



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 15 OF 2018

LESIT, J

REPUBLIC.....PROSECUTOR

VERSUS

COLLINS OMONDI OTIENO.....1ST ACCUSED

OMK.....2ND ACCUSED

RASHID BRIAN MWANGI.....3RD ACCUSED

RULING ON BAIL

1. The subject and accused in this case **OM** aged 17 years and **BRIAN MWANGI** aged 23 years old, are facing two counts of murder contrary to **Section 203** of the **Penal Code**. Ms. Jepkorir, Counsel holding brief for Mrs. Kinyori and Mr. Wamwayi for the subject/accused respectively urged the court to release the two on bail/bond pending their trial.
2. In regard to the subject counsel urged that he was an orphan and if granted bail he will relocate to Machakos. It was urged that he was a student in Form 2 and would go back to school if granted bail. Counsel submitted that the subject has denied being a member of any gang or terror group.
3. In regard to the accused Brian Mwangi, Counsel urged that he was the sole breadwinner of his family. Counsel urged that the accused was not part of any terror gang and if released on bond he will go to live with his mother in Dandora.
4. The Prosecution has opposed bail on grounds there was real fear the subject and accused may interfere with witnesses if released on bond. Ms. Onunga for Prosecution urged that the subject O dropped out of school and joined the group he ascribes to which terrorizes the community where he lives. Counsel urged that the Area Chief tried to Counsel the subject to leave his wayward ways and return to school but he declined.
5. Ms. Onunga urged that witnesses and the entire community have expressed fear if subject and accused are released. Counsel urged that the findings on the ground by the Probation Officer confirms the witnesses' concerns.
6. There is a replying affidavit by Brian, the 2nd accused in this case in response to the affidavit by the Investigating Officer. He denied being a flight risk or having gone into hiding after the offence was committed as alleged by CPL Lekisima the Investigating Officer in this case. He deposes that he is self-employed and earns a living doing business. He also denies intimidating any prosecution witnesses saying he did not know where they live.
7. I have considered the affidavit by CPL. Lekisima dated 5th March, 2019. I noted grounds cited why the subject and accused should not be released. Of particular interest is the averment that certain witnesses should be placed under witness protection and their statements deducted before subject/accused may be considered for release.
8. The prosecution has not given an indication that there is an intention to place any of the witnesses under witness protection. The Investigating Officers contention to that effect has no backing.
9. The primary consideration in bail applications is whether the accused will turn up for their trial. **Section 124 of the Criminal Procedure Code** states so. Both the subject and the accused in this case have promised to abide by the terms and conditions of bail and to show up for

their trial. The Investigating Officer has averred in his affidavit that the two may not show up because after the offence they went under and could not be found until several months later.

10. The court called for Probation Pre-Bail Reports. Only one in respect of the subject has been filed and is quite insightful as it brings out the character and antecedents of the subject. The subject is a school dropout according to findings by the probation officer. For the latter, the accused person, we have no pre-bail report.

11. **The Bail and Bond Policy Guidelines at Paragraph 4:9** sets out what the court should consider in order to determine whether there exist compelling reasons to deny bail. These are:

- a) **Nature of charge or offence and seriousness of the punishment.**
- b) **The strength of the prosecution case.**
- c) **The character and antecedents of the accused persons.**
- d) **The failure of the accused person to observe bail or bond terms.**
- e) **The likelihood of interfering with witnesses,**
- f) **The need to protect victims of the crime.**
- g) **The relationship between accused and potential witnesses.**
- h) **The best interest of child offenders.**
- i) **The accused person was a flight risk.**

j) Whether the accused person was gainfully employed.

12. There are also other factors to consider like threats to public order, peace and security and the impact granting bail may have on the future conduct of the case.

13. The Investigating Officer has raised serious concerns about the subject and the accused regarding their character and antecedents, the circumstances under which offence took place and the disappearance of the offenders for months after the offence.

14. The Pre-Bail report sheds light on the aftermath of the attack. The motive for attack on the deceased remains unknown and at least one of the victims' family which was interviewed are apprehensive that their security may be compromised.

15. I looked at a statement of a bar tender at the Bar where incident occurred. The statement brings out serious issues. It appears as if there was an unprovoked altercation between young men and the older men in the material bar, that the young men flashed out knives and started stabbing the old men. Two of the old men are the deceased in this case. Two others were hospitalized for a period of time. The culprits are also well known.

16. The Investigating Officer avers that both subject and accused have no fixed abode and that they are dangerous members of a gang and unruly. Both have denied it. Bare denial is not helpful. They claim they will relocate to other areas. However, the greater concern is the issue of whether they will show up for the trial.

17. The burden lies with the Prosecution to prove, on a balance of probabilities that there are compelling reasons to deny bail.

18. I see from the record this offence was committed in 2017 July. Arrests were effected in March 2018. It is claimed by the Investigating Officer that the subject and accused had gone underground. However what the Investigating Officer stated is confirmed by family of the victims and the community of the area where these offences occurred in their interview with the Probation Officer. I find that there is a high probability that the two went underground after the offence was committed.

19. The talk of involvement on criminal gangs featured a lot in the Pre-Bail Report and the investigating officer's affidavit. It portrays a picture of young people who live a reckless life of crime and who are feared in the community. Even though the two deny being members of any gangs, I am satisfied on a balance of probabilities that they are members of such groupings.

20. I have considered legal provisions on children. **Section 4(3), Children Act 2001** makes it imperative for all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by the Children Act to **treat the interests of the child as the first and paramount consideration.** I am also aware of **Section 187 (1) Children Act** which provides that every person in authority dealing with a child shall have regard to the best interests of the child and shall, in a proper case, take steps of removing him from undesirable surroundings.

21. Having considered the two provisions, I find that it will be expedient in this case to keep the subject in this case in custody in order to keep him away from undesirable environment that has the potential to destroy his life. So, even though he is a child, and even though the law

provides that the detention of a child should be the last resort, I find that it is necessary in this case to have the child held in custody during the pendency of this case.

22. I find that the subject and accused are flight risks. They have no known places of abode. They have no known employment with which they can be able to be independent and take care of their needs. They are likely not to show up for their trial. These are a serious issue which cannot be wished away. For this reason bond is declined.

23. Accordingly, both applications are dismissed.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF MAY, 2019.

LESIT J

JUDGE