REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 10 OF 2019

(Coram: Odunga, J)

(CONSOLIDATED WITH MACHAKOS CRIMINAL CASE NO. 15 OF 2019)

REPUBLIC.....PROSECUTOR /RESPONDENT

-VERSUS-

1. PAULINE MAISY CHESANG.....1ST ACCUSED

2. RICHARD LORUNYEI MORU.....2ND ACCUSED

3. LAWRENCE METAYO LEMPESI.....3RD ACCUSED

4. PETER MAUNDU MBITHI.....4TH ACCUSED

5. NUNO HASSAN JILLO.....5TH ACCUSED

RULING

1. The accused, **Pauline Maisy Chesang, Richard Lorunyei Moru, Lawrence Metayo Lempesi, Peter Maundu Mbithi** and **Nuno Hassan Jillo** face the charge of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya. The particulars of the offence are that on the 17th day of February, 2019 at Moke Gardens in Lekunya Area, Athi River Sub-county within Machakos County they jointly with others not before court murdered **Robert Chesang**.

2. They seek that pending the hearing and determination of this case, they be admitted to bail.

3. On 27th May, 2019, this court issued directions with respect to the various applications in which the accused persons seek to be admitted to bail pending the hearing of their case and fixed the mater for delivery of the ruling therefor on 10th June, 2019. However, before the said ruling could be delivered, on 31st May, 2019, the interested party herein, the victim's family filed an application of the same date seeking substantially that this matter be transferred to another court away from Machakos High Court for hearing and determination. It is noteworthy that the said application does not in its body seek recusal of this court.

4. On 10th June, 2019, I directed that the application dated 31st May, 2019 be heard and that depending on its outcome, a ruling encompassing both applications would be delivered at the same time.

5. The said application dated 31st May, 2019 was based on an affidavit sworn by **Nehemiah Cheptumo Chesang**, who deposed that he was representing other family members of the victim.

6. Before I proceed, I have to disclose that on 12th June, 2019 after morning court session I found an envelope left with my secretary in chambers which, upon opening, had a glimpse of a letterhead bearing the name of the same deponent. As is my practice, I do not interact with communications made by parties during the pendency of matters before me particularly where the said communication is from a party who is represented in the proceedings in question. Accordingly, as I deliver this ruling I am not aware of the contents of the said letter and its contents have no bearing on this ruling. It may, however be, a manifestation of the confidence, or lack of it, the deponent (not necessarily the family) has in their legal representation. I however hasten to warn parties against such conduct and to make it clear this Court does not tolerate the same action which may itself constitute a criminal offence.

7. According to the deponent, this court handled Miscellaneous Case No. 380 of 2018 which in his deposition was a culmination of Criminal

cases 517 of 2018 at Mavoko Law Courts, Miscellaneous Case 47 of 2018 at Mavoko Law Courts and Miscellaneous Case 33 of 2018 at Machakos Law Courts. According to him, the said proceedings were between the deceased herein and the 1st accused and the said cases are believed to have contributed to the brutal murder. According to the deponent, he was the deceased's closes brother and the deceased confided in him that he was not getting justice in court's within Machakos as well as this court which handled his other cases. He disclosed that at some point the deceased was so stressed and under pressure on how this court handles the application before it and was not confident of getting justice. According to the deponent, he was in court when the deceased's miscellaneous application 380 of 2018 and from what transpired, he feels that the deceased will not get any justice before this court.

8. The deponent further averred that the proceedings before this court and before the lower court will be used as evidence in the criminal trial hence justice will not be seen to have been done. In some wild averments, the deponent contended that had this court handled the matters raised before it, the deceased would not have been murdered.

9. It was averred that the 1st accused has served in Kangundo Law Courts which is under the jurisdiction of this court and has a working relationship with this court hence a fair and impartial trial cannot be held.

10. According to the deponent, the 1st accused is already receiving preferential treatment over the other accused persons pursuant to the orders issued by this court since she is remanded at Athi River Police Station Cells where the criminal matter was reported, investigated and where the criminal case file containing all records, details and contacts of the witnesses is kept.

11. It was contended that since the 1st accused served as a magistrate within the jurisdiction of Machakos County she must have interacted and worked with police officers within this court in the course of discharging her duties and that that working relationship is a threat to the security of the witnesses. According to him, he feels threatened if this case is handled within Machakos County since the police from the same county have been pushing for the charges against some of the accused persons dropped purely due to the past working relationship with the 1st accused. It was therefore his view that the security of the witnesses and the victims are at risk.

12. In a further averment, the deponent a veered that this court comes from the same ethnic background with the first accused and therefore there is reasonable apprehension that the court will not be impartial in determining the matter.

13. In his view the determination of an application for bail has fundamental effect and great bearing to the case generally as it is an issue which directly affects the witnesses and the evidence in the case and that there is likelihood of conflict, bias, discrimination and compromise of security of the witnesses and that some of the witnesses lined up by the prosecution have expressed concerns about their security.

14. On his part, **Ms Mogoi**, learned prosecution counsel, stated that she had no preference with respect to who and where the trial was held. According to her the prosecution's only concern was the justice of the case and had no position with respect to where the trial was held.

15. In his submissions, **Mr Kiptoon**, learned counsel for the interested party, reiterated the averments in the supporting affidavit.

16. In opposing the application, the 1st accused, against whom the application was substantially directed deposed that for one to be admitted as a victim under the ***Victim Protection Act, 2014***, an assessment has to be carried out within 24 hours of the offence being reported and a report on the victim filed. She averred this mandatory requirement of section 6 and 7 of the Act has not been complied with hence the deponent of the supporting affidavit does not have right of audience as a victim within the meaning of the Act. In her affidavit, she disclosed that the said deponent, **Nehemiah Cheptumo Chesang**, though a brother of the deceased, had hardly spoken with the deceased for the last 10 years she was married to him until August 2018 so it is inconceivable that he would be claiming to be a victim.

17. It was averred that the High Court in Machakos only gave directions in Miscellaneous Application Number 342 of 2018 and never dealt with the substantive matter as alleged. However, the said directions were given on 15th October 2018 and were never appealed which could only mean the Application was not aggravated (sic) in any way.

18. It was deposed that the contents of the said affidavit are speculative and cannot form the basis of denying me bail and in any event, the Deponent does not say who believes the cases to have contributed to the murder of the deceased. According to the 1st accused, in view of the fact that no appeal was ever filed from the directions of this court the allegation that the deceased was not getting justice, was stressed and was not confident of getting justice before this court is totally without basis and should be treated as untrue.

19. According to the 1st accused, pursuant to the orders of the court on 7th May 2019, the prosecution has served her Advocates on record with documents they intend to rely on during the trial and the proceedings referred to in paragraph 9 of the Supporting Affidavit do not form part of the evidence we have been supplied with. It was therefore her case that since material has been placed before the court and no cogent reasons have been given to support the averment that justice will not be done in this court, the said allegations are totally unfortunate and misplaced.

20. The accused averred that since she has served in Milimani Law Court, Kangundo Law Courts, Voi and Nyeri Law Courts, by implication the deponent is saying she cannot be tried in Machakos, Nairobi, Voi, and Nyeri High Courts which suggest he is shopping for a forum which will give him a particular verdict.

21. She deposed that she is not comfortable being remanded at Athi River Police Station cells and is not receiving preferential treatment as alleged. The only reason why she is being held at Athi River is for her safety and she has no access to the criminal file containing the records, details and contacts of the witnesses. She further denied that she has a working relationship with the Police in the county. In any event, the office of the Director of Public Prosecution has not raised any fears for the security of their witnesses or instructed the Deponent to raise such apprehension on its behalf. Further, there are mechanisms for protecting witnesses who fear for their safety hence the reason why the witness protection agency was set up and no fears have been expressed that she may interfere with their witnesses.

22. According to the 1st accused, her late father **Dr Edward Adhiambo Owino** was a Luo hailing from Gem Kambare in Siaya County, and her mother **Norah Anindo Owino** hails from Bukura in Kakamega so she is half Luo and half Luhya. According to her therefore, the averment that the presiding judicial officer is from the same ethnic background with her and so on that ground may not be impartial in determining this matter is ludicrous to say the least.

23. The 1st accused referred to the proceedings of the 7th May 2019 where the court held it could deal with matters of bail as a duty court. With respect to the allegations of the likelihood. It was deposed that the same are not based on any evidence at all and are speculative and go against all the precedents set by the courts requiring the prosecution to place material before the court supporting the averments of the likelihood of interference with witnesses. In any event, the courts are clothed with enough powers to deal with instances where an accused person supposedly interferes with witnesses.

24. To her, the allegation that there is a high likelihood of conflict, discrimination and bias as against the other accused persons is baffling to say the least as the deponent seems to have taken it upon himself to plead their case on their behalf notwithstanding the fact that they have very able counsel on record for them and they have not expressed such apprehensions.

25. It was revealed that most of the witness statements we have been supplied with have the identities of the witnesses redacted and so the 1st accused cannot, even if she wanted to, harm people whose identities she does not know.

26. In the 1st accused view, the repeated allegation that she is receiving preferential treatment which is the running theme in the Supporting Affidavit clearly shows that the Deponent has a fixed mind that she must be convicted and hanged as he had threatened her earlier through a phone call to her sister **Majory Owino** and is not willing to allow the facts of the case to come out clearly during the trial. In her view, a clear reading of the affidavit reveals the hostility that is clearly directed at her alone and shows that it totally lacks in objectivity.

27. While expressing utmost faith in the ability of this court to do justice, she averred that the reason why she asked the **Honourable Justice Kemei** to rescue himself was because, not only do they come from the same village with the deceased, but he was physically present at the funeral of the deceased and the Deponent had threatened her that she should just wait to be hanged because she had been convicted.

