



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO. 4 OF 2021**

**REPUBLIC**

**– VERSUS–**

**PROTUS JUMA KHAMALA alias JOMBA**

**RULING**

The accused who is charged with the offence of murder has applied for bail pending his trial.

Mr. Omooria for the Republic has opposed the application. When the matter came up for hearing, he applied for more time to have the investigating officer to prepare an affidavit in opposition to the application.

In view of the urgency of the matter, I decided to take oral evidence since the investigating officer, No. 88268 Corporal Faith Kishuin was in court. The investigating officer testified that the accused lives behind the house of Jones Nanjala Wafula, who is a key witness in this case. Jones N. Wafula was held in detention along with the accused as suspects in the murder of the deceased. Following the advice of the Office of the Director of Public Prosecution (DPP), the prosecution decided to withdraw the charge of murder against her, so that she would testify against the accused.

It was her further evidence that the deceased went to the house of Jones Nanjala Wafula. It was also her evidence that Jones Nanjala Wafula was the first person to raise a stress call (screams). The accused was the first person to respond to those screams together with his neighbours. The investigating officer declined to give the identities of the potential neighbour witnesses, since they are fearing for their lives, if their identities are disclosed. She further testified that they need more time to record a plain witness statement from Jones Nanjala Wafula. She further testified that they have recorded a statement under inquiry from Jones Nanjala Wafula, which cannot be used in court as a evidence.

Furthermore, she testified that it is the potential neighbour witnesses who required the concealment of their identities. The bases of that request came from one witness who told the investigating officer that there was a village elder (Mukasa) who was killed after he testified in a murder case in the same area. The killing of that village elder followed the release of the accused in that case.

She also testified that the lead investigating officer who is the CID boss has assigned pseudonyms to the potential neighbours witnesses. She asked the DCIO why he had not put in writing the names of the neighbour potential witnesses. The DCIO told her that they feared for their lives.

She further testified that she has no evidence that the accused has threatened any potential witnesses.

She also testified that she cannot remember whether Jones Nanjala Wafula has revealed the identities of the prosecution witnesses, who were sought to be protected. Similarly, she testified that she cannot remember whether the accused revealed the identities of the witnesses sought to be protected in his statement under inquiry.

I sought to know from the prosecution counsel Mr. Omooria whether they will be seeking immunization of Jones Nanjala Wafula after her testimony. He answered in the affirmative. This is necessary to protect her from a potential prosecution against her arising from that evidence.

I have considered the evidence of the Investigating Officer (Faith Kishuin) and the opposition by the prosecution counsel to the release of the accused on bail. I find as credible evidence that the potential prosecution witnesses have genuine fears for their lives if their identities are disclosed. That evidence came from the lead investigator namely the DCIO Kiminini area. Admittedly this piece of evidence is hearsay. For purposes of bail that hearsay evidence is admissible in evidence.

Furthermore, it came out in the evidence of the investigating officer that the prosecution have not given to the defence the statements made under inquiry by Jones Nanjala Wafula and the accused. On the face of it, this is in breach of the disclosure obligations imposed upon the prosecution by Article 50 (2) (j), which provisions read as follows:-

“ To be informed in advance of the evidence the Prosecution intends to rely on and to have reasonable, access to that evidence”

I hereby direct the prosecution to disclose (give) those two statements under enquiry to the defence to enable them prepare for their defence, subject to redaction. The redaction is necessary to avoid disclosing the identities of the potential prosecution witnesses.

In the premises the application for bail by the accused fails, because the fear of the potential prosecution witnesses is a compelling reason within the meaning of article 49(1) (h) of the 2010 Constitution of Kenya.

The application fails and is hereby dismissed.

The defence are at liberty to reapply for bail when the circumstances of the case have changed.

**Ruling signed, dated and delivered in open court at Kitale this 4<sup>th</sup> day of February, 2021 in the presence of Mr. Omooria for the prosecution and Mr. Wanyonyi for the accused.**

**J.M. BWONWONG'A**

**JUDGE.**