



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL CASE NO. 18 OF 2019

REPUBLICPROSECUTOR/RESPONDENT

VERSUS

BENSON MURITHI KITHINJI.....ACCUSED/APPLICANT

RULING

1. **Benson Murithi Kithinji (“the applicant”)**, has been charged with the offence of murder contrary to *section 203 a read with section 204 of the Penal Code*. It is alleged that on 20/10/2019 at Kiroo Sub location Maara Sub County, within Tharaka Nithi County jointly with others not before court murdered **Frankline Gichobi Kithinji**.

2. After taking plea, the applicant’s Advocate, **Mr. Kimathi** applied for the applicant to be released on bond. It was the applicant’s submission that the applicant has been in custody for the last 30 days. He suffers from asthma. He took himself to the police station and that the offence is bailable. The applicant also opposed the pre-bail report which recommended that the release of the applicant on bail/bond terms be put in abeyance so as to allow witnesses to testify as they come from the same family.

3. The application was opposed by the prosecution. They submitted that there was a genuine fear that the applicant will interfere with the witnesses. They proposed bail to be reinstated after the witnesses have testified.

4. In reply the applicant denied being feared by the family members and stated that there is no affidavit from the Investigation officer to prove the compelling reasons.

Analysis and Determination

5. In his arguments before court, counsel for the accused stated that the offence is bailable. This is correct. Except, I do not think there is any offence in the new constitutional order that is non-bailable. Be that as it may, an accused person is entitled to bail except where there are compelling reasons not to so release him. See article 49(1) (h) of the Constitution.

6. The general considerations in determining whether or not to grant bail are now contained in ***Bail and Bond Policy Guidelines and*** section 123A of the Criminal Procedure Code. They include: the nature of the offence; strength of prosecution case; character of accused and antecedents; failure by the accused to observe previous bail or bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is a child offender; whether the accused is a flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person.

7. In this case the prosecution has alluded to possible interference with witnesses. The Court, on 20/11/2019 granted leave to the prosecution to file their response within seven (7) days but none was filed. The prosecution has only relied on the pre-bail report.

8. The pre-bail report expresses apprehension that this being a family conflict i.e. the deceased being a step brother to the accused, he is likely to undermine the confidence of potential witnesses to testify. I do note that the accused person and potential witnesses are relatives. The events of the incident herein are vivid in the minds of those the family of the victim as the fatal incident happened not so long ago i.e. on 20th October 2019. In addition, the pre-bail report states that the family members of the deceased have relocated from the homestead to rented premises pending the hearing of this case. It is important to note that there are two houses involved here and the two houses seem to be in great hostility with each other. The accused is from one house whereas the deceased is from the other. Also, the reason for and the feuding dispute between the two houses still subsists. These facts have not been negated in any way and I do not find anything which may put to doubt the facts as narrated in the pre-bail report. In these circumstances, possibility of witnesses resigning to fear due to the presence of the accused so soon a time is real.

9. On the foregoing, I am content and persuaded to cite the expressions in **Republic v David Ochieng Ajwang Alias Daudi & 11 others**

(2013) eKLR by Sitati, J. that:

"...It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety."

10. On the basis of the above reasons, I deny him bail but only for now. I am aware that the accused person is aged 50 years, a father of three and an alleged asthmatic. Therefore, I order that the witnesses who are family members of the victims to be availed before the good judge at Chuka so that their evidence shall be taken expeditiously. And, once those vulnerable witnesses have testified, the accused shall be admitted to bail upon terms to be set by the judge at Chuka. Because of the exigencies attendant to this order, this file be placed before the judge at Chuka on 17/2/2020. It is so ordered.

Dated signed and delivered at Meru in open court this 6th day of February, 2020.

F. GIKONYO

JUDGE

In presence of

Kimathi for accused

Accused – present

Maina for state.

F. GIKONYO

JUDGE