28. In her deposition, the proceedings in Mavoko Criminal Case Number 511 of 2018; Misc Application Number 47 of 2018 and Machakos High Court Miscellaneous Number 342 of 2018 clearly show that the deceased was a vexatious litigant who made all manner of allegations against Police officers and Judicial officers whenever he did not get his way. Evidently the Deponent is carrying on with this practice. In her case, the real victims in this trial are herself and my minor children who are now under the care of her mother without a mother or a father. She therefore urged the court to uphold the provisions of section 9(2) (b) of the ***Victims Protection Act*** which places prominence in the rights of the accused and to uphold her right to presumption of innocence until proven guilty and to protect her from the persecution she is facing in the hands of the Deponent.

29. In his submissions, **Mr Osiemo** learned counsel for the 1st accused reiterated these averments and relied on this Court's decision in **Republic vs. The Independent Electoral and Boundaries Commission & Others exp Wavinya Ndeti [2017] KLR** and **Charity Muthoni Gitabi vs. Michael Wachira Gitabi [2017] KLR**.

30. The rest of the accused persons associated themselves with the position of the 1st accused.

31. I have considered the application herein, the affidavits filed both in support of and in opposition to the application and the submissions made by respective counsel on behalf of their clients.

32. As rightly submitted by the counsel for the 1st accused, the principles guiding a decision by a court when faced with an application for recusal were restated in **Republic vs. Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017] eKLR**. I must however reiterate that in this application there was no express prayer seeking that I recuse myself from hearing the matter. Instead I am being asked to transfer the mater for hearing outside Machakos. However, from the submissions made it is clear that the interested party seeks that this mater be heard by a different Judge apart from myself.

33. I will therefore proceed to determine the application as if it is an application for recusal. Before dealing with the merits of the application, it is important for this Court to deal with the principles relating to recusal of judges in matters before them.

34. The foundation for the principle underlying recusal of judicial officers was restated by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** as follows:

> **"Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in *Black's Law Dictionary*, 8th ed. (2004) [p.1303]: *"Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."* From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."**

35. The principles relating to recusal were discussed in details in the **President of the Republic of South Africa vs. The South African Rugby Football Union & Others Case CCT 16/98**, in which the Constitutional Court of South Africa pronounced itself as follows:

"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront…A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes…<u>In applying the test for recusal, courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence</u>…This consideration was put as follows by Cory J in R. v. S. (R.D.):37

'Courts have rightly recognized that there is a presumption that judges will carry out their oath of office…This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.'

In their separate concurrence, L'Heureux-Dube and McLachlin JJ say:38

'Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances=: *United States v Morgan, 313 U.S. 409 (1941) at p. 421*. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England III . . .[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd. (1994), 133 N.S.R. (2d) 50 (C.A). at pp. 60-61*.'

The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased."

36. The Court then proceeded to pronounce itself as follows:

"Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J:41

'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs… In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own…Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge.

It is appropriate for judges to bring their own life experience to the adjudication process. As it was put by Cory J in R. v. S. (R.D):42

"It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.'

Similar considerations were expressed in their concurring judgment by L'Heureux-Dube and MacLachlin JJ:43

'[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging…It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function.'"

37. Relying on **Committee for Justice and Liberty et al vs. National Energy Board** the Court agreed that:

> **"…the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…[The] test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude."**

38. It was further held that:

> **"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. *The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application*.**
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> **It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test…We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia [In *Re J.R.L.:Ex parte C.J.L.* (1986) 161 CLR 342 at 352.]:**
>
> **"*Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour*…It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."** [Emphasis mine].

39. On the views held by judges the Court held:

> **"It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires."**

28. In conclusion, the Court decreed:

> **"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training…and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial…Under our new constitutional order, judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself."**

40. It was similarly held in **South African Commercial Catering & Allied Workers Union & Anor. vs. Irvin & Johnson Limited Sea Foods Division Fish Processing Case CCT 2 of 2000**, where the same Court expressed itself as follows:

> **"The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after Sarfu, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:**
>
> **'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into**

question an element of judicial integrity.'

The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigants apprehension a legal value, and thereby decides whether it is such that is should be countenanced in law…The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged. On the other, the courts very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance…We are aware of the need to prevent litigants from being able freely to use recusal applications to secure a bench that they regard as more likely to favour them. Perceptions of bias or predisposition, no matter how strongly entertained, should not pass the threshold for requiring recusal merely because such perceptions, even if accurate, relate to a consistent judicial "track record" in similar matters or a broad propensity to view issues in a certain way. Recusal applications should never be countenanced as a pretext for judge-shopping."

41. While dealing with the independence of judges, **Lord Denning** in ***What Next in the Law***, at page 310 had this to say:

"If I be right thus far – that recourse must be had to law – it follows as a necessary corollary that the judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused…[The judges] will not be diverted from their duty by any extraneous influences; not by hope of reward nor by the fear of penalties; not by flattering praise nor by indignant reproach. It is the sure knowledge of this that gives the people their confidence in the judges."

42. In our own jurisdiction the issue has been the subject of legal pronouncements. The Court of Appeal in **Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996** held:

"Except where a person acting in a judicial capacity had a pecuniary interest in the outcome of the proceedings, when the Court would assume bias and automatically disqualify him from adjudication, the test applied in all cases of apparent bias was whether having regard to the relevant circumstances, there was a real danger of bias on the relevant member of the tribunal in question, in the sense that he might unfairly regard or unfairly regarded with favour or disfavour the case of a party to issue under consideration by him: the real test is in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias... Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duties to sit and do not, by acceding too readily to the suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their cases tried by someone thought to be more likely to decide the case in their favour... Although most litigants would much prefer that they be allowed to shop around for judges that would hear their cases, that is a luxury which is not yet available under our law to litigants."

See also Galaxy Paints Company Ltd. vs. Falcon Guards Ltd. Civil Appeal No. 219 of 1998 [1999] 2 EA 83.

43. On the same note, the Supreme Court of Uganda in **Uganda Polybags Ltd vs. Development Finance Co. Ltd and Others [1999] 2 EA 337** was of the view that litigants have no right to choose which judicial officers should hear and determine their cases since all judicial officers take oath to administer justice to all manner of people impartially, and without fear, favour, affection or ill will and the oath must be respected.

44. It must be appreciated that in matters of perception the applicant must show that there exists ***reasonable perception***. Such reasonable perception in my view must be based on facts and in this case the perception alluded was clearly unreasonable or not. According to ***The Bangalore Principles of Judicial Conduct***:

"Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one said or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind, an attitude or point of view, which sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case. *However, this cannot be stated without taking into account the exact nature of the bias. If, for example, a judge is inclined towards upholding fundamental human rights, unless the law clearly and validly requires a different course, that will not give rise to a reasonable perception of partiality forbidden by law*." [Emphasis added].

45. What I understand by that position that if a Court of law has pronounced itself on a matter and the parties view that as the correct legal position, there ought to be no valid objection to the same Court entertaining a subsequent matter even if similar issues are involved. Where the parties are of the view that the matter in controversy has been decided, save for the option of an appeal where one is provided, parties are expected to order their lives in accordance with the said decision since courts of law are meant to set the law straight so that litigants may predict the outcome of their actions and either avoid taking a particular course or order their lives in accordance therewith. Therefore, where the Court has pronounced itself on a matter, parties to the subsequent proceedings where the legal issues are similar ought not to seek that the same be heard by different judges in the hope of obtaining a different outcome. In **Miller vs. Miller [1988] KLR 555**, the Court of Appeal

expressed itself as follows:

> **"No party should be placed in a position where he can choose his court. But this is not to say that no circumstances is it possible for a judge to disqualify himself from hearing a case....There is nothing prejudicial in one Judge making several or more orders in a court record. In practical terms it is advantageous to the parties and therefore in the interest of justice for a judge to familiarise himself with the substance of a court file. In the absence of the evidence that the appellant's case was prejudiced by some order of the nine orders the trial judge made, it must be held that the submission on this aspect was without substance. No objection was taken to the trial judge making any of the nine orders...It would be disastrous if the practice was that once there are allegations made against a judge and the judge's honour is in question, that the judge must disqualify himself. The administration of justice through court would be adversely affected since mischievous parties to cases would obtain disqualification by judges with ease and the consequence would be a choice of trial judge by a party."**

46. In this case, although it was contended that this Court has dealt with previous proceedings which were the culmination of the criminal proceedings in Mavoko, the Court has not been informed that any party has preferred an appeal against the said earlier decisions. In fact, as will be shown herein, one of the said matters was withdrawn by the deceased himself before the hearing could proceed and determination made.

47. In **Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12** it was held:

> **"The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the Judge. Success or failure of the government or any other litigant is neither ground for praise or for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is a fundamental tendency for the decisions of the Courts with which there is disagreement to be attacked by impugning the integrity of the Judges, rather than by examining the reasons for the judgement. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officer...An application brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing is tantamount to abuse of court process...It is indisputable that different minds are capable of perceiving different images from the same facts. This results from diverse facts. A "suspicious mind" in the literal sense will suspect even where no cause for suspicion exists and unfortunately this is a common phenomenon among unsuccessful litigants and that is why the mind envisaged in the test to determine perception of possible or likely bias on the part of the Judge is a reasonable, fair and informed mind...While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because they believe that such persons will be less likely to decide the case in their favour."**

48. To seek the recusal of a Judge from hearing a matter simply on the ground that he has determined a matter with similar facts is an implication that there is a likelihood that another Judge will arrive at a different decision. In my view, instead of subjecting another Judge of concurrent jurisdiction to an embarrassing situation of arriving at a different decision, parties ought to be advised by their legal counsel to appeal the decision instead and the law provides for mechanism for protection of a party while it is pursuing an appeal. By asking another Judge to hear the matter, based on recusal there would be an expectation that that other Judge may arrive at a decision different from the decision arrived at by the Court referring the matter. Whereas a Judge of the High Court is not bound by a decision of a Court of concurrent jurisdiction, to deliberately set out to have another Judge arrive at a different decision is in my view a manifestation of bad faith. If the matter were to be heard by a different Judge of concurrent jurisdiction and a different decision is arrived at there would be two conflicting decisions of the Court and the perception created would be that the Respondent chose a Judge who was sympathetic to its cause. If that were to happen the citizens of this Country would be led to believe that justice depends on a particular Judge rather than the rule of law and that belief would bring the whole judicial process into disrepute and embarrassment.

