



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO 16 OF 2019

REPUBLIC

VERSUS

1. DOYO GALGALO.....1<sup>ST</sup> ACCUSED

2. GALMO GUYO GALGALO alias MAKAYANGU.....2<sup>ND</sup> ACCUSED

3. BOKAYO DIDA BORU alias WARABO.....3<sup>RD</sup> ACCUSED

4. SOMO HUKA KANCHORO.....4<sup>TH</sup> ACCUSED

RULING

**Bail**

[1] Bail is a constitutional right, albeit, not absolute for an accused may be denied bail where compelling reasons exists. The burden of proof that compelling reasons exists lies with the prosecution. The proof is also by cogent evidence. This is a high standard which I believe draws from the constitutional threshold on limitation of rights set out in article 24 of the Constitution. Therefore, the evidence should be rousing and one that brings conviction upon the court to deny bail.

[2] The accused are charged with murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 law of Kenya. The prosecution has objected to their release on bail or bond on a single reason; that the accused will interfere with witnesses. Courts have stated that interference with witnesses is one of the compelling reasons for which bail may be denied.. But has the prosecution proved witness tampering?

[3] The prosecution filed an affidavit sworn by NO. 236140 IP ERNEST MUA on 31<sup>ST</sup> January 2019. The gist of his averments therein is;-

**a. That the accused persons especially 1<sup>st</sup> and 2<sup>nd</sup> accused are politicians and therefore persons of great influence upon the inhabitants of their area. They cited the example of barricade of the of Marsabit police station on 17<sup>th</sup> December 2018 by their supporters after their arrest. The crowd threatened to burn down the police station. Due to this incident, the suspects had to be moved to Laisamis police station.**

**b. That the 1<sup>st</sup> and 2<sup>nd</sup> accused persons are associated with the Governor of Marsabit County by virtue of being politicians. And that the said Governor has sent emissaries to the relatives of the deceased to settle this matter out of court.**

**c. That the 1<sup>st</sup> accused person is an elder in Borana Community- a position that adds to his influence.**

**d. That the manner in which the deceased was killed- by burning- sends shivers to and makes the family of the deceased to be apprehensive of their safety especially if accused person is released.**

**e. That the accused are interfering with witnesses and have already sent proxies to them.**

[4] The State Counsel, M/S NYAMOSI, augmented the prosecution's case through quite robust submissions. She emphasized that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons being persons of immense influence politically and socially could cause a lot of disharmony within the Borana

community as well as against the family of the deceased at this time they are facing these charges. According to her, the barricading and the threat to burn down the Marsabit police station eloquently dramatised the kind of influence the accused persons have over the community, and in relation to this matter. To her there is sufficient evidence that the accused persons have interfered with and are likely to continue with interference of the witnesses if released. She informed the court that some witnesses are being considered for placement under witness protection program. She summed up by stating that the case is yet to be heard and there is need to protect the witnesses and the victim family as well as maintain public order. She was confident that the prosecution has established compelling reasons for which the accused persons should be denied bail.

[5] The defence filed replying affidavits sworn by each accused person. They have made averments on many matters; twists and turns in their case. But of importance is that they all stated that they have fixed abodes and are not a flight-risk. They also stated that they had been granted bail in case number 123 of 2018 but now terminated by DPP. And none defaulted on the terms of bail granted thereto. In granting bail, they asked the court to also consider the probation officer's report which was filed in earlier proceedings. They also beseeched the court to release them on bond on terms and conditions like those imposed in the earlier case which were terminated. In addition, they stated that they are aware that the Council of Elders have been engaged in reconciliatory meetings aimed at bring harmony in the clans. They even paid school fees for the children of the deceased.

[6] Learned legal Counsel for the accused person Mr. Sagana, leading Mr. Muganda eloquently submitted on the matter. He was categorical that the affidavit by the IO is based on speculations and apprehensions. He also argued that there is no single incident of interference with witnesses that has been shown to have taken place. He laid emphasis on the fact that no single witness has filed an affidavit claiming interference by the accused persons. He took issue with the fact that they have not been supplied with witness statements, thus, it is hard to know who these witnesses are. He urged that the fact that the prosecution intends to place some of their witnesses under witness protection program is simply their duty to do so. Of importance to them is that the accused persons are innocent until proven guilty.

[7] Mr. Sagana continued. He was of the view that political status of the accused persons does not remove them the constitutional protection of equal treatment in and to have the benefit of the law. He stressed that the accused did not breach any of the conditions of bail granted to them earlier. Therefore, this factor should be considered by court. He also impressed upon the court to find that no way the accused person could have managed to incite his supporters to barricade the police station when he was in the cells. In any event, there is no official record or OB on the alleged occurrence. He did not stop there. He argued that the intervention by the Council of Elders was to bring harmony amongst the members of the community; thus, it should be seen as a sign of goodwill rather than an interference of witnesses. He concluded by stating that for the reasons he had adumbrated, the accused persons deserve to be released on bail.

[9] Mr. Kiget, learned counsel for the 3<sup>rd</sup> accused person fully associated himself with the elaborate submissions by Mr. Sagana and asked the court to release his client on bail.

