



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO 16 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

1. JANE WANJIRU MACHARIA

2. CHARLES MACHARIA.....ACCUSED

RULING ON BAIL

1. The Accused persons herein, **JANE WANJIRU MACHARIA** and **CHARLES MACHARIA**, are daughter and father respectively. They are charged that on 04/12/2018 in Nanyuki Town within Laikipia County, they murdered one **GEORGE GACHIBI KAREGWA**. They pleaded not guilty to the charge and their trial shall commence in due course. In the meantime they have asserted their constitutional right to be admitted to bail pending trial.

2. The Republic and also the Deceased's family have opposed bail for the Accused persons. The germane grounds urged for that stand are

(a) **That they are a flight risk.**

(b) **That there is another suspect who is still at large, and that releasing the Accused persons on bail may make it that much more difficult to apprehend him.**

(c) **That the Accused persons are likely to interfere with witnesses.**

(d) **That the Accused persons are likely to be harmed by members of the public in Nanyuki Town if released on bail.**

(e) **That the admission of the Accused persons to bail will aggravate the Deceased's family's pain and be a mockery to them.**

3. I have considered the two affidavits of the investigating officer and the one of a brother of the Deceased from which the above grounds are gleaned. I have also read the Accused persons' response in the form of an affidavit by their learned counsel which essentially argues matters of law. Finally, I have considered the submissions of the learned counsels appearing.

4. Bail pending trial is now a constitutional right in respect of all criminal offences that will be denied an accused only for compelling reason. Further, any condition that the court might impose for such bail, again by constitutional edict, must be reasonable. For all that see **Article 49(1) (h)** of the *Constitutional of Kenya, 2010*. The rationale for this constitutional right to bail is that because of the very important principle of presumption of innocence, an accused person should be able to enjoy his freedom pending his trial, and the court should impose only such conditions as would ensure that he duly attends the trial. The right to bail however is not absolute and will be denied for any compelling reason.

5. "**Compelling reason**" is not defined in the Constitution or in any law that this court is aware of. The term is also not defined in *Black's Law Dictionary, Tenth Edition*. However, the term "Compelling need" is defined there as –

"A need so great that irreparable harm or injustice would result if not met."

A note following that definition states –

"Generally, courts decide whether a compelling need is present based on the unique facts of each case."

6. Compelling reason therefore, in this court's view, is a reason that must militate against granting the accused bail, such as proven likelihood

of his not attending court, interference with witnesses, harm to witnesses or to himself, and the like. The important word here is **proven**. It is not a matter for the discretion of the court; it is a matter of judgment. He who seeks to deny an accused person his constitutional right to bail pending trial must place evidence before the court as would establish, on balance, the compelling reason urged. It is not enough to merely allege without evidence.

7. In the present case I will examine the various compelling reasons urged by the prosecution and the Deceased's family.

Flight risk

8. It has been urged that the Accused persons have no known fixed abode and that they were arrested away from Nanyuki Town where the offence was committed. It will be a matter of evidence at the trial where exactly they were arrested as they have denied that they were arrested at Thika as stated in the Investigating Officer's affidavit and have asserted that they were arrested at their home. There is a "To Whom it may Concern" letter dated 30/01/2019 by the Ag. Chief of **Gatanga Location, Thika** (which is annexed to a Bail Assessment Report dated 31/10/2019 by the **Probation Service** filed in court on 01/02/2019. The letter states categorically that the Accused persons hail from **Gatanga Location** and are well known to the Chief's Office. The letter further states that the Accused persons have been living **Kirwara Sub-location** in Gatanga Location, where they interact freely with members of the community.

9. It therefore cannot be true that the Accused persons have no known fixed abode.

Other suspects still at large

10. I cannot understand how the efforts of the police to apprehend any other suspect or suspects can be hindered by the release of the Accused persons on bail. How will the Accused persons be privy to the operations or movements of the police (presumably to alert the other suspects of the same)?

Likely interference with witnesses

11. It has been pointed out that the witnesses are former workmates of the 1st Accused. But it has not been urged that that the 1st Accused was in any position of influence or authority over such witnesses, or that any of them are related to her in anyway. No evidential basis for the allegations of likelihood of interference with the witnesses has been laid out.

Likelihood of harm to the Accused

12. It has been urged that the Accused persons themselves had on a number of occasions asked the court that they be remanded at GK Prison, Nyeri rather than at GK Prison, Nanyuki as they were apprehensive of their own safety. That has nothing at all to do with their safety while out on bail. It has already been seen from the Ag. Chief's letter already referred to above that their home area is in Gatanga Location, far from Nanyuki Town where the alleged offence was committed.

Deceased's family's pain

13. This court cannot permit denial of bail as a means of retribution. The Accused persons are presumed innocent until otherwise found guilty after full trial. Only in that event (of conviction) would the issue of retribution arise while considering appropriate punishment.

14. After considering all matters placed before the court, I do not find any compelling reason to deny the Accused persons their constitutional right to bail pending their trial. Each of them shall be admitted to bail upon their personal cognizance in the sum of KShs 500,000/00 and one different surety each in like sum. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 17th DAY OF JULY 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 18TH DAY OF JULY 2019