49. That now brings me to the grounds relied upon by the interested party in this application. However, before doing so, it was contended on behalf of the 1st accused that for one to be admitted as a victim under the ***Victim Protection Act, 2014***, an assessment has to be carried out within 24 hours of the offence being reported and a report on the victim filed. Since this mandatory requirement of section 6 and 7 of the Act has not been complied, it was contended that the deponent of the supporting affidavit does not have right of audience as a victim within the meaning of the Act.

50. This issue brings to light the role of victims in criminal proceedings. In **Joseph Lendrix Waswa vs. Republic [2019] eKLR**, the Court of Appeal sitting in Kisumu expressed itself at paragraphs 20-24 as hereunder:

> **"[20]…it is clear that the Constitution and the VPA gives a victim of an offence a right to access justice and a right to fair trial which rights, as Article 20(2) provides, should be enjoyed to the greatest extent consistent with the nature of the right. The right to a fair trial as Article 25 provides is an absolute right. The fact that the rights of an accused person to fair trial are enumerated and the rights of victims of offences are recognized by Article 50(9) but to be stipulated in a legislation indicates that the Constitution intends, as a principle, that the constitutional rights of an accused person to a fair trial should be balanced with the statutory rights of the victim of the offence as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial.**
>
> **[21] The concept of *"watching brief"* in a criminal trial where an advocate for the victim does not play any active role in the trial process is now outdated. The Constitution and the VPA now gives a victim of an offence a right to a fair trial and right to be heard in the trial process to assist the court, and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest. That right of the victim to be heard persists throughout the trial process and continues to the appellate process.**
>
> **[22] The constitutional and statutory role of the DPP to conduct the prosecution is not affected by the intervention of the**

victim in the process. The nature and scope of the victim's intervention prescribed by the VPA should be interpreted in conformity with the Constitution and implemented by the trial court at the appropriate stages of proceedings as the justice of each case requires. It is the duty of the trial court to conduct a fair trial and to protect and promote the principles of the Constitution *(Article 159(2) (e))*.

The rights granted to victims of offences just like the rights conferred by the Bill of Rights are to be liberally construed. Some rights in the trial process are stipulated in the VPA, such as the right to submit information during plea bargaining, bail hearing and sentencing *(section 20, section 12)*, the right to adduce evidence which has been left out and to give oral evidence or written submissions *(section 13).*

The independent and discretionary power given by the trial court by section 150 of the Criminal Procedure Code is intended to help the court to search for the truth and to function as a court of justice.

It is not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP if a victim of an offence, either in person or through his advocate is allowed to exercise the full power of the court in the manner provided by section 150 of the Criminal Procedure Code so long as the safeguards in the proviso thereto are observed.

Accordingly, we find that a victim of an offence or his advocate or representative may exercise the plenitude of the powers of the court under section 150 of the Code with the permission and directions of the trial court.

[24] We have been asked in this appeal to set the full parameters of the extent of the victim's participation in the trial process. Other than what we have said above, we recognize that the issue of victim's participation would arise in infinite variety of factual situations where the trial court would be required to offer guidance to ensure a fair trial to an accused person.

A rigid prescription would not only limit the exercise of rights and the judicial discretion of the trial court but would also impede the administration of justice and the development of the law. It is preferable that the exercise of the victim's rights should be determined by the trial court as occasion arises and as the justice of each case requires."

51. Based on the said decision, I have no hesitation in finding that the interested party has *locus standi* in this matter and its participation herein is supported by the Constitution and the law.

52. The application was however based on three grounds: that since the 1st accused share the same ethnicity as the Court, there is likelihood that the victim will not receive justice; that this court presided over previous proceedings which were a culmination of criminal proceedings between the deceased and the 1st accused and that the deceased was not satisfied with the manner in which they were conducted; and that the 1st accused having worked in Machakos, there is likelihood of interference with the proceedings. There were other grounds which were directed at other entities such as the police and the investigators. Suffice it to state that this court is not the investigating agency in this matter and if the interested party is unhappy with the manner in which the investigations are being conducted the right decision to take is to take up the matter with the said investigators as this court has no control over the manner in which the investigations are being conducted.

53. As regards the issue of ethnicity, apart from a bare allegation that this court shares the same ethnicity with the 1st accused no attempt was made to expound on this serious allegation. The 1st accused deposed that she is of mixed ethnicity of the Luo and the Luhya. This deposition was not challenged. If this court was to recuse itself on this ground, it would follow that neither a Judge of Luo or a Luhya extraction would hear the matter. Apart from that it has not been contended that the co-accused are from the same ethnic community. If this Court were to accede to the application by the interested party on this ground, it would mean that this Court would have to make an inquiry into the ethnic backgrounds of all the accused persons in order to decide which Judge does not come from their ethnic communities and who is therefore suitable to hear the case. In my view, this Court would have been turned into a circus of momentous magnitude. Never before has a court of law been treated to such a theatre of the absurd.

54. In my view to object to a judicial officer hearing a case on the ground of ethnicity is the most absurd and ridiculous ground upon which such an application has ever been based. One cannot stoop lower than this. It is clearly ill-conceived and no court worth its name ought to entertain such an application as it goes against all the principles of judicial adjudication. Never before has an application been based on a ground so frivolous and contemptuous. That is a ground that ought to be dismissed with all the contempt it deserves. This Court will not be the forum at which such dangerous and unfounded precedent is to be set.

55. The second ground was that this court presided over proceedings between the deceased and the 1st accused which were a culmination of the criminal proceedings between the two parties. In Misc Application No. 342 of 2018, the parties were the deceased on one hand and the 1st accused, the **Officer Commanding Police Division (OCPD), Athi River Police Station, the Officer Commanding Station (OCS), Athi River Police Station, the Deputy Officer Commanding Station, Athi River, Fred Too and Caroline Seet.** It is not contended that apart from the deceased and the 1st accused the other parties are parties to these proceedings. When I asked **Mr Kiptoon**, learned counsel for the interested party he, after consulting the deponent of the supporting affidavit, readily admitted that in Miscellaneous Application No. 342 of 2018, the matter was referred to this Court from Mavoko Law Courts following events therein that made it unsuitable for the matter to be heard by any of the magistrates in that station. **Mr Kiptoon** readily conceded that the only decision this court made was to direct that the matter be heard at Machakos Law Courts. This Court has not been informed of the impact such a supervisory administrative order has on these proceedings in order to term such an order prejudicial to the interests of the deceased. To the contrary the deceased's complaint was that the manner in which proceedings were being handled in Mavoko was inimical to his interests.

56. As regards Miscellaneous No. 380 of 2018, when I asked **Mr Kiptoon** the circumstances under which the said proceedings were terminated, it became clear that **Mr Kiptoon** was clearly at sea. His consultation with client in Court clearly was of no help. According to

him the said proceedings were withdrawn at the instance of the Respondents. It is pathetic that learned counsel would rush to the Court with an application which has serious impact on administration of justice based on insufficient or clearly misleading instructions from a client. The proceedings in Miscellaneous No. 380 of 2018 were commenced by the deceased in which he was complaining about the manner in which his case before the lower court was being handled. However, before the matter could be heard, the deceased himself applied to have the same withdrawn on the ground that the families concerned had agreed to settle the matter out of court. At no time was there any allegation by the deceased, himself a lawyer of no mean repute, that he was uncomfortable with this court. In fact had he been uncomfortable he would not have filed the application before this court in the first place.

57. To make such wild allegations against the court in the hope that the court will recuse itself from the matter is in my view one of the greatest sins against the administration of justice and no court ought to entertain such frivolous grounds as a basis for giving in to the demands of litigants.

58. One cannot therefore understand how the admission of such proceedings, one an order transferring a matter from a court where the deceased himself had raised complains regarding its impartiality and the other which was withdrawn by the deceased before any hearing took place can possibly be said would influence the trial of this case in which the parties are not substantially the same save for one.

59. The third ground was that the 1st accused having worked in this jurisdiction, she is likely to influence the outcome of these proceedings. I was not addressed on the period when the 1st accused served in Machakos. Suffice to say that by the time I was posted in Machakos the 1st accused was not one of the magistrates in Machakos. The 1st accused deposed that she has worked in Milimani Law Courts, Voi, Nyeri and Machakos. If this court was to transfer the matter, it would follow that all the four stations would be out of question in terms of the place of hearing. By doing so this court shall have in effect disqualified certain judges from hearing the matter just as in the case of ethnicity.

60. Apart from that the 1st accused is a Magistrate. As far as this court is aware all High Court Stations have Magistrates Courts presided over by magistrates who are her colleagues. Therefore, if this ground was to be sustained it would mean that this matter cannot be fairly dealt with in any High Court Station in Kenya and would have to be heard outside Kenya. One only leads to mention this to show the absurdity of such an order. I do not have the jurisdiction to transfer the matter out of the Country.

