond. Such reasons include that;
 - a. The accused is a flight risk
 - b. the accused is likely to interfere with witnesses
 - c. The accused’s life would be in danger if he is released
 - d. The accused person is likely to endanger peace and national security.
 - e. It is in the public interest that the accused person be denied bond.
23. The circumstances and the nature of the offence certainly inform the court decision as to whether the prosecution has demonstrated to the court that there are compelling reasons to detain the accused person in custody pending his trial. It is not disputed that an application for bond was made before Justice Ougo in this case but it was denied. It is also acknowledged that Asuma B. A. Chogo Advocate for the 3rd accused filed an application on July 18, 2022 and dated July 14, 2022 urging the Court to reconsider, and review/vary/rescind and/or set aside the ruling dated December 16, 2021 to the extent that it denied the Applicant and the accused persons bail/bond pending trial.
24. A look at the ruling the subject of the review in the application dated July 14, 2022 shows that among other considerations, were the report filed by the Probation Officer in regard to the 1st, 2nd, 3rd, 4th and 5th accused persons then that ;

“The 1st – 5th accused persons hail from Mwangichana East Location. According to the report there is apprehension from the family their families that if they are released on bond, the accused persons may face retaliatory attacks from members of the community following the brutal death of the deceased persons. The accused persons have not provided an alternative



area /place of abode upon their release on bail. Clearly it will not be safe for the accused persons to go back and live in the same locality in which murders were committed...although the Probation Officers' Report was not availed in regard to the 6th Accused person, this court notes that the deceased persons come from the same locality as all the 6 accused persons. The Probation Officer's report reveals that there is still a lot of tension in the locality and the community is outraged by the death of the 4 deceased persons.

There is also a great likelihood that most of the potential witnesses come from the same community as the accused persons .Therefore if accused persons are released on bond back to the same community that they share with the witnesses, the witnesses may have genuine fear and eventually fail to appear /testify against the accused persons. The accused persons have been charged of very serious offences and it would be in the interest of justice that they should face trial having taken plea. Their security cannot be guaranteed”

25. The argument by the defence in support of variation or setting aside the above ruling is that circumstances have since changed as other accused persons have been arrested and that some of the accused persons have since secured alternative place of abode. The issue really is not about more accused persons being arrested and charged. It is notable that investigations in a criminal case do not end when some of the suspects are arrested and charged in court. Those being arrested are charged with this same offence of murder of the four deceased persons. The offence is said to have been committed by several suspects some of whom are not before court.
26. It is noted that the application dated July 14, 2022 was not responded by the Prosecution but that is not the main point. In order to assess whether circumstances have changed since the ruling by justice Ougo, this court endeavoured to have the Probation Officer avail reports of all the fourteen accused persons. No doubt those reports were availed before this court on March 22, 2023 and they are in respect of each of the 14 accused persons on their suitability to being released on bond.
27. The Report respect of the 1st accused shows he is not suitable for bond as the social inquiry is that he is a flight risk, his life and those of the victims will not be safe and that he is likely to interfere with the case. In respect of the 2nd accused, the Report shows that the social inquiry revealed that he is the cause of the murders and therefore the local administration and other community members object his release citing retaliatory attacks. In regard to the 3rd and 7th accused, the children of the deceased and relatives are bitter. The local administration has advised that there is fear of retaliatory attack and hence they not suitable for bond.
28. Though relatives of the youthful 4th accused are poor , they are willing to take him out on bond but the local administration fears his security and that he is likely to abscond as the Marani business community is bitter and the accused is likely to be lynched if released. Likewise, the life of the 5th Accused is said to be in great danger if he is released as the community is very bitter with whispers being that he was hired to settle scores due to a land dispute.
29. In regard to the 6th accused, the social inquiry revealed that he is a flight risk and his life is in danger if he is released on bond. As regards the 8th accused, it is said that his life and those of the deceased families will be in danger if the accused is released on bond. It is said that there is fear to retaliatory attack if the 9th and 12th accused are released on bond and goes home as relatives of the deceased persons are still very bitter. Likewise, the life of the 10th accused is said to be in danger if he is released to the community and the victim's family and the local administration have cautioned that accused should not be released.
30. The view of the administration and others is said to be that the life of the 11th accused will not be safe at home as families of the victims , their relatives and friends are likely to retaliate if he is released. The



14th accused is said to be a flight risk and his life and the life of the victims is said to be in danger if he is released on bond as the victims believe that he might regroup with those at large.

31. Though some of the accused persons are said to have sought an alternative place of abode, the issue is whether their security is guaranteed such that they will not be hunted and harmed by the community; this court having taken judicial notice of the ease at which murder is committed within this community.
32. It is clear from those reports that the main issues that led to denial of bond in the earlier ruling still remain. Some witnesses are not yet under protection. Hostility on the ground has not changed and the safety of the lives of the accused persons is not guaranteed. The nature and the circumstances under which these murders are said to have been committed is in the public domain and a matter of great concern to the nation.
33. Where there are threats of retaliation and lynching, and the same confirmed by the security machinery on the ground, then their release on bond becomes a threat to peace and stability within the community and therefore a national security issue. Under section 123 A of the *Criminal Procedure Code*, the said accused persons should be kept in custody for their own safety. It is immaterial that they have not raised that concern.
34. The Probation Officer recommends that the 13th accused Roseline Nyanchama Omweri alias Mellen be released on bond subject to the discretion of the court for the reasons that; there is no animosity between the families; the families of the victims have no objection to her release; the families of the victims told the probation office that her arrest was mistaken identity by the police and her husband is willing to secure her bond.
35. It is noted that there is no comment by the local administration and the community. It is the family saying there was mistaken identity during the arrest. The report came after the parties herein had already submitted on the issue of bond. The prosecution has opposed bond on all the accused persons and there is no material that these family members are witnesses in this case and that they have retracted their statements. That therefore remains a matter of evidence which can only be determined during hearing of this case and not at this stage.
36. In the circumstances the court makes the following orders ;
 1. The application for review of ruling dated July 14, 2022 is hereby disallowed.
 2. The application for release of 1st to 12th and the 14th accused on bond is denied.
 3. The request by Probation Officer that this court exercises its discretion to release of 13th accused at this stage is put on hold for the Prosecution to confirm the status for her possible release on bond.
 4. In the interest of justice, this case be given utmost priority to ensure its expeditious disposal.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF MAY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ochengo for the State

All accused persons and their Advocates

All advocates for the Victims



Kevin Isindu, Court Assistant

