



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 7 OF 2014**

**JAPHET KOBIA.....1<sup>ST</sup> ACCUSED**

**JAMES KIUNGA.....2<sup>ND</sup> ACCUSED**

**GODFREY KARITI.....3<sup>RD</sup> ACCUSED**

**SIMON MUTUA.....4<sup>TH</sup> ACCUSED**

**-VERSUS-**

**REPUBLIC.....PROSECUTOR/APPLICANT**

**RULING**

1. On 29<sup>th</sup> November, 2018, this court delivered a ruling whereby for reasons set out therein, the accused's bonds were cancelled and they were ordered to remain in custody during their trial. On 14<sup>th</sup> February, 2019, Ms. Aketch, Advocate Counsel for the accused, lodged an application in this court under **sections 123, 124 and 364 of the Criminal Procedure Code, Articles 49, 50 and 159 of the Constitution**, seeking the setting aside of the said ruling.

2. The grounds upon which the application was made were that; the accused are facing a murder charge which is a bailable offence; that the accused have denied the charge and they had been admitted to bail; that the grounds upon which the accused's bonds were cancelled were unsatisfactory and that the 4<sup>th</sup> accused had lodged 3 cases against the complainants in this case, and that the cancellation of the accused's bonds was meant to aid the acquittals of the complainants in this case.

3. Ms. Aketch, Learned Counsel for the accused swore a long affidavit in support of the application. She deposed, *inter alia*, that, it is the complainants in this case who have perfected the art of being a risk to the community; that the complainants in this case had been involved in acts of atrocity against the accused and the community as a whole. That the complainants had been charged in a Tigania Court but were acquitted on 26<sup>th</sup> November, 2018 because the accused were in this court. Counsel urged that the application be allowed.

4. Mr. Gitonga, Learned prosecutor opposed the application on points of law. He submitted that the accused were on bond before the prosecution applied for its cancellation on 9<sup>th</sup> October, 2018. That nothing new had been disclosed to warrant the review of the order cancelling the accused's bond. He urged that the application be dismissed.

5. I have carefully considered the deposition by Ms. Aketch. She has indicated that it is the complainants in this case who are hostile to the accused and that they had been arrested and charged in a Tigania court. She never disclosed the names of the so called complainants in this case.

6. I have seen the documents produced by Learned Counsel. In **Tigania Criminal Case No.180 of 2018**, the accused is one **Benjamin Muriithi Alias Mbaabu Ngwine**. That case was about attempted arson. There was no explanation who Benjamin Muriithi is in this case. The allegation that the accused were in this court on 26<sup>th</sup> November, 2018 is not correct. However, they had been placed in custody on 5<sup>th</sup> November, 2018 pending the ruling.

7. Bond is a Constitutional right of every accused person. It can only be denied on exceptional circumstances. Indeed, **Article 49 of the Constitution** provides that it can only be denied where "*exceptional circumstances*" exist. This is so considering that every accused is presumed innocent until **proved** guilty.

8. The accused in this case pleaded NOT guilty to the charge they are facing. They were released on bond and had enjoyed that right for close

to three years until November, 2018. At the risk of repeating what the court stated in its ruling of 29<sup>th</sup> November, 2018, it is important to look at the events that led to the cancellation of the bond.

9. **PW2** testified before this court on 19<sup>th</sup> June, 2018. The matter was then adjourned to 9<sup>th</sup> October, 2018. On that day, she complained through the prosecutor that after testifying, she had been accosted and warned of dire consequences by the accused. The prosecution applied that the accused's bond be cancelled. The court being mindful of the sacred nature of the right to liberty declined to entertain the application and ordered the matter to proceed.

10. **PW3** then testified and gave a harrowing experience that he had undergone in an attempt to stop him from testifying in this case. He had had one of his fore limbs chopped off. It is after he had finished testifying that the court ordered the OCS, Mikinduri Police Station to carry out investigations of the alleged interference with witnesses in this case. The OCS appeared more three times when he gave details of his investigations on which he was cross-examined at length.

11. Despite intense cross-examination, the OCS remained firm that the accused were interfering with the prosecution witnesses. That ever since they were released on bond, there had been increased incidences of criminal acts touching on or connected with this case. He was of the view that the bond of the accused be cancelled. The court believed him.

12. It should be recalled that, the first time the application for the cancellation of the bond was made on 9<sup>th</sup> October, 2018. There were several appearances that followed before 5<sup>th</sup> November, 2018 when the bond was suspended. All that has now been raised by Ms. Aketch in the instant application was never raised then. The letters written by the chiefs are of self-serving and of little probative value having in mind that the OCS himself who is in-charge of security in the area testified to the contrary.

13. The chiefs who wrote those letters did not offer themselves for cross-examination. They wrote the letters on 2<sup>nd</sup> and 13<sup>th</sup> November, 2018 before the ruling of 29<sup>th</sup> November, 2018. It defeats logic why they did not attend court before the ruling only to have the letters surface thereafter. Although two of those letters are shown to have been addressed to this court, none of them was received by the court.

14. As stated in the ruling that cancelled the bond, while an accused has a right to liberty through bond, that right must of necessity be weighed against public interest. It is in the public interest that once criminal proceedings have been commenced, they should not in any way whatsoever be interfered with. Threatening a witness with a view to scaring him or others from offering evidence is a serious interference with the due process. It is unacceptable and cannot be allowed to stand.

15. In the present case, there was ample evidence that when the accused were released on bond they not only attempted to interfere with witnesses, they actually threatened them. Indeed, **PW2** was said to have moved away from her home and is housed elsewhere because of fear of reprisals for having appeared in court and testified against the accused. That was but a stern warning to the other civilian witnesses who have yet to testify.

16. In view of the foregoing, I do not think anything new has been raised to suggest that the compelling reasons or circumstances that existed which led to the cancellation of the accused's bonds have changed. In the circumstances, the application is without merit and is dismissed.

**DATED and DELIVERED at Meru this 7<sup>th</sup> day of March, 2019**

**A. MABEYA**

**JUDGE**