61. I have perused the record of these proceedings and it is clear that a similar application for recusal was made before my learned brother, **Mr Justice Kemei**. At that time though the interested party was legally represented as now by **Mr Kiptoon**, learned counsel kept a studious silence when the matter was being argued. The interested party must have been aware right from the time of registration of the charge in Machakos that the 1st accused at one point in time was posted to serve in Machakos, yet nothing was said until the matter was transferred to this Court. It is trite that applications for recusal of judicial officers or transfers for that matter must be made at the earliest opportunity when the ground arises so that it is not seen that parties are cherry-picking courts or forum shopping for judicial officers whom they believe will do their bidding.

62. However, from the submissions made before me, **Mr Kiptoon** seemed to have inadvertently let the cat out of the bag when he submitted that since **Kemei, J** had recused himself when an issue of ethnicity was raised before him, this Court must also do the same. It would seem that it is now tit for tat. With due respect, legal proceedings are not conducted in such fashion. Legal proceedings are serious proceedings for both the accused and the victim. In this case the family of the deceased have lost one of their member while the accused risk being sentenced to death if found guilty. Those are circumstances which cannot be treated the way one treats a re-match in a football league. Parties, particularly where represented by officers of the court, must therefore refrain from making applications and submissions which are solely intended to serve self-interests but must at all times assist the court in achieving the cause of justice.

63. With due respect to counsel for the interested party, this is one of the most frivolous applications seeking recusal of a judge that I have ever had the misfortune to listen to. It ought not to have been made at all. Legal Counsel ought to remember that it is not for no reason that they bear the title "counsel". They are supposed to and are obliged to advice and counsel their clients on matters of the law. They are not just their clients' mouthpiece but are also officers of the court. They must be at the forefront in upholding the dignity of the courts and the rule of law and ought not to simply allow themselves to be instruments through which otherwise frivolous and scandalous applications are made before the Courts particularly where such applications are made on baseless grounds. It is really a sad day for this country when advocates are used by their clients as the instruments through which ethnic profiling of judicial officers is engineered.

64. I concur with **Trevelyan, J** in **Shilenje vs. The Republic [1980] KLR 132**, that the Court ought not to transfer a case unless there is a reasonable apprehension, honestly held and that the Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer. Further:

> **"whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused. The court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts which would amount to a serious evil…It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences."**

65. The applicant's application was based on erroneous factual foundation. Apart from that it was also based on grounds which are frowned upon by the Constitution of this country – ethnicity.

66. Having considered the grounds upon which this application was based, I find that the said application does not meet the threshold required for a judicial officer to recuse himself. I have said enough to show that the application dated 31st May, 2019 is completely devoid of merits. It is therefore dismissed.

67. I now proceed to deal with the application by the accused persons seeking to be admitted to bail pending the hearing of this case.

68. According to the 1st accused, **Pauline Maisy Chesang**, she was arrested and locked up on the 6th day of March 2019 at the Athi River Police Station. Previous to her arrest, she had for three weeks reported to the Athi River Police Station after being summoned by the investigating officers. She was however only produced later before court on the 20th of March 2019, 14 days after being locked lock up. Upon being arraigned in court, the learned prosecution counsel sought 14 days to conclude investigations. Accordingly, the Deputy Registrar deferred the taking of the plea and directed that the applicant be detained up to 9th April 2019. During her detention the applicant has not been subjected to any interrogations or questions.

69. In support of her application, the accused relied on Article **49(1)(h)** of the Constitution which provides that an arrested person has a 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. According to her, she is constitutionally entitled to bail *until and unless* compelling reasons are demonstrated. It was contended that section **123** of the ***Criminal Procedure Code*** [as amended by the Constitution of Kenya 2010 permits bail for all criminal cases] and makes bail available at all times - *at any time while in the accused is in custody or at any stage of the proceedings a court can grant bail.*

70. *The 1st accused's position was that* granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. To her, the cornerstone of the justice system is that no one will be punished without the benefit of due process and that incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. She contended that since the need for bail is to ensure that the accused person will appear for trial and not to corrupt the legal process by absconding, anything more is excessive and punitive.

71. It was her position that the general rule is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case. Thus in determining bail public good as well the rights of the accused should be kept in mind.

72. In support of her application the 1st accused submitted that when it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision.

73. She also relied on the decision of the Supreme Court of Malawi in ***M. Lunguzi vs Republic*** in which it was stated that another ground of refusal is where the court *is satisfied that the interests of justice so require. And submitted that* the court has discretion to grant or refuse bail provided that the discretion is exercised judicially. In this regard she relied on the decision of **Emukule, J** in ***Republic vs. Milton Kabulit & 60 Others*** *and submitted that w*here the accused applies for bail, the Judge, who is independent and impartial, will make his/ her decision in accordance with the law having considered all the relevant information placed before the Court.

74. In her view, the Judge will, amongst other things, analyse all the relevant factors relating to both the individual circumstances of the offence with which the accused is charged (e.g. the seriousness of the offence) and the individual circumstances of the accused (e.g. whether they have previous convictions). This means that each application for bail is unique; even where two people have been charged with an offence together ("co-accused") their individual bail applications will be unique because their personal circumstances will differ (e.g. one co-accused may have previous convictions for similar offences whereas the other co-accused has not). According to her, at least one or more of the grounds set out above ought to be proved to the satisfaction of the court in order to justify a denial of bail hence mere allegations or possibility is not enough. While bail cannot be refused simply because the accused has been charged with a very serious offence, the seriousness of the offence can be taken into consideration as a factor in determining if one of the grounds for refusing bail exists (e.g. the seriousness of the offence may increase the risk that the accused will fail to appear for their trial).

75. On the issue of risk/failure to appear before court it was noted that the applicant is a Kenyan citizen with a fixed abode, and is willing to deposit her original passport in court as a condition for bail/bond. She is not a flight risk and neither does she pose any threat to the witnesses in the criminal trial. Furthermore, the applicant duly honoured summons and presented herself to the directorate of criminal investigations before the charges were laid in court. She has never made any attempts to run away from the law and does not plan to do so during the pendency of the criminal trial against her.

76. Of great importance in this situation is the fact that the applicant is a judicial officer in active service. In the course of her work while working in Kajiado, Machakos, the Applicant convicted accused persons some of whom are held at the Machakos G.K prison where the respondents applied for her to be held hence the applicant is apprehensive that there is a likelihood that she will be put in harm's way.

77. It was further noted that the applicant is the sole remaining parent of a very young family. Since the unfortunate demise of her husband and her untimely detention, the Applicants children have been denied the presence of a competent caregiver' and such uncertainties greatly affect the emotional and physiological development of a child.

78. The court was also urged to take into account that the applicant suffers from asthma, a condition triggered by dust, cold and respiratory tract infections and has already suffered an asthmatic attack related to pneumonia and her continued detention is likely to cause further downward spiral to her health.

79. It was therefore contended that considering the merits of the case and the situation at hand, the balance of fairness leans towards granting bail to the applicant as the respondent has failed to illustrate any compelling reason as to why the accused/applicant should be denied bail.

80. On behalf of the 2nd accused, **Richard Lorunyei Moru**, reliance was similarly placed on the same Article as well as the case of **Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009** and **Republic vs. Lucy Njeri Waweru & 3 Others Nairobi criminal Case No. 6 of 2013.**

81. Whereas the prosecution contended that the accused persons were likely to abscond due to the evidence so far gathered and the confession from the 2nd accused, it was contended that the confession was obtained after he was tortured and physically hurt and threatened that his son would rot in jail if he does not confess hence the confession was fabricated and obtained under duress. It was disclosed that the 2nd accused on his first opportunity brought to light this by addressing deputy Registrar to make an order for him to be taken to hospital after he sustained injuries. Though an order was made by the Deputy Registrar for the 2nd accused to undergo treatment and a medical report to be filed before the next court date, the prosecution have deliberately failed to file the medical report even when the advocate on record prayed to be supplied with a copy. Since it would discredit their alleged confession, the 2nd accused relied on section 26 of the ***Evidence Act***.

82. On the authority of **Muriuki vs. Republic** it was submitted that a person in authority means one who has or appears to have power to influence a decision and includes a Police Officer, parent, religious leader, previous employer, Judge or Magistrate. In the present case, it was submitted that the 2nd accused was threatened and tortured by the investigation officer **CPL Kapario Lekakeny** in the company of other officers upon his arrest together with his son at Bunyala Roundabout. Therefore, the alleged confession cannot be used as a reason to deny the 2nd accused bail since its admissibility is yet to be determined.

83. It was submitted that the evidence that the prosecution wishes to produce in court cannot raise compelling reasons to deny the 2nd accused bail since the evidence is subject to being examined by the defence counsel and ballistic evidence cannot be interfered with by the accused person on release of bond. In this case, the prosecution is yet to prove this case beyond reasonable doubts and they cannot assume that the accused persons are guilty without a conclusive trial.

84. It was submitted that since an accused person's innocence is enshrined in the constitution and it is through the trial process that it is otherwise proved, the supply of documentary evidence does not diminish the accused's defence and is not a compelling reasons as not to grant the 2nd accused bail.

85. According to the 2nd accused, his permanent abode has been well described through his supporting affidavit through the prosecution's affidavit as being Ruruta Police Station, Mutuni Police Post and his home is in Loiyangalani in Marsabit west county. Therefore, he is not a flight risk as he has a permanent place of abode within the jurisdiction.

86. Though the prosecution claimed that the 2nd accused is deeply involved in the murder of the deceased person and if released on bail, the accused persons are likely to interfere with witnesses specifically those who identified them or the motor vehicle that was used during commission of the offence, it was the 2nd accused's contention that t**he** witnesses as listed by the prosecution have not sworn affidavits raising their apprehension to having the accused persons released on bail pending trial. He noted that he is a Police officer at the rank of a Police sergeant and that he does not command the Police force and if granted bail his presence cannot raise anxiety or apprehension on the part of the victims and witnesses.

