REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO 8 OF 2019

REPUBLIC ……………......……………………………........ODPP

VERSUS

WILLIAM LOPOLIAN & 6 OTHERS………………ACCUSED

RULING

1. **William Lopolian, Joseph Mbugua Njoroge, Duncan Gichuki Irungu, Santos Opiyo, Diba Banchale** and **Mohamed Kullow Dube** being the 1st to 6th Accused respectively are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 24th day of December 2018 at Huri area in Tsavo East National Park within Tana River County jointly with others not before court murdered **Lami Bocha**.

2. The Accused took plea on 8th April, 2019. They all denied the offence and a plea of not guilty was entered. **Mr. Mouko** appearing together with **Mr. Nyongesa** for all the 6 Accused applied for bond pending trial. Learned counsel submitted that bond was a constitutional right available to the accused. He submitted that the Accused were not a flight risk as demonstrated by the fact that they had presented themselves to the police and co-operated in the investigations. That they did not run away even though they had an opportunity to.

3. Counsel further submitted that the Accused were employees of the government with fixed offices, a fixed abode and family ties and were therefore not likely to abscond trial. He submitted that the Accused were not capable of interfering with the investigation as the same had been completed. In conclusion, counsel submitted that there were no compelling reasons to stop the Accused from being granted bail. He prayed for reasonable bond terms.

4. **Mr. Kasyoka** learned counsel for the prosecution opposed the release of the Applicants on bail. He submitted that **Article 49 (i) (h) of the Constitution** limits the right to bail where there are compelling reasons. Counsel relied on the affidavit sworn by **No. 233043 Chief Inspector Charles Ate Kamil** on 4th April, 2019. Learned counsel submitted that the affidavit raised 3 compelling reasons. Firstly, that the Accused had been unco-operative in the investigations and had attempted to intimidate the investigators. Secondly, counsel submitted that the Accused were a flight risk and there was a probability that they will abscond. He submitted that they had initially refused to take plea in Malindi court. Thirdly, counsel submitted that the court should consider the unique circumstances of the offence stating that similar incidences were on the rise and the body of the deceased had not been found.

5. Ms Thuku learned counsel watching brief for the victims' family supported the arguments of the prosecution. She drew the court's attention to the standard of proof to be applied under paragraph 4 of the Bond/Bail policy being one on a balance of probability. She submitted that there were compelling reasons to deny the Accused bond.

6. In reply to the prosecution's submissions, Mr. Nyongesa learned counsel for the Accused reiterated their position that there were no compelling reasons. He contended that the affidavit had been sworn by the D.C.I.O yet he was not the investigating officer. He submitted that the deponent neither disclosed the sources of his information nor showed that the Accused had resisted investigation. With respect to the averments at paragraph 7 of the affidavit that the Accused attempted to intimidate the police, counsel submitted that no particulars of intimidation or alterations of documents had been shown. He submitted that there would be no interference with witnesses as the Accused did not even know the witnesses.

7. The court allowed both parties to file authorities. I have considered the submissions by learned counsel along with the authorities supplied.

8. There is no dispute that **Article 49 (i) h of the Constitution** gives a suspected person the right to bail. It states that:-

> **"An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."**

9. It is clear from the wording of Article 49 (i) h that the right is not absolute and can be denied where there are compelling reasons. The limitation of the right to liberty of an individual must also be in accordance with **Article 24 of the Constitution** which provides:-

> **"1. A rights or fundamental freedom in the Bill of Right shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including**
>
> > **(a) The nature of the right of fundamental freedom,**
> >
> > **(b) The importance if the purpose of the limitation,**
> >
> > **(c) The nature and extent of the limitation**
> >
> > **(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
> >
> > **(e) The relation between the limitation and purpose and whether there are less restrictive means to achieve the purpose."**

10. It follows therefore that since denial of bail is a limitation of the right to liberty of an accused, such denial must be a judicious determination flowing from the existence of compelling reasons.

