



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. 15 OF 2018**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**ELIUD KANUMBI alias NDERITU.....1<sup>ST</sup> ACCUSED**

**PATRICK NGATUNYI alias NGATIA.....2<sup>ND</sup> ACCUSED**

**DUNCAN NDEGWA MUKIRA.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons herein are charged with murder contrary to section 203 as read with s.204 of the Penal Code. The particulars are that on the night of 13<sup>th</sup> and 14<sup>th</sup> of October 2018 along Njigari-Gitugi road at Njigari village Mahiga West Location, Nyeri South Sub-County within Nyeri County within the Republic of Kenya jointly murdered ERICK NGURI GIKUNJU.

2. They each took plea on 20<sup>th</sup> November 2018 where they pleaded not guilty to the charge/information.

3. When the matter came for pre-trial on 4<sup>th</sup> December 2018 the prosecution indicated that it had objections to bail. On the same day **No.68360 Cpl Abraham Koech** filed “*Replying Affidavit*”. He set out the grounds for opposing bail.

*i. That the accused persons had threatened the witnesses who had fled their homes due to fear from the accused persons and prosecution risked losing the evidence of crucial witnesses from Njigari village.*

*ii. That accused were habitual offenders and hence were flight risks- he demonstrated this with examples of cases where; Accused 3 had an ongoing attempted robbery case in Nyahururu and had previous record of theft of motor vehicles.*

*iii. That the public was still angered by the offence committed by the accused and it was not in the interests of peace and public security for them to be released on bond.*

*iv. That these were compelling reasons and he urged the court to follow the bail and bond policy guidelines.*

4. Mr. Kimunya appeared for the 1<sup>st</sup> accused person. He relied on the persuasive authority of **Republic Vs Cyrus Mwangi Kimunya Kerugoya Murder Case No.13 of 2014** where the court dealt with the issue of accused being denied bail on the ground of their own security. The judge therein also relied on the persuasive case **Republic Vs John Kahindi Karisa & 2 others**. He argued that there was nothing specific with regard to the allegations of families having fled/crucial witnesses disappearing, or that the ground was volatile against the accused persons.

5. Mr. Gathiga Mwangi for Accused 2 argued that there were no compelling grounds to deny the accused person bond. That Accused 2 as an old man of 60 years was not a flight risk and there was nothing about him being a flight risk/habitual offender. He reminded the court of the presumption of innocence with regard to the accused persons.

6. Njuguna Kimani for Accused 3 urged the court to find that the investigating officer’s affidavit disclosed no compelling reasons and to be guided by Articles 49 (1)(h) and 50 of the Constitution and s.143 of the CPC. That the affidavit was speculative while other averments were matters of evidence that ought not to be raised at this stage. That there was nothing to show that the state was putting their witnesses under witness protection due to the alleged threats. That the allegations against the accused being habitual offenders and the specifics against the accused 3 were in violation of the presumption of innocence, as the accused 3 had only been convicted of the unrelated offence of theft of M/v parts, and the robbery case was still pending. He urged the court to find that the accused person would be able to abide by the orders of the court.

7. The state responded that it was still opposing bail. That the right to bail is not absolute. That there was an ongoing process to keep the witnesses in witness protection. That accused persons had no fixed abode, and if released would be untraceable, that 3<sup>rd</sup> accused was a habitual offender having been convicted the 1<sup>st</sup> time in 1993, pending Cr case 2502/ 2014 in Nyahururu CM's court, and another where the police file was no. 758/55/06. That accused were aware of the evidence against them and would abscond.

8. I sought a Pre-Bail Report on each of the accused persons which were filed on 8<sup>th</sup> February 2019.

9. Each report outlined the persons who were interviewed, the views of the community, the investigating officer, the local administration and those of the victims.

10. The probation officers despite finding some disparaging issues about the accused persons were unanimous that due to their family ties they were not flight risks as it was their immediate family members who were ready willing and able to stand surety for them.

11. The running thread in the three Pre-Bail Reports is some mystery about the accused persons' business- described variably as 'unknown business', 'strange business' with one being described as a conman, another dealer in mercury, creating an aura of shady characters. These are the observations from members of the community as gathered from the social inquiry, and they are juxtaposed with the views that the accused persons are also well settled within their respective families and well known in their communities. They are family men, who attend church, take care of their children and engage in other social activities. For Duncan Ndegwa, it was not even known in the village that he had been arrested and was in custody for the offence of murder. The family of the deceased did not even know that suspects had been arrested. While there is no tangible evidence that the accused persons might/may interfere with witnesses or threaten witnesses the description of their dealings within the community gives the appearance of persons who **could** ensure that witnesses do not testify. The reports in their own way confirm that investigating officer's fears are not completely unfounded.

12. Bond is a constitutional right but it is not absolute, that is why the window is there for the state to establish compelling reasons to deny the same, and the court, the discretion to set the terms for each. At the end of the day, it is the undertaking by the accused person to the court and the rest of the criminal justice system that he will attend court as and when required until the final determination of the case.

13. I note that the Probation Officer did not provide contacts of those who were spoken to. I think it is necessary for purposes of verification that they were actually spoken to. I do not see any harm that could come to them because they are family members of the accused persons and administrators – people who deal with the accused persons on a day to day basis.

14. Having said that I am of the view that the accused persons may be released on bail. However, that this should be after the prosecution has called the witnesses they consider to be vulnerable. Why? Because although the state has the obligation to protect its citizens wields the instruments and powers of control in a nation as ours where the Rule of Law abides, it is still the lived reality for Wanjiku on the ground that it is not always that rosy. As much as the Witness Protection Agency does exist access may not be easy even for deserving cases due to logistical issues. The court is called upon to exercise a form of balancing act between the two competing interests- the public and the private and personal.

15. It is therefore my considered view is that the accused persons ought to remain in custody until the key witnesses testify following which each may be released on bond.

16. The terms of the Bond are at Kshs. 750,000/- each with one surety of similar amount, accompanied by the usual documents and in addition, a letter from assistant chief who was interviewed, full photo of the accused, and the surety. Each accused is bound to report to the area assistant chief if he is leaving the sub location, which report the assistant chief is bound to relay to the OCS, Othaya Police Station.

17. The Deputy Registrar to have the order extracted and served on the Assistant Chiefs Gitundu sub location, Gikoe Sub location through the Probation Office, and the OCS Othaya, through the ODPP, Nyeri.

18. The Sureties to be approved by the Deputy Registrar.

**Dated delivered and signed at Nyeri this 6<sup>th</sup> March 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:-

Court Assistant: Juliet

Magoma for state

Accused-Present

Kiboi holding brief for Kimunya for Accused 1

Gathiga Mwangi for Accused 2

Njuguna Kimani (was appearing for Accused 3) but has withdrawn vide letter of 27<sup>th</sup> February 2019 filed on 1<sup>st</sup> March 2019.

Mention on 13<sup>th</sup> March 2019 before Deputy Registrar for Accused 3 to be allocated counsel.

Hearing on 27<sup>th</sup> March 2019.

**Mumbua T. Matheka**

**Judge**

**6/3/19**