87. It was further contended that the other allegations made against the 2nd accused have no basis as they are not supported by evidence. According to the 2nd accused, the need to weigh an accused person's right to bail vis-à-vis the interest of the public and the reasons given in opposition to grant bail were observed by **Mativo J.** in **Republic –vs- Danfornd Kabage Mwangi (2016) eKLR.**

88. While appreciating that the offence of murder is a serious offence carrying a severe sentence if one is convicted, it was the 2nd accused's position that he is presumed innocent until the contrary is proved.

89. Accordingly, as the prosecution has not raised any compelling reasons to warrant the denial of bail, this Court ought to grant him bail pending trial.

90. The 3rd accused on the other hand averred that since 2nd March, 2019, has has been held, first at Athi River Police station and later on in Machakos Maximum prison – (Remandees branch) that being a period of nearly three months. During this time, and particularly while at Athi River Police station, he was tortured and forced to sign a statement whose contents he does not know. He was forced to lie face down on a cold floor with his hands cuffed and his statement written by an unknown person so that it is aligned with other recorded statements. He was then made to sign the said statement failure to which he would not be released from the very uncomfortable position.

91. He further averred that his Identification Card, Driving licence, Automated Teller Machine ATM Cards and several other personal documents were held by officers and/or representatives of the Director of Criminal Investigations since his arrest hence was not even been able to register for the Huduma Number despite the Court issuing an order for the release of, at least, his identification card.

92. It was his position that an accused person must be treated with dignity and has a right to be treated fairly and to proceed with the trial in a humane manner. He lamented that his absolute right to be free from torture and cruel, inhuman and degrading treatment has been and continues to be infringed upon and urged this Court to uphold the same. While citing Article 50 of the Constitution, the 3rd accused deposed that the only reason the prosecution has given for the denial of bail is that he was arrested two weeks after the deceased was shot dead. He however contended that this does not prove any guilt on his part since he was not expected to hasten his arrest so as to be admitted to bail despite being innocent. Further, the presumption of innocence is not pegged on the nature of the crime. In fact, one accused of committing murder must not be treated as a murder on flimsy grounds due to the gravity of the offence and the shame associated with it in the society. He made reference to the case of **Nganga –vs- Republic (1985) KLR 451.**

93. Based on **Mahadi Swaleh Mahadi vs. Republic [2014] eKLR,** he submitted that the presumption of innocence must be accompanied by a fair trial and the opportunity to continue with his livelihood even as the trial progresses. He also cited the case of **Republic vs. Zacharia Okoth Obado [2018] eKLR,** in which the Court stated that the prosecution had the onus and burden to prove presence of compelling reasons to deny bail. In this case, no such evidence or compelling reasons have been presented before this Honourable Court since the 3rd Accused has not been placed at the scene of the crime and neither has any intention or motive been established to commit murder. It was

therefore his submission that the prosecution had not discharged their burden to establish compelling reasons for the denial of bail.

94. While relying on **Republic vs. Danfornd Kabage Mwangi [2016] eKLR** it was submitted that it is upon the prosecution, to prove beyond any reasonable doubts, that there exist compelling reasons to warrant the denial of the fundamental right to reasonable bail terms to the third accused. In this case, it was contended that the prosecution has only given two reasons: first, that the 3rd accused is at flight risk due to the circumstances of his arrest and second, that if released, the 3rd accused is likely to interfere with witnesses as he is an ex-police officer with access to firearms. As regards the issue of flight risk, the 3rd accused contended that he is a Kenyan citizen, previously a civil servant with a permanent abode in within Maralal-Samburu County. Further, he is a family man with one wife and 2 children and also has several businesses within Samburu and Nairobi County and is a retired Police Officer.

95. According to him, on 2nd March, 2019, he was arrested while in his home county within one of his business empires, a hotel where he also has a residence in Baragoi where he had arrived at around 6.00 am via a water bowser with his driver which vehicle had water to be used in the running of the hotel. He was arrested by local police officers between 10.00 am and 11.00am. At the time of arrest, he was participating in the day to day running of the said hotel which he owns as any other reasonable business person would do and was not trying to flee. After his arrest, he cooperated with the police officers in Maralal- Samburu and later on in Athi River – Machakos County despite them torturing and harassing him.

96. According to him, he is a person of integrity having served as a police officer until his retirement and intends to retain his good name in his local community and with the state which he has served diligently and for a long time. He has a lot more to lose by fleeing as opposed to attending trial so that his innocence can be confirmed.

97. As for the allegation that he is likely to interfere with the witnesses, the 3rd accused averred that in addition to the fact that the 3rd accused is incapable of interfering with witnesses, the ***Witness Protection Act*** Number 16 of 2016 was enacted to protect witnesses in criminal proceedings. Therefore, his right to bail must not be curtailed due to a failed witness protection agency and/or system but his rights must be balanced with the rights of the complainant as well as the State's duty to conduct a fair and just hearing. In any event, none of the named witnesses has directly implicated the 3rd accused person in the commission of the offence as per the Affidavit. Further, being a retired police officer, the 3rd accused has no access to firearms as alleged by the prosecution, an allegation which is a mere allegation intended to mislead this Court and deny the him bail/bond unfairly.

98. The 3rd accused therefore contended that any ground or compelling reason alleged by the prosecution must be proved to the satisfaction of the Court and relied on the decision of **Mativo, J** opined in **Republic vs. Danfornd Kabage Mwangi,** that since mere allegations or possibility is not enough, bail cannot be refused simply because the accused has been charged with a very serious offence. What the prosecution has attempted to provide are indeed allegations and highly unlikely possibilities. They have failed to satisfy this court that there exist compelling reasons to deny bail.

99. It is therefore prayed that the 3rd accused be admitted to reasonable bail terms. As for the terms, the 3rd accused contended that since the key word is reasonable, it would be pointless to grant bail that the accused person would not be able to meet as this would be tantamount to refusing bail. He therefore relied on the case of **Republic vs. Moses Lenolkulal (unreported),** where the High Court reduced the accused's cash bail from Kshs One Hundred Million to Ten Million and the One Hundred and Fifty Million Bond reduced to 30 million Shillings. He also referred to **Republic vs. Danfornd Kabage Mwangi,** where the Court directed that the accused be released on a bond of Kshs 500,000 plus a surety of similar amount or cash bail of Kshs 300,000.00, a case where the accused person had been charged with murder contrary to section 203 as read with section 204 of the ***Penal Code***. Further reference was made to **Republic vs. David Muchiri Mwangi [2018] eKLR,** where the Applicant charged with the offence of murder contrary to section 203 as read with section 204 of the ***Penal Code*** and was released on a bond of Kshs 2,000,000 with 2 surety of a similar amount. He therefore prayed that his application be allowed and that guided by the said authorities, bond of Kshs 1,000,000.00 with one surety and a cash bail of Kshs 500,000.00 would be reasonable.

100. On his part the 4th accused person reiterated the legal position taken by the 1st and 2nd accused and contended that it is noteworthy to note that the trial of this case has not commenced and there has been no evidence whatsoever which has been adduced by the prosecution to rebut the presumption of innocence of the accused herein. It was submitted that the prosecution herein was entitled to provide the evidence to illustrate the strength of their case which evidence has not been adduced for the benefit of this court. He relied on **Francis Macharia Karichu vs. Republic [2018] eKLR**.

101. In this case, it was contended that since the prosecution did not adduce such evidence the court ought not to be inclined to deny the 4th accused person herein the right to bail/bond.

102. According to the 4th accused, one of the reasons as set out that the court may consider to deny an accused person bail/bod is the likelihood that an accused person would attempt to evade trial or abscond from the jurisdiction of the court. In this case, however, the prosecution has conceded to the fact that after the 4th accused person became aware that the authorities were looking for him, he voluntarily presented and/or surrendered himself to the investigating officers. The averment that he absconded his duties at the Mutuini Police Post of Riruta Police Station do not meet the threshold as the said 4th accused has not been charged with the offence of absconding duty to date.

103. It was disclosed that the investigating officer even admitted that the 4th accused person was not arrested but resurfaced and presented himself to the investigating officer on the 2nd day of March 2019. With the 4th accused person having presented himself willingly and on his own volition, the same does illustrate and demonstrate to this Honourable court that the said accused person is not a flight risk and will appear before this Honourable court as and when required. It was emphasised that the 4th accused herein is a police officer having been attached to the Mutuini Police Post of Riruta Police Station. He has already been interdicted by virtue of having been charged with the said offence of murder and cannot perform his duties as a law enforcement officer until cleared by this Court since section 88A of the ***National Police Service Act*** provides that:

Where a police officer is interdicted from duty in accordance with Force Standing Orders or any other written law, the officer's appointment shall not cease only because of such interdiction.

Provided that the powers, privileges and benefits vested in him as a police officer shall, during his interdiction, be in abeyance, but the officer shall continue to be subject to the same discipline and penalties, and to the same authority, as if he had not been interdicted.

104. Accordingly, the 4th Accused person will not enjoy any privileges thereto and cannot have access to the information which he would ordinarily have as if he was on duty. It was noted that the accused person herein would be granted bond with a surety. If the bond is indeed approved, and in the unlikely event the 4th accused person would not present himself to this court, this court has jurisdiction and the requisite powers to summon the surety to explain the whereabouts of the 4th accused person. The surety would inform the court and undertake to make sure the 4th accused person would always present himself in court when his presence would be required by this Honourable court.

105. As regards the allegations of likelihood of interference with the prosecution witnesses, the court was urged to be guided by the decision of **Felity Sichangi Nyangesa vs. Republic (2014) eKLR** where the court therein cited the case of **Republic vs. Jackson Mayende** which stated that the interference of the prosecution witnesses is a compelling reason only when evidence that the accused has or can interfere with the witness.