11. The term "compelling reasons", though undefined by the Constitution, has been the subject of many decisions. In **Republic versus Jokta Mayende and 3 others HCCR Case No. 55 OF 2009** Gikonyo J put it this way:-

> **"……. And accordingly, the phrase compelling reasons would donote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."**

12. In **Antoinette Uniweza and another versus Republic, Nairobi HCCR Case No. 54/2013** this court stated thus in respect to compelling reasons:-

> **"……… The Constitution has however in its wisdom left the task of deciding on the compelling reasons to the court so that the court can, taking into consideration the circumstances of each individual case, exercise discretion in granting or refusing to grant bail. Needless to add, the court is obligated to exercise its discretion judiciously and on the basis of the law and facts before it."**

13. **The Bail and Bond Policy Guidelines** issued by the Judiciary provide a guide to the court in determining applications for bail. **Section 4.9** sets out the following factors for consideration by the court:-

> **a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.**
>
> **b) The strength of the prosecution case.**
>
> **c) The character and antecedents of the accused person.**
>
> **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 the victim or victims of the crime.**
>
> **g) The relationship between the accused person and the potential witnesses.**
>
> **h) The best interest of child offenders.**
>
> **i) The accused person is a flight risk.**
>
> **j) Whether the accused person is gainfully employed.**
>
> **k) Public order, peace and security.**
>
> **l) Protection of the accused persons.**

14. In **R. V Richard David Alden 2016 eKR,** Lesiit J summarized the guidelines in the following terms:-

> **"the Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set our under Section 123A of the Criminal Procedure Code. These general considerations are: the nature of the offence; strength of the prosecution case; character of the accused and antecedents; failure by the accused to observe previous bail and bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accuse is a child offender; whether the accused is flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person."**

15. It has been held and is now the acceptable legal position and practice that it is the duty of the State to demonstrate compelling reasons. This was succinctly stated by Ibrahim J (as he then was) in the case of **R. Vs. Danson Mgunya and Kassim Sheebwana Mohamed, Mombasa Criminal Case No. 26 of 2018** where he stated:-

> **"I do hold that if the prosecutor objects to the release of the accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused to prove or at least demonstrate the existence of the "compelling reasons."**

16. In the present case, the State has stated three main reasons why the Accused should not be admitted to bail. These are contained in the sworn affidavit of C. I Kamil and Kasyoka the oral submissions of Mr. Kasyoka learned prosecution counsel. It is the averment of C.I Kamil that the Accused initially resisted investigations and attempted to intimidate the investigators by turning up at the police station armed and in uniform and in the escort of their armed colleagues who were heavily armed. He averred that this action resulted in fear and intimidation within the police station and the interrogation had to be postponed to another date. He annexed a letter in this respect addressed to the Director General of KWS dated 20th February, 2019.

17. The 2nd ground advanced by the prosecution is the likely intimidation of and threat to prosecution witnesses. It was deponed that the Accused who were all serving KWS officers might interfere with civilian witnesses as they had the antecedent of having attempted to intimidate police officers.

18. The 3rd ground is that there were many cases of killings in Tsavo Park which have been directly linked to the KWS officers making the present case a matter of public importance and interest.

19. All the above grounds were dismissed by the defence in their submissions as lacking in truth and substance.

20. I will start with the last ground that the Accused be denied bond because there were many similar reported incidents of murder in the Park. I must dismiss this ground for the reason that no concrete evidence was presented to me and further that the Accused before court cannot be punished for offences at large committed by persons at large. The killing of any person is indeed a matter of great public interest and the police are expected to execute their constitutional mandate to protect life and property; detect and prevent crime, and; apprehend and charge offenders in a court of law. It serves no useful purpose to import broad allegations into the current application before the court instead of tangible action being taken against the perpetrators of such heinous crimes. It indeed behoves the State to take urgent and deliberate action to make the parks safe and secure.

21. There is not contestation that the purpose of bail is to secure an accused person's attendance at trial. See **Jaffer v. Republic 1973 E.A** It follows therefore that the court would not hesitate to deny bail where it is proven that the Accused would abscond and evade trial if released.

