



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 52 OF 2018

CONSOLIDATED WITH CRIMINAL CASE NO. 53 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

APC JOSEPH ONYANCHA.....1ST ACCUSED

APC AMOS KHAEMBA.....2ND ACCUSED

RULING

1. The Applicants **APC AMOS KHAEMBA** and **APC JOSEPH ONYANCHA** are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that on the 12th day of July 2012 along Kabete Road within Nairobi County jointly murdered **CPL. FREDRICK KANAMPIU THURANIRA**.
2. They pleaded not guilty and in exercise of their constitutional rights under **Article 49 (1) (h)** seek to be released on bail pending the hearing and determination of this case.
3. The 2nd Applicant's application was supported by an affidavit sworn by his Advocate on record **DENNIS ANYOKA MOTURI** in which it was deponed that the same was a police officer whose residence was well known to the prosecution, was not a flight risk, will not interfere with prosecution witnesses and will turn up in court when called upon. It was deponed further that he was sickly and the harsh prison conditions might cause his poor health condition to deteriorate.
4. The application was opposed by the prosecution through a replying affidavit sworn by **CPL SAMUEL KIRUI** one of the investigating officers and **KENNEDY KINYUA KANAMPIU** on behalf of the family of the deceased in which it was stated that since 2012, the DCI and ODPP recommended that the Applicants be charged with the offence of murder and requested the AP County Commander to surrender them but such surrender was not done and instead they were transferred. It was stated further that the Applicants failed and refused to appear before the DCIO Gigiri resulting into a pray for warrants of their arrest on 2nd May 2018 before the Chief Magistrate Court Milimani.
5. It was deponed that there was high likelihood of the Applicants interfering with and intimidating key prosecution witnesses if released on bond. It was further stated that they had evaded and delayed their arrest by using their influence within the Administration Police Service and might use the same to delay justice. It was contended that the key prosecution witnesses were fellow police officers who were on duty on the fatal day and there was therefore a possibility that the Applicants would inflict real fear and legitimate anxiety upon them.
6. On behalf of the family of the deceased it was deponed that the deceased was executed in cold blood while performing his duties as a police officer by the Applicants who are Administration Police Officers who were thereafter protected by their boss from arrest for a period of six (6) years until the unit was integrated with Kenya Police Service. It was stated that the accused persons being armed and dangerous by virtue of their work will be a danger to the family of the deceased.
7. The 1st Applicant on 9/1/2019 swore an affidavit in reply to the prosecution and stated that on the material day the regular police officers were not in uniform and were acting outside their jurisdiction without sending signal to other officers on patrol making them think that they were thugs. He denied evading arrest and stated that six (6) years had since passed since the alleged incidence without any prosecution witnesses giving any evidence of intimidation or any contact from him.

SUBMISSIONS

8. On behalf of the prosecution it was submitted that though the offence is bailable, it is subject to compelling reasons as stated under **Article 49 (1) (h)**. It was submitted that most of the prosecution witnesses are police officers and because of their network within the service the Applicants are likely to interfere with them. On behalf of the family it was submitted that the family members fear that the Applicants may harm them if released on bond.

9. On behalf of the 1st accused it was submitted that the same has always had access to a gun but has never used it to intimidate the witnesses. It was submitted that he was readily available and never resisted arrest. It was stated further that he was not a flight risk. On behalf of the 2nd accused it was submitted that he was not on the run during the six (6) years and that all the witnesses statements were recorded in the year 2012 and there is no evidence of interference presented before court for which the case of **REPUBLIC v ASBEL KIPROP MALELE [2014] eKLR** was submitted. It was submitted that the rights of the 2nd accused to bail cannot be limited on the ground that all witnesses are police officers.

10. It was submitted that the 2nd accused in the course of his duties responded to a report of robbery only to realize that the deceased was a police officer who was not in uniform and that he thereafter reported the incidence and recorded a statement in 2012 and had not been on the run.

DETERMINATION

11. Bail is a constitutional right of every accused persons which is only limited where there exists compelling reasons to be proved by the prosecution on a balance of probability as per Bail and Bond Policy Guidelines. The accused persons are at this time considered and presumed to be innocent under **Article 50 (2)**. The purpose for bond and bail still remains that of providing a guarantee that the accused will attend trial. In this matter the prosecution has submitted that the accused person influenced their not being charged with the offence in the year 2012 but only supported the same with three letters, two addressed to the then County Administration Police Commander and one from the County DCI Headquarters to the Director of Directorate of Criminal Investigations.

12. There is no evidence presented before me to support the prosecution's contention that the Applicants resisted arrest and as submitted by their Advocates at their rank in the service, I am unable to agree with the prosecution that they had any direct influence in the police force to resist and block their arrest. The Applicants cannot be denied bail on the basis of the inaction on the part of their then in charge to effect their arrest.

13. There is no evidence tendered to support the contention by the prosecution of the likelihood of the Applicants interfering with the witnesses and having noted that the intended prosecution witnesses are police officers who understand the law and police regulations, I am not persuaded by the prosecution that they are likely to be interfered with by the Applicants.

14. I have looked at the Pre-bail report submitted in compliance with Bail and Bond Policy Guidelines on 28/11/2018 and find and hold that the prosecution has not advanced any compelling reasons which cannot be cured by appropriate bail terms and conditions to enable me deny the Applicants the enjoyment of their constitutional right to bail.

15. Having found that there are no compelling reasons advanced by the prosecution, the next issue for determination is what constitutes reasonable bail terms:- The accused persons faces a charge of murder wherein one of the sentence which is available should they be found guilty is death sentence and therefore any bond terms issued must be such that will not make it easy for them to abscond should they feel in the course of trial that they might be convicted. As stated herein above the primary concern of the court is to secure the attendance of an accused person at his/her trial and the amount of bond should not be such that will amount to denial of bond.

16. With the above in mind I hereby grant the Applicants' bond/bail on the following terms:-

a. Each shall be released on a bond of Kshs.500,000/= (Kenya shillings five hundred thousand) with two sureties of similar amount.

b. In the alternative to (a) they can each deposit cash bail of Kshs.1,000,000/= (one million each).

c. They shall report to the investigating officer in respect of this case once after sixty (60) days until further orders by the court at dates to be determined by the investigating officer.

d. They shall not interfere with any of the prosecution witnesses and or the course of justice in this matter in any manner whatsoever.

e. In default of any conditions herein the bond shall stand cancelled without any further order from the court.

It is so ordered.

Dated, delivered and signed at Nairobi this 9th day of May, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Sinana for Anyoka for the 1st accused

Mr. Otieno for the 2nd accused

Mr. Ndolo for Kiptoo for the family

Accused 1 – present

Accused 2 – present

Court assistant: Karwitha