



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 86 OF 2019

REPUBLIC..... RESPONDENT

VERSUS

COSMAS KITHAKA M'ARIMI1ST APPLICANT

PETER KABURIA2ND APPLICANT/ACCUSED

ZAVERIO KIRIA ATUGI3RD APPLICANT/ACCUSED

ZAVERIO KABURU MUGERA.....4TH ACCUSED

RUGINU KIAMBI WAIRURA5TH ACCUSED

GEOFFREY KIRUGI MUNA6TH ACCUSED

RULING

[1] This matter relates to the Motion dated 16/12/2019 brought under **Article 49 (1) (h) of the Constitution, the Criminal Procedure Code** and all other enabling provisions of the law. The applicants seek bond or bail pending charge or trial.

[2] The grounds upon which the application is premised are set out in the application and the supporting affidavit of Cosmas Kithaka M'arimi sworn on 16/12/2019 and on behalf of the other co-applicants. It is contended that under the Constitution an accused person may be released on bail or bond pending charge or trial as one is presumed innocent until proved guilty. The applicants are respected members of their locality having served them diligently. They have no criminal record and are not a flight risk. They are ready and willing to comply with reasonable bail or bond terms set by the court. They will cooperate with the investigating officers and not interfere with witnesses.

[3] This was opposed vide the affidavits of Aquarina Kai Samuel, Mark Kirimi Mbwiria and Bernard Mbii sworn on 17/12/2019. According to Aquarina, wife of the deceased stated that she believes that the 1st accused person and the Area Chief one Gilbert Gichunge Mutua shall interfere with the witnesses. The chief called her daughter one Alice Kagwiria and he intimidated her that they cannot compete with the government. That various people have been threatened especially the prosecution witnesses namely Bernard Mbii and Mark Kirimi Mbwiria.

[4] Mark Kirimi declared that on 27/09/2017 at around 9.00PM he was taken from his house by the accused persons who seriously assaulted him resulting to multiple injuries. Upon preparing for their arrest and prosecution the chief together with the assistant chief threatened him and told him that they would kill him and his body will never be found. The 4th accused person also threatened him that notwithstanding the alleged assaults they have planned to kill him. Due to the intimidation he abandoned the case. That if the accused are released they shall intimidate the witnesses and interfere with evidence.

[5] Bernard Mbii deponed that he being one of the witnesses he has been intimidated that if he testifies he would be killed. If the accused are released they have high chances of interfering with witnesses especially him.

[6] The issue of determination is **whether to issue the applicants bail or bond.**

[7] **Article 49 (h) of the Constitution** stipulates that an arrested person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. Therefore, right can be restricted where there are compelling reasons. On this subject, I find it relevant to cite **Bail and Bond Policy Guidelines**, in particular at p. 25:

The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

- a. That the accused person is likely to fail to attend court proceedings; or*
- b. That the accused person is likely to commit, or abet the commission of, a serious offence; or*
- c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or*
- d. That the accused person is likely to endanger the safety of victims, individuals or the public; or*
- e. That the accused person is likely to interfere with witnesses or evidence; or*
- f. That the accused person is likely to endanger national security; or*
- g. That it is in the public interest to detain the accused person in custody.*

[8] From the arguments presented, this application has been opposed on the basis of interference with witnesses. The OCS of Mitunguu Police Station vide his letter dated 6/01/2020 reported on the objections raised.

[9] He stated that based on preliminary investigations, Mark Kirimi Mbwiria through their occurrence book number 19/29/12/2019 confirmed his name had been mispelt and the identification number used is not his and, thus, not being a witness in this case the issue of intimidation does not arise. Bernard Mbiu is a witness in this case but he reported of an affidavit which had been drawn without his consent through occurrence number 16/28/12/2019. He recalls that the daughters of Aquarina and a witness in this case, went to his home and requested for his identification card number. As for Aquarina she accepted having sworn the affidavit but at no one point did she ever report the issue of intimidation to the police for necessary action. In his opinion the accused persons should be released on bond. Being the assistant chief and members of *nyumba kumi* they are not a flight risk and will not interfere with witnesses. He stated that necessary action will be taken if any accused persons does not adhere to the bond terms.

[10] The bail assessment reports recommended that the accused persons are suitable for reasonable bond terms for they are neither a flight risk nor at risk of the community's wrath. They are well known and have fixed abodes. Also, the victim's family members' safety is not at risk.

[11] It is not clear whether the victim's family tended to mislead the court so as to ensure that the accused are not released on bail or bond especially on the basis of the evidence of the OCS and Bernard Mbiu. The latter denied the signature on the affidavit that sought to oppose the current application. I will however leave that matter at that for it is under investigation by the police to establish who the authors of the affidavits purportedly made by Mark Kirimi Mbwiria and Bernard Mbiu's affidavits.

[12] Aquarina's affidavit averred that she signed her affidavit, but she did not report the intimidation to the police. She alleged that the threat in issue was made to her daughter one Alice Kagwiria. The said daughter did not record anything towards the alleged intimidation.

[13] Be that as it may, some of the accused are persons in authority and at the closest length to the people including the witnesses herein. I do not therefore wish to treat the allegations of intimidation as a trifle. I will therefore attach stringent conditions to their release. The accused persons shall be released on bond pending their trial on the following terms:

- a) Each of the accused person shall be released on a bond of Five Hundred Thousand shillings (Kshs 500,000.00) with one surety of the like sum. The said surety to be approved by the Deputy Registrar of this Court. Given the circumstances of this case, a cash bail is not suitable or appropriate option if the integrity of the trial and safety of witnesses is to be guaranteed.**
- b) During the pendency of this case, or until further orders of the court, the accused persons shall appear for the mention of their case once every 30 (thirty) days and in default of any one appearance without justifiable cause, the bond shall stand cancelled and the surety shall be called to account.**
- c) The accused persons shall not interfere with any of the witnesses or in any manner influence the prosecution of the case.**
- d) If the accused person violate the conditions stipulated herein his bond shall stand cancelled and he shall be remanded in custody till the conclusion of the trial.**

Dated, signed and delivered in open court this 10th day of February, 2020.

F. GIKONYO

JUDGE

IN PRESENCE OF

Kurauka for accused

Mwiti Watching brief

Maina for state

F. GIKONYO

JUDGE