22. In this case the state has through the sworn affidavit of Chief Inspector Charles Ate Kamil and the submissions of the prosecution counsel stated that the Accused were a flight risk. They have however not persuaded the court that the Accused would indeed fail to attend court. To the contrary it has been shown that the six Accused were Public Officers employed by the KWS, had fixed offices and family ties. I am persuaded that it is unlikely that they would flee the jurisdiction of this court to evade trial.

23. A final ground raised by the State is that the Accused were likely to interfere with and intimidate witnesses. Interference with witnesses is a valid ground for denial of bail. In **R. V Joktan Mayende & 3 others 2012 eKLR** Gikonyo J had this to say:-

> **"In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010."**

24. Interference with the administration of justice and with witnesses takes varied forms and can occur at different times from investigation to the end of the trial. In the **Mayende case** (***Supra***) the court held:-

> **"All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any persons including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses or other persons are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the**

right to liberty of the accused."

I could not agree more with the exposition above.

25. This court has held before in **Republic v. Dwight Sagary & 4 others Nairobi Criminal Case No. 61 of 2012** that :-

> **"As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of the threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others".**

26. In the present case C.I Kamil averred at paragraph 6 of his affidavit that the Accused persons had been very uncooperative from the onset of the case. He stated that the offence was committed in December, 2018 and a report made at Garsen Police Station a few days after the offence but various attempts to investigate the case by the DCI Garsen were thwarted by the accused persons with the help of their employer. That the DCIO Garsen only managed to interrogate them on 18th February, 2019 and had them arrested on 13th March, 2019.

27. C. I Kamil further averred at paragraph 7 that when the Accused finally agreed to be interrogated, they presented themselves at the DCI Voi heavily armed and in uniform, and in the company of their armed colleagues whose presence was not required contrary to the DCIO's instructions not to be armed and not to be in uniform.

28. The defence opposed the averments of Chief Inspector Charles Ate Kamil and the submissions of counsel for the State. They submitted that there was no evidence that the Accused would either interfere with the case or intimidate witnesses.

29. I have considered the opposing positions. It is the fear of the prosecution that the Accused will interfere with the witnesses. It is my considered view that the basis of the fear has been laid. The state has cited the antecedents of the Accused that they initially refused to co-operate with investigators and resisted investigation. The averment that they were unco-operative is backed by a letter dated 20/2/2019 directed to the Director General KWS by the D.C.I.O raising the concerns of the investigators and specifically stating that the suspects created fear and intimidation within the police station.

30. Against the background laid out above it is not far-fetched for the prosecution to aver that the Accused if released would interfere with witnesses. They have demonstrated through the antecedents of the Accused when they resisted investigation and intimidated the investigators that they were capable of interfering with and intimidating witnesses thereby interfering with the administration of justice. The specific instance of interference has been laid before the court.

31. I am persuaded that the Accused if released would intimidate witnesses and particularly civilian witnesses who would have no muscle like the police to stand up to any intimidation or interference; and that this would amount to interference with the administration of justice. As stated by Lesiit J in **R. V. Fredrick Leliman & 4 others, Criminal Case No 57 of 2016:-**

> **"Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."**

32. Having taken all factors into consideration, I am persuaded that the Accused are likely to intimidate and interfere with witnesses and the administration of justice if released. That, I find is a compelling reason not to release the Accused on bail. They shall remain in custody pending trial.

Ruling dated, delivered and signed at Garsen on this 8th Day of May, 2019

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R. LAGAT KORIR

JUDGE

In the presence of

All 6 Accused.

Mr. Mouko for 1st, 3rd, 4th and 5th Accused.

Mr. Mouko holding brief for Mr. Okanga for 2nd Accused and Mr. Lutta for 1-6th Accused.

Mr. Emukule holding brief for Mr. Nyongesa for 6th Accused.

Ms Thuku watching brief for the Victim’s family.

Mr. Kasyoka for Republic.

Pacho Court Assistant.