106. According to the 4th accused, the test is that if there is an allegation that an accused person is released on bail/bond would likely proceed to interfere with the prosecution's witnesses, then it is not just enough to aver, the prosecution ought to demonstrate the same to the court that it is within the intention and within the mandate of the accused person to interfere with such witnesses. In this case however, the prosecution through its affidavit and submissions has only made inferences that interference is a 'potent ground' for refusal of bail yet they have not demonstrated to the court the nature and intent that the 4th accused person will interfere with them. Without any evidence, the same remains as such, mere inferences. In any event, the Court has discretion to impose other conditions which it may deem fit so to do.

107. In the premises it was submitted that there are no grounds which would entitle this Court to deny the 4th accused person herein his right.

108. In his application, the 5th accused person averred that on 1st April, 2019, he was arrested in Isiolo, produced in court on 5th April 2019 and remanded at Machakos GK He was informed that he was arrested because he was in communication with one of the suspects in the murder of one **Robert Chesang**. It was his averment that he had been in custody since the date of arrest on 5th of April 2019 during which period he had co-operated with police in their investigations pertaining to the subject matter.

109. The 5th accused averred that he was a student at Kenya Medical Training College, Kisumu Campus and unless released on bail, his education would be adversely affected and his admission terminated due to absenteeism. According to him, he has never committed or being convicted of any offence and is a law abiding citizen residing and working for gain in Isiolo County with a fixed abode at Isiolo County where the police can get him any time they need him.

110. The 5th accused undertook to abide by any bail or bond terms given by this court and that he will not interfere with investigations or witnesses in this subject matter. He further asserted that he is not a flight risk and that he will co-operate with the court, prosecution and the investigating authorities until this matter is heard and determined and that he will appear in court for mentions and hearings of the matter and whenever required to do so.

111. In response to the replying affidavit he stated that **Cpl Kapario Lekakeny's** affidavit does not state which sim card number was disposed of or the International Mobile Equipment Identity (IME)I number of the phone which was disposed of, making the assertions just mere allegations with no evidence to back them up. He insisted that he has never concealed his identity or evaded an arrest by the police. According to him, he could not avail himself to the police as no such communication had been made for him to do so. He therefore denied that he was hiding but insisted that he was doing business in Isiolo and staying at his home in Isiolo County.

112. He similarly contended that the confession by his co-accused, **Richard Lorunyei Moru**, and cannot be relied upon without hearing his part as pertains to the confession. At this stage the court cannot look at the prosecution's evidence and the seriousness of the charge cannot be a compelling reason to deny an accused bail.

113. In his view, the seriousness of an offence and the sentence therein is not a ground to deny him his fundamental rights under the Constitution to be released on bail or bond on reasonable terms pending the hearing and determination of this matter.

114. **Cpl Kapario Lekakeny** of Athi River Police Station, a CID Officer attached to DCI Athi River Police Station and one of the investigating officer in this case swore a replying affidavit on behalf of the Respondent.

115. According to hi, the deceased who was an advocate of the High Court of Kenya was shot dead in his house at Moke gardens on the 17th February, 2019 by the assailants who were later arrested and charged herein as 1st, 2nd, 3rd and 4th accused persons. He deposed that the 1st Accused person, an advocate of the High Court of Kenya, was married to the deceased person prior to his death and was serving as a magistrate at Nyeri Law courts.

116. The 2nd accused person, No.50162 **Sgt Richard Lorunye Moru**, is police officer currently attached to Riruta Police Station, Mutuini police post as the officer in charge of patrol and beats, and holds briefs of the officer in charge of armoury while the 3rd accused person is a retired police officer, who is currently working as a businessman. The 4th accused person is No.117822 **PC Peter Maundu Mbithi**, a police officer currently attached to Mutuini police post, Riruta Police Station performing general police duties.

117. He deposed that the 2nd Accused person was arrested on the 26th February, 2019 with the help of integrated command and control centre, when the registration number of motor vehicle that was used during commission of the offence was circulated within Nairobi. The said vehicle was intercepted and impounded at Bunyala round about, Nairobi County thus leading to his arrest, being the owner of the said motor vehicle. He was later transferred to Athi River Police Station. On the 28th February, 2019 at Athi River police station identification parade was conducted and a witness by the name **Ronald Bosire** positively identified him as the assailant who shot the deceased person at Moke gardens on the 17th February, 2019.

118. According to the deponent, the 3rd accused person was arrested on the 2nd of March, 2019 in Baragoi town within Samburu County following coordination of investigations with the local police officers at Maralal, Samburu County. This was about two week after the offence was committed. It was therefore deposed that if the accused person is released on bond there is high likelihood that he may go into hiding and abscond from the court proceedings.

119. It was averred that after commission of the offence the 4th accused person absconded from his work station at Mutuini Police post of Riruta Police Station until the 2nd of March, 2019 when he resurfaced and surrendered to the Police Station. The deponent was therefore apprehensive that the accused person if released on bond may abscond from the court proceeding thus delaying justice for the deceased person.

120. According to the deponent, the evidence so far gathered and the confession from the 2nd accused person directly implicate the 1st ,3rd & 4th accused person to have been directly involved in the arrangement and execution of the murder of the decease person and therefore there is a high likelihood of conviction which on its own is an incentive to abscond from the jurisdiction of this court.

121. It was disclosed that crucial evidence including telephone transcripts between the 1st, 2nd ,3rd and 4th accused person placing 2nd and 4th accused person at the scene of crime at Moke gardens, where they murdered the deceased in cold blood have since been availed to the defence, and this is sufficient incentive for the 2nd and 4th accused person to make this application and take flight at the earliest should they be released on bond, since their alleged innocence having been substantially diminished.

122. It was deposed that ballistic report which positively indicate that the empty cartridges that were recovered from the scene of crime belonged to a government riffle that had been assigned to the 2nd and 4th Accused persons respectively have since been supplied to the defence thus diminishing the accused person defence which can be an incentive for them abscond.

123. It was therefore averred that in view of the foregoing, it may not be possible to trace and apprehend the accused persons, if granted bond and abscond hence unnecessary interruption of smooth proceedings herein which in turn will delay justice to the kith and kin of the deceased. It was averred that the 1st accused person who was a resident at Moke garden was in direct communication with the watchmen within the estate and has a lot of inference, if she is released on bond she can easily interfere with the evidence of **Alex Wanyonyi** and **Ronald Bosire** who were watchmen at Moke gardens and are crucial prosecution witnesses. Further, the 1st accused person would also likely interfere/negatively influence the evidence of **Alex Wanyonyi** who was a watchman Moke gardens who the 1st accused person had requested to monitor the deceased person movement in and out of their matrimonial house in case he brings other women to their house while she was away.

124. It was averred that based on the investigations so far conducted and evidence gathered, the 2nd, 3rd and 4th Accused persons are deeply involved in the murder of the deceased person and if released on bail, the Accused persons are likely to interfere with witnesses specifically those who identified them or the motor vehicle that was used during commission of the offence namely **Alex Wanyonyi**, **Ronald Bosire**, **Gideon Teto Saka**, **Leshokoo Mepukori** and also especially considering the fact that they are police officers and ex-police officer with access to firearms. In his view, the 2nd and 4th Accused are Police Officers who held positions of influence and authority in the Society, further they were trained and able to use firearms which fact raises legitimate anxiety and apprehension on the part of the victims and witnesses if they were released on bail or bond pending trial. He disclosed that there is now ample evidence that the 2nd applicant is a dangerous sharp shooter and executioner of the heinous crime subject of the proceedings herein and is therefore highly likely to target and /or interfere with the key prosecution witnesses and thus affect the smooth hearing and determination of this case should he be released on bond.

125. It was disclosed that the safety of among the key witnesses namely **Alex Wanyonyi**, **Ronald Bosire**, **Gideon Teto Saka** and **Leshokoo Mepukori** herein may not be guaranteed if the Accused persons are released on bond before conclusion of this matter or before their evidence is adduced since the accused persons would inflict real fear and intimidate them. The deponent contended that interference with witnesses in a criminal trial before they tender their evidence in court will go to the root of the prosecution's case and will negatively impact it thus leading to subversion of justice.

126. While appreciating that the offence of murder is now bail able, it was contended that the grant of bail is not absolute but a matter of discretion on the part of the court after the considering the compelling reasons adduced by the prosecution. Therefore, in his view, it will be just and fair if this Honorable Court does not grant the Accused persons bail/bond until the hearing and determination of the instant case.

127. It was submitted that there is no single legislative enactment in Kenya that defines the term "bail/bond". It should be noted that there is no legislative guidelines on bail and the Courts are left with an unfettered discretion to determine whether to grant bail, based on the reasons advanced by the prosecution as envisaged under Article 49(1)(h) of the Constitution of Kenya. According to the Respondent, the law on bail has two conflicting demands, fundamental rights of an individual (suspect/accused) and the greater public interest. Since there should be peace and safety of the public/people and their property, the Courts of Law and all organs of Government have a duty to ensure that national and international security is preserved. The fundamental rights of an individual must be balanced with greater public interest.

128. Based on Article 49(1)(h) of the Constitution, it was submitted that all arrested person produced before courts of law are entitled to seek their release on bond or bail, pending charge or trial unless there are compelling reasons not to be released. The Respondent relied on **Republic –vs- Ahmed Mohammed Omar & 6 Others** **High Court Nairobi Criminal Case No. 14 of 2010** and submitted that the right to

bail pending trial is not absolute.

