



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL CASE (MURDER) NO 4 OF 2019

BETWEEN:

THE REPUBLIC

and

DAVID MACK MAROMBE GITAHU (alias Soldier Boy)

RULING ON BAIL APPLICATION

1. The Court has before it an application for the Applicant. The Applicant has been charged with the Offence of Murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the Offence are that David Marke Marobe Gitahi alia Soldier Boy did on the night of the 29th day of March 2019 cause the death of Esau Juma Mwangeka by shooting at the Rocklands Bar Taveta Township within Taita Taveta County.

2. The Accused was declared fit to plead on 17th April 2019 and he has pleaded not guilty. As such he is entitled to the benefit of the presumption of innocence until proven guilty.

3. The Accused has applied to be released on bail and/or bond until trial. It is well established that under the Constitution of Kenya an accused is entitled to bail and/or bond unless there is good reason for refusing the bail. The function or purpose of the bail or bond is to ensure that the Accused will appear before the Court to be tried. Before coming to a decision the Court must consider the following:

- (a) The Antecedents of the Accused
- (b) The likelihood of absconding
- (c) The likelihood of committing other offences while out on bail
- (d) The seriousness of the offence
- (e) The gravity of the punishment
- (f) The safety of the Accused
- (g) Any health conditions of the Accused
- (h) The approval of the sureties
- (i) The wishes and feelings of the victims.

4. In this case Counsel for the Accused has argued that he should be granted bail. He has produced one surety who owns a property in the Kitengele area. She is a niece to the Accused. The Accused relies on his right to be granted bail, his health in that he says he is HIV positive and there is no objection in the community to his release. The Accused relies on the Report of the Probation Officer (dated 12th July 2019) to support his arguments. The Report was signed by Mr Piri the Senior Probation Officer for Taita Taveta. Mr Piri told the Court that the information contained in the Report emanates from other sources. Those sources are not named. A general list containing typing errors forms part of the introduction to the Report. Probation Reports are intended to assist the Court in exercising its discretion. For reasons set out below, this Report does not assist the Court. It should also be recorded that the ODPP does not oppose bail.

5. Dealing first with the seriousness of the offence and the likely penalty if the Accused is found guilty. The Accused is charged with murder

which carries the death penalty at its worst. In the circumstances, the Court must consider the possibility of absconding. In the circumstances of this case, the Accused is a police officer. He clearly has the sympathy of the Probation Officer and the ODPP. Further, the area where the Accused worked and probably will return to work is renowned for being a region with a porous border with Tanzania. In the circumstances, if the Accused wished to do so he could easily disappear. In light of the position of the other authorities it is likely that he will not be re-apprehended.

6. The Court must in the circumstances, also look at the likelihood of re-offending. The Report of Dr. C.M. Mwangome Consultant Psychiatrist/DDMS at Coast Province General Hospital prepared a report on the Accused's fitness to plead. The report states that the Accused is fit to plead. However, the Accused himself told the Psychiatrist that he felt he was "*being persecuted and that people wanted to finish him*". He also said "*He was hearing voices of people telling him they wanted to kill him*". It is therefore clear that should those feelings persist the Accused is at a high risk of re-offending if he is returned to the Community. Interestingly, there is no mention of the HIV status of the Accused and its effect on him.

7. In coming to a decision on whether or not to release the Accused on bail at this juncture, the Court must consider the rights and needs of the Accused. The Court also must consider the needs of the State in the sense of the administration of justice. Thirdly, the Court must take into account the wishes and feelings of the victims and the community at large.

8. The Probation Report states that if he is released the Accused will be living in the family home. The Report omits to state where that family home is situated. Is it within this County or another. If it is in this County how will contact with the victims be managed? Again the Report fails to address a fundamental issue. It also fails to record whether or not the Accused will return to work as a policeman. Again that is a fundamental aspect of both his rights and the exercise of the Court's discretion. After the Court heard this matter the Probation Officer has filed a pre-bail report from a Probation Officer in Baricho. He feels the Accused can safely return to his ancestral home and the family in that ancestral home with ensure he attends for trial. The family member who attended Court has not put forward any surety from the Baricho area. No one has come forward to say they will ensure the Accused attends Court. The Surety who attended, a Lucy Muthoni Kinyeki spent the entire hearing on the verge of tears. It was clear she was before the Court under duress and as such is not an appropriate surety. Also interestingly, the Probation Officer in Baricho states that the Accused is and has always been of good health. As to family, the Probation Officer in Voi appears to know about a wife and two young children who are unknown to the Probation Officer in Baricho. The Probation Officer in Voi states that the Accused was "*newly diagnosed to be Hiv positive and is on ARVs after counseling*". There was no medical evidence placed before the Court verifying that position at the time of the hearing. That was placed on the file subsequent to the Hearing by Mr Piri the Probation Officer. That states that the Accused was diagnosed at Shimo La Tewa Prison Dispensary on 19th June 2019. The Report states that the Accused is receiving medication. There is no file for him and that he has been advised to attend Taveta Sub-District Hospital suggesting it is his intention to remain in the vicinity of the victim's family. That demonstrates he has no intention of returning to the family home pending trial. At present he is remanded at Voi Police Station and therefore has easy access to Taveta Sub-District Hospital (see Medical Report).

9. It should also be noted for the Record that the Probation Report from Voi was signed off on 12th July 2019. The Court was told it draws information from investigations conducted by the Probation Officer in Baricho. However, the Report from Baricho is dated 4 days later, namely 16th July 2019 and after the first report was filed. Such inconsistencies do not inspire confidence in the administration of justice.

10. Also of great concern to this Court is that the Probation Officer in Voi stated that he interviewed the victim's family in particular his father who is not opposed to bail being granted. It transpired that every statement made in relation to that interview was untrue and it would seem, knowingly so. The Probation Officer did not interview any member of the family of the deceased. In fact he would have found it difficult to do so because the father is elderly and unwell and speaks through his son who was present in Court. The **TRUE** position is that the family of the victim are poor people and they are violently and vociferously opposed. They are also clearly feeling let down by the system which allows a Probation Officer to come before the Court and mis-state their views. Their distress and that dishonesty was tangible.

11. In the circumstances, the Court has before it a Pre-Bail Report from Voi on which it can place no reliance given that it contains statements that are factually untrue. It is also clear that if the Accused is truly HIV positive, his treatment is being conducted from Taveta Sub-District Hospital. That means he will stay in the vicinity. The negative impact on a family who are impoverished and vulnerable as well as bereaved was clear to the Court. It is also clear that this family is feeling let down by the system and that has an impact on the administration of justice. The likelihood of them wanting to take matters into their own hands is high and therefore the Accused would be at risk.

12. In the circumstances, this Court has no option but to dismiss the application and refuse bail at this stage. However, this Court hereby grants leave for a copy of this Ruling to be served on the National Probation Service with a request for the appointment of an alternative probation officer who has no connection with the Accused and Taveta to carry out a fresh inquiry on which to base a review of this decision.

Order accordingly,

Farah S. M. Amin

JUDGE

Signed, Dated and Delivered this the 22nd day of July 2019

In the Presence of

Court Assistant: Josephat Mavu

Prosecution: Ms Mukangu

Defence: Mr Muthami

Probation Office: No Appearance

Victims' Representatives: Have not identified themselves.