[10] Mr. Ndubi watching brief for the victims supplied the court with the decision by Limo J.

## ANALYSIS AND DETERMINATION

[12] It bears repeating that interference with witnesses is one of the instances that constitute compelling reason on which bail may be denied under article 49(1) (h) of the Constitution. There is no dearth of judicial authorities on this subject. I do not wish to multiply the authorities except to cite **R vs. KIMUNYA [2011] 2EA 360**.

[13] Interference of witnesses may take different forms. It may be overt or covert and stealth; it may be direct or indirect; it may be active or disguised; it may be intrusive or by persuasion; it may be a combination of one or more of the foregoing; it may be of coloured displays. Some instances of interference with witnesses or witness-tampering include assault or threats to or intimidation of a witness, or persuading or bribing of witness or making promises or offers to witnesses. I will add also that using influence or power to tamper with witnesses is also an incident of interference with witnesses. But, it must be shown also that the aim of these acts is to make or persuade or coerce a witness to give skewed or fabricated evidence or to prevent a witness from giving evidence or to pervert the course of justice. I pose: What does the evidence on alleged interference with witnesses herein portend?

[14] The IO deposed that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons are persons of influence and may use their political clout to interfere with witnesses. I should say here that merely having a political clout is not a crime or by itself an automatic recipe for interference with witnesses lest all prominent persons should be ineligible for bail. The prosecution must show such acts of the use of influence to exert pressure or to intimidate or threaten or persuade witnesses to give skewed evidence or fabricated evidence or not to give evidence at all or to pervert the course of justice. The prosecution stated that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons incited their supporters to barricade the Marsabit police station when they were arrested on 17<sup>th</sup> December 2018. There is no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> accused person had incited their supporters to barricade the police station. It is possible for the supporters to have acted out of own volition- but such act is however criminal and a breach of security and peace. All persons should be warned of taking the law into their own hands as that is criminal and should be dealt with severely.

[15] What about the intervention by the Council of Elders? The 1<sup>st</sup> and 2<sup>nd</sup> accused are said to bear considerable political clout. They are said to be close to the Governor of Marsabit. The IO has accused the Governor of having sent some emissaries to the family of the deceased to settle this case out of court. The IO in paragraph 8 of his affidavit quoted above gave the names of the relatives of the deceased to whom the emissaries were sent, to wit, (1) Bika Duba; (2) Rob Duba; (3) Guyo Galmo; and (4) Matta Wako. Such overtures would ordinarily be clear interference with witnesses. But, I wonder why the prosecution did not find it necessary to file an affidavit or affidavits by one or more of these witnesses to confirm the overtures by the Governor. This omission weakens their argument on that front. I should however state that parties should never attempt to scuttle the state obligation of bringing offenders to justice in the name of out of court settlements, for such heinous crimes as murder cannot be settled by communities but by the law.

[11] What is not in doubt and the accused persons confirmed this in their affidavits as well as through submissions by legal counsels is that the Council of Elders took the initiative of bringing peace and harmony among the clan members. Genuine and honest initiatives of that kind

are welcome. However, if it is aimed at compromising the murder case or persuading or appeasing the family to compromise this case, such becomes an instance of interference with witnesses and evidence in the case; and is a grave matter of perversion of justice. It has been claimed and that is not disputed that the 1<sup>st</sup> accused person is an elder in the Borana community and wields great influence. Therefore, possibility of use of influence by him to interfere with witnesses through the elders is high.

[14] One other thing which is important is that the accused are from the same community with the victim families. And in light of the manner the crime was executed the family may be intimidated by the presence of the accused. I note that the prosecution has informed the court that some witnesses are already under the witness protection scheme and has intimated to court that it will make appropriate application for the court to adopt such safe and appropriate procedures and lawful methods of taking of evidence as to secure the witnesses. They suggested the matter be heard in camera. This reality is not a trifle; it is a reality of law and an important consideration here. And to avoid any interference with the security of the witnesses or prejudice to the witness protection scheme, and for the sake of probity of these proceedings it is not appropriate to release the accused on bail for now. I am aware that the case shall be heard on 25<sup>th</sup> February 2019 and upon taking of the vulnerable witnesses testimony the issue of bond will be revisited for the reason to object to bond will have dissipated promptly. Therefore, the prosecution should ensure that all vulnerable witnesses are availed on 25<sup>th</sup> February 2019 in order to avoid any prejudice to the accused persons who are held in custody for the reason of likelihood of interference with witnesses. The prosecution has shown new zeal of prosecuting cases expeditiously. The court is also ready to deal with the matter expeditiously. I have made myself clear; any delay will be an attack on justice. Case be fast tracked. Accordingly, the accused shall remain in custody for now.

**Dated, signed and delivered in open court this 12<sup>th</sup> February, 2019**

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**F. GIKONYO**

**JUDGE**

**In Presence of**

**M/s Nyamosi M/S Onunga for state**

**Ndubi holding brief**

**Muganda for 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> accused**

**Muganda for Kiget for 3<sup>rd</sup> accused**

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**F. GIKONYO**

**JUDGE**