129. According to the Respondent, while the Constitution does not define what compelling reasons are, the Bail and Policy Guideline which were gazetted on March 2015 list what Court should take regard in determining whether the prosecution has adduced compelling reasons to warrant detention of an accused person. Further there are a number of authorities in relations to the right to bail and what would be regarded as compelling reasons. It was submitted that the said Guidelines at Para 4.26(a) is to the effect that the prosecution shall satisfy court, on balance of probabilities, of the existence of compelling reasons that justify the denial of bail. In this regard reliance was placed on the decision of **Achode, J** in **Republic –vs- Ahmad Abolafathi Mohammad & Anor High Court Nairobi Criminal Revision No. 373 of 2012** out in which the criteria for bail in determining what are compelling reasons was set as;

> a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty: where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive;
>
> b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused person is strong, it may be justifiable to remand him in custody;
>
> c) Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with the prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference;
>
> d) Whether the accused will attempt to evade trial?
>
> e) Whether the release will endanger public security, safety and overall interests of the wider public?
>
> f) Attempt to influence or intimidate witnesses or to conceal or destroy evidence;
>
> g) Undermine or jeopardize the objectives or the proper functioning of the criminal justice system;
>
> h) Where in exceptional circumstances, there is a likelihood that the release of the accused would disturb public order or undermine public peace and security.

130. Further reliance was placed on the case of **Dr. Ismail Kalule & 2 ors –vs- Uganda Crim. Case No. 115 of 2008 (2011) eKLR** and **Republic –vs- Milton Kabulit & 6 Others Crim. Case No. 115 of 2008 (2011) eKLR.**

131. It was noted that there is no legal impediment in adducing evidence gathered by police during investigation. The Prosecution is at liberty to disclose evidence so far gathered during the bail application while not losing sight of the presumption of innocence. It was submitted that based on the Affidavit in Objection to Bail filed on the 5th April, 2019, Evidence gathered during investigations heavily implicates the accused persons.

132. In this case it was submitted that based on the seriousness of the offence, makes the accused persons flight risk. To support this, it was submitted that the character and antecedents of the 3rd Accused person (***Lawrence Metayo Lempesi***) after the commission of the offence has been laid out, that he was arrested at Maralal Samburu County two week after the commission of the offence and hence this increases the chances of him absconding in case this court grants him bond. As regards the 4th accused person (**Peter Maundu Mbithi**), he absconded from his work station at Mutuini Police Post of Riruta police station until the 2nd of March, 2019 when he resurfaced and surrendered to the police station. After the commission of the offence the 5th accused person (***Nuno Hassa Jillo***) disposed of his mobile phone and sim-card which would have been crucial evidence in the prosecution's case. This was also meant to conceal his identity and ensure that he may not be arrested. He was arrested on the 1st April, 2019 at Isiolo town within Isiolo County following coordination of investigations with the local police officers at Isiolo Town, Isiolo County and the officers from the DCI Athi River. This was about one and half months after the offence was committed, therefore if the accused person is released on bond there is high likelihood that he may go into hiding and abscond from the court proceedings.

133. It was therefore submitted that based on the behaviour of the 2-5th accused persons after the commission of the offence, the nature of the charges and their seriousness, there are high likelihood of the 2nd -5th accused persons evading justice and evade attending this trial which will seriously delay the course of justice to the kith and kin of the deceased person.

134. In the Respondent's Submissions, the investigation officer is apprehensive that the 2nd, 3rd and 4th accused person if granted bond they may interfere with prosecution witness. Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give eschewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice. Interference with witnesses is a highly potent ground, on which the accused persons 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. It was submitted that interference with witnesses is an affront to the administration of justice as it compromises the flow of justice and goes to the root of a trial and that alone is a compelling reason within the meaning of Article 49(i) h of the Constitution of Kenya.

135. In opposing the applications, the interested party averred that Article 24 and 25 of the Constitution confirms that the right to bail is not absolute as it does not fall under those rights that are non-derogable. Therefore, where there are compelling reasons to deny bond, the court is bound to deny.

136. As to what constitutes compelling reasons, the respondent relied on ***Bail and Bond Policy Guidelines, 2015*** which guide the Judicial Officers in the application of the laws that provide for bail and bond. In determining the compelling reasons, it was averred that the Policy Guidelines, 2015 under paragraph 4.9 sets out compelling reasons.

137. In opposition, the interested relied on the replying affidavit of **Nehemia Cheptumo Chesang** brother to the deceased and that of the Investigating officer **CPL Lekakeny Kaparo** and submitted that the accused persons herein are facing the charge of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** CAP 63, Laws of Kenya and if found guilty they shall be sentenced to death. The Court was urged to bear in mind the nature and severity of the offence since the accused persons are charged with murder which was conducted with a savagery that makes this a unique case of murder. According to them, the evidence available that will be tendered at the trial paints a clear picture of a calculated series of events, meetings, money exchanging hands, court cases culminating to the murder of the victim herein. According to the interested party, the severity of the offence goes hand in hand with the severity of the sentence once the accused persons are convicted. It reiterated that the offence of murder is serious and the punishment is heavy being that of death penalty as stipulated under Section 204 of the ***Penal Code***. In support of this position, the interested party relied on the decision of **Ochieng', J** in **Republic vs. Ahmed Mohammed Omar & 6 Others (2010) eKLR** and the decision of Supreme Court of Malawi in the case of **John Zenus Ungapake Tembo & 2 Others vs. The Director of Public Prosecution M.S.C.A CR. Appeal No. 16 of 1995**.

138. In the present case, it was contended that the 1st accused is a Judicial officer, the 2nd, 3rd, 4th and 5th accused are police officers all with significant influence, they may abscond trial for the reason that they may be fearful of its culmination as well as their safety. Having been charged with this serious offence there is therefore a high possibility to abscond for fear of death penalty if released on bail or bond. That is a consideration that must be taken into account when considering the Application to grant bond or bail.

139. As regards the strength of the prosecution case, the interested party submitted that the evidence against the accused persons are very strong and therefore justifiable to subject the accused persons to pre-trial detention. It was contended that the witnesses in this matter have recorded statements establishing the accounts, genesis and the basis that may have culminated to the murder of the Deceased. The documentary evidence available and mobile phone data analysis clearly establishes that there was a well-choreographed plan put in place and meticulously executed leading to the death of the deceased.

140. The interested party therefore associated itself fully with the submissions by the Prosecution on the strength of the case and submitted that from the witness statements, it is very clear that the planning was so meticulously organised with a view of concealing the execution of the deceased person. According to him, the post mortem report served on the accused persons indicate the horrific and extensive fatal injuries occasioned on the deceased persons. Evidence gathered from the three of the key Prosecutions witnesses that is the brother and the sister to the deceased and the investigating officer whose statements have been given to the accused persons and are relied upon establish that the deceased persons was fearful of his life. He had expressed those concerns to his brother and sister on how the 1st accused is planning to kill him using police officers which actually did happen.

141. It was further averred that the accused persons have been served with the Prosecution witnesses' statements. They are now aware of the key Prosecution witnesses and the weight of the Prosecution's case against them and the content of the evidence the said witnesses will tender. There is thus a high possibility that they will inflict real fear, intimidate and interfere with the Prosecution witnesses if released on bail.

142. It was contended that it is for a fact that since the 1st accused was arrested she was remanded at Athi River Police Station, a station in which she abused her office as a judicial officer and had the deceased arrested on the 17th August 2018 as per the affidavit contents of the deceased brother **Nehemiah Cheptumo Chesang**. The police took instructions from the 1st accused and did not allow the Deceased's relatives to see him pursuant to the instructions of the 1st accused, it is only until the deceased fell ill and for fear that he may die in the cells that the police released him on the 19th August 2019 to the brother and sister who are witnesses herein. Even after the release of the Deceased under the circumstances explained in the affidavit of the brother **Nehemiah Cheptumo Chesang**, the 1st accused was not happy and threatened to use the same police officers at Athi River Police station to have the brother arrested.

143. It was submitted that after investigations were concluded, the 1st accused was arrested and placed in cells at Athi River Police Station, she was eventually arraigned in court and instead of getting same treatment like any other accused person, she was elevated, given special and preferential treatment, whereas after making an application to be remanded at Athi River Police station, her application was allowed. This, the interested party contended was because the 1st accused has network of Police friends at the said station, the accused is known at the station and she knows she can easily manipulate and misuse the police at the said station at will. This is the Police station which investigated the case before this court and the police station where witnesses recorded their statements and also the station where the police file containing exhibits, witness statements and witness addresses and contacts is kept.

144. The interested party contended that the 1st accused has a great dislike against the brother to the deceased, her sister and other witnesses for recording statements against her and this was demonstrated in court on the 9th April 2019 during plea taking. Therefore, if released on bail or bond the witnesses now being aware of how the deceased person met his death will fear coming to court to tender their evidence if the accused persons are released on bail or bond noting that they will be coming to testify against them. According to the interested party, the seriousness with which the court should consider the question of possible interference with witnesses was addressed in the decision of **Republic vs. Jocktan Mayende & 3 Others [2012] eKLR.**

145. According to the interested party, the witnesses in this matter mainly reside in Athi River and Kitengela which is a close proximity to the accused persons. If released, the accused persons will be living amongst the witnesses whom they will testify against them exposing them badly as their personal security and that of their other family members will be at risk.

146. It was further submitted that the 1st accused is a serving judicial officer, she has good network amongst the police officers, she served as a Judicial officer in Kajiado law courts and Kagundo Law courts therefore she is a person of great influence. She has good grasp of the law having served as a judicial officer and understands evidence that will likely lead to conviction and therefore she can easily pin point the

potential witnesses with crucial evidence and directly or indirectly intimidate them, interfere with their testimony at the trial. The fears expressed by the family of the victim of whom are witnesses are real.

147. To the interested party, the fears of the family of the victims are not mere words expressed for the sake of it, they pose real danger which if not jealously guarded will compromise the course of justice, and in order to buttress the point above, referred the court in the case of **Republic vs. David Ochieng Ajwang Alias Daudi & 11 Others [2013] eKLR.**

148. It was contended that the 1st accused chose to subvert justice by frustrating the cases that were pending in Mavoko Law Courts and Machakos Law courts against the 1st accused. It was submitted that apart from the pre-trial detention there is no other way that can prevent the accused persons and more specifically the 1st accused from planning and executing any criminal act to subvert justice again by eliminating, threatening and inflicting fear upon the witnesses and other parties involved in this matter before this Honourable Court.

149. It was therefore submitted that the safety of the witnesses and that of the victim's family is of paramount importance. The publicity within which this case has attached to have a great bearing to the safety of the accused persons, the emotions of the general public may be volatile and hence may not be safe to the accused persons. According to the interested party, the members of the victim's family have suffered intense anguish and trauma over the death of their beloved one hence the release of the accused persons on bail or bond shall cause more trauma to the victims being the deceased person's immediate relatives and potential witnesses. According to the interested party, the 1st is a judicial officer, the 2nd to 5th Accused persons are Police Officers whereas credible evidence has indicated that the 2nd, 3rd, 4th and 5th accused person were hired to assist in executing the deceased person by the 1st accused. They are therefore persons in a position of influence and authority in the society, trained and able to attain firearms and therefore this could raise a legitimate anxiety and apprehension on the part of the victims and witnesses if they are released on bail or bond.

150. It was its submissions that the accused persons have failed to prove that they are suffering from any of the alleged aliments. The 1st accused states that she is allergic to cold and dust and that she is asthmatic which medical conditions are likely to worsen if they continue to be held in custody yet no medical documents have been attached to confirm the same neither have they attached the treatment notes to confirm that their conditions have worsened while in custody.

151. To the interested party, the release of the accused persons on bail pending the hearing and determination of the trial is not absolute and is at the discretion of this Honourable Court. While appreciating that the right to presumption of innocence under Article 50 (2) of the constitution is a subset of rights available to an accused person, it submitted that this right is available to those admitted to bail and/or bond and those held in custody. Those admitted to bail and /or bond are admitted to bail and bond because there are no compelling reasons as was held in the case of **Republic vs. Nahashon Muchiri Mutua [2016] eKLR.**

152. The interested party therefore in the interest of justice the accused persons should be held in custody for the duration of the trial. The court was urged to find that the above-mentioned reasons are compelling for this Honourable Court not to release the accused persons on bail or bond pending the hearing; determination and/or conclusion of this trial and that the application should be dismissed.

Determination

153. I have considered the application, the affidavits in support thereof, the submissions made and the authorities relied upon.

154. Article 49(1)(h) of the Constitution provides that:-

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

155. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. I therefore associate myself with **Mativo J.** in **Republic –vs- Danfornd Kabage Mwangi (2016) eKLR** that**:**

> **"Granting bail entails the striking of a balance of proportionality in considering the rights to the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. incarcerations before trial, when the outcome of the case is yet to be determined, cuts against this principal. The need for bail is to assure that the accused person will appeal for trial and not to corrupt the legal process by absconding. Anything more is excessive and positive…"**

156. In the same vein, in the case of **Nganga –vs- Republic (1985) KLR 451,** it was that:

"Generally in principal, and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an Accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

(a) The Accused will fail to turn up at his trial or to surrender to custody, or

(b) The Accused may commit further offences, or

(c) He will obstruct the course of Justice."

157. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. See **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**. In that case the Court held that:

"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system… the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question… the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

158. It was therefore held in **Francis Macharia Karichu vs. Republic [2018] eKLR**, that:

"In addition, the Bail and Bond Policy recently published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail." (Emphasis added).

159. Gravity of the offence as a consideration was appreciated by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."

160. It is true that if found guilty the accused are liable to be sentenced to death. However, they are yet to be found guilty. Secondly, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it is nolonger mandatory that those found guilty of murder must be sentenced to death.

161. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

(i) The nature of the charges;

(ii) The strength of the evidence which supports the charge;

(iii) The gravity of the punishment in the event of conviction;

(iv) The previous criminal record of the accused if any;

(v) The probability that the accused may not surrender himself for trial;

(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;

(vii) The likelihood of further charges being brought against the accused;

(viii) The probability of guilty;

(ix) Detention for the protection of the accused;

(x) The necessity to procure medical or social report pending final disposal of the case.

162. Locally, the issue has been dealt with in the case of **Republic vs. Lucy Njeri Waweru & 3 Others Nairobi criminal Case No. 6 of 2013** which listed some of the factors that a court needs to consider in an application for bail as:-

a) Whether the accused persons were likely to turn up for trial should they be granted bail;

b) Whether the accused persons were likely to interfere with witnesses;

c) The nature of the charge;

d) The severity of the sentence;

e) The security of the accused if released on bond.

f) Whether the accused person has a fixed abode within the jurisdiction of the court.

163. This was the position adopted in **Dr. Ismail Kalule & 2 ors –vs- Uganda Crim. Case No. 115 of 2008 (2011) eKLR** where **Hon. Justice Owiny Dollo** stated that;

"There are well established guidelines Court should adhere to, in the exercise of its discretion, in considering the issue of bail.

These include nature or gravity of the offence the accused is charged with, the severity of the sentence that could result therefrom if conviction is secured."

164. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."

165. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.

166. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

> **"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."**

167. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

168. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

> **"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."**

169. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in **Republic vs. William Mwangi Wa Mwangi [2014] eKLR** where **Muriithi, J** held that:

> **"It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail…It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail."**

170. In this case the opposition to the accused persons release on bond is 'two fold. First is regards the evidence gathered against the accused persons which in view of the respondent and the interested party may be an incentive to their absconding. To my mind, to make a decision as to the weight of the evidence to be adduced against the accused persons at the stage of determination of an application for bail may well be prejudicial. However, the Court is not disentitled to have regard to the nature of the evidence to be adduced in setting conditions for the grant of bail.

171. Where the prosecution's case is hinged on the allegation that the accused person is likely to commit the commission of another offence or endanger the safety of victims, individuals or the public, there ought to be a basis for forming such a belief.

172. In this case the 1st accused faces an offence of commission of murder of her husband. She contends that her children are now under the care of her mother. This contention is not denied by the prosecution. The said accused person is however presumed innocent till proven guilty. I also note that the prosecution has not established that the 1st accused is a fight risk. I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & Others** (supra) that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."**

173. The second issue is that the accused persons' status may well influence the prosecution witnesses and deter them from giving evidence against the accused. In my view, there are in place constitutional and legislative mechanisms in place to protect witnesses who are shown to be under real threat if an accused person is released. Therefore, the Court in making a determination must consider whether such safeguards, if invoked, are unlikely to have any impact of the safety of the witnesses.

174. It is also my view that even in cases where limitations contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words, the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to ***Thesaurus English Dictionary*** is forceful, convincing, persuasive, undeniable and gripping.

175. In **Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009** court defined the term "compelling reasons" as follows:-

> **"The phrase compelling reasons would denote 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."**

176. Citing the same case, the Court in **Felity Sichangi Nyangesa vs. Republic (2014) eKLR** held that:

> **"Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the Case where a person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The Court is then entitled, if not bound to infer that the intention of the accused in accosting the witness had been to dissuasive the witness from giving evidence."**

177. As I have stated above it is upon the prosecution to prove that there exist compelling reasons to justify the court in limiting the applicant's otherwise constitutionally guaranteed rights. Such compelling reasons cannot be said to have been satisfied based on bare averments. It is contended that having known the case against them, the accused are likely tamper with the evidence. I however associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & other High Court Criminal Case No. 61 of 2012** that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."**

178. In this case it must be appreciated the Constitution guarantees to an accused the right to be supplied with the material the prosecution intends to use in its case. Such a right cannot be the basis of denying the accused another constitutionally guaranteed right – the right to bail.

179. The second objection was that the offence with which the accused are charged may carry death penalty. That may be so, however, the accused are presumed innocent till proven guilty. In **Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120** it was held by the Constitutional Court of Uganda that:

> **The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of**

innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially…]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person's appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him."

180. As regards the same issue, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** expressed himself as hereunder:

"Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;

'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'

Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."

181. On the other hand, without pre-empting the outcome of the case, I bear in mind the severity of the offence vis-à-vis the right of the accused to be admitted to bail and that there are mechanisms for protecting the witnesses in the case. I also consider that the court in admitting the accused to bail must do so conditions which are reasonable both to the accused and to the victims. I have also considered the nature of sentence available for the offence of murder in the event the accused is convicted and also the issues raised by the interested party and the respondent. In the circumstances, I made the following orders:

(1) The accused persons may be released upon deposit into court of a cash bail in the sum of Kshs 500,000.00.

(2) In addition, the accused will provide two sureties of KES 1 Million each to be approved by the Deputy Registrar of this court.

(3) The accused must deposit all their travel documents including their passports which they hold – if they have any.

(4) The court will be at liberty to cancel their bail and bond and to remand them in custody for the remaining part of their trial if any of the following conditions, which I hereby set as part of the terms upon which they are released, are breached:

(a) They shall report once a month to the deputy registrar of this court and shall attend court without fail whenever required to do so.

(b) They shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that have been supplied by the State to the defence.

(c) They shall not intimidate close relations of the deceased.

(d) They shall not leave the jurisdiction of this court without court's prior permission.

182. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos 14th day of June, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Osiemo for the 1st accused

Miss Watta for the 2nd accused and holding brief for Miss Namida for the 3rd accused and Mr Nthiwa for the 4th accused

Mr Mutinda for the 5th accused

Miss Waweru for Miss Mogoi for the State

Mr Nagwere for Mr Kiptoon for the interested party/family

CA Geoffrey