



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 73 OF 2016**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MARK NYONGO.....ACCUSED**

**RULING**

[1] Upon the arraignment of **Mark Nyongo**, the accused person herein, on the **27 June 2019**, his Advocate, **Mr. Nyamweya**, applied for his admission to bail pending the hearing and determination of this case. The Prosecution Counsel, **Ms. Mumu**, opposed the application on the basis of the averments set out in the affidavit of **Raphael Nyina**, sworn on **24 June 2019**. Thereupon, **Mr. Nyamweya** asked for more time to file a Replying Affidavit, which was done on **2 July 2019**. The Replying Affidavit was sworn by the accused person in response to the averments in Mr. Nyina's affidavit.

[2] The brief background to the application is that the accused person was jointly charged with one **Michael Masai** on the **27 October 2016** with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the night of **2<sup>nd</sup> and 3<sup>rd</sup> April 2015** at around 23.30 hours, at Elgon View Estate within Uasin Gishu County, they jointly murdered **Michael Asenga Luka**. The court record shows that, prior to the institution of this case, there was an inquest that had commenced before the court of the Chief Magistrate, Eldoret; and that the said inquest was terminated midway by the Director of Public Prosecutions to pave way for the murder charge herein. It is also evident from the proceedings between **23 November 2016** and **23 January 2017** that this case was apparently filed before the termination of the inquest; hence the accused persons filed a Notice of Motion herein as well as a Petition seeking, inter alia, a conservatory order to forestall the plea-taking pending termination of the inquest. The Notice of Motion was ultimately withdrawn in deference to the Constitutional Petition; which, as the Court was to later learn could not be prosecuted to conclusion because the court file went missing.

[3] Thereafter, warrants of arrest were issued against the two accused persons to compel their attendance for plea. It was thus in execution of the warrant of arrest issued against the accused person that he was availed in court on **23 May 2019** to answer the allegations herein; and granted the aforestated background, it was the averment of **Raphael Nyina**, an investigator with the **Independent Policing Oversight Authority ("the Authority")**; and the investigating officer in this matter, that the Authority received and investigated the case of murder of the deceased, **Michael Asenga Luka**, and the resultant investigation report was forwarded to the Office of the Director of Public Prosecutions on **2 September 2016** for further advice and directions. Thereafter the ODPP wrote to the Authority directing that the accused be arrested and prosecuted for the murder; whereupon the inquest was terminated.

[4] **Mr. Nyina** further averred that the accused person, through his Advocate, **Mr. C.D. Nyamweya**, has at all material times, opposed his being charged, and that this was why he filed **the Petition No. 23 of 2016** which has remained unprosecuted to date; and that in addition, the accused went into hiding immediately he became aware that he was required to answer the murder charge. **Mr. Nyina** made reference to his conversation with **CI Japheth Nyabengi**, the Officer in Charge of **Langas Police Station**, that the accused deserted the service to further evade attending court; and therefore, that he is a flight risk. Further to the foregoing, the Prosecution averred that, given the magnitude of the offence, there is a high likelihood that the accused, if released on bond, shall threaten and/or intimidate witnesses in order to subvert the course of justice, given that he is a police officer who has wide connections with fellow police officers.

[5] In his Replying Affidavit, the accused sought to set the facts straight by asserting that in **Petition No. 23 of 2016**, they took issue with the filing of this case in disregard of their rights as enshrined in the Constitution and the applicable law; and that, it was thereupon that the Court issued Conservatory Orders restraining plea-taking herein pending the hearing and determination of the Petition. It was therefore his averment that the Conservatory Orders were not pegged on the termination of the Inquest. He further averred that while **Petition No. 23 of 2016** was pending, he was transferred from **Langas Police Station** to **Kajiado Police Station** and thereafter deployed to Laikipia District on operation duties during the flare-up of strife between the herders and ranchers in that area; which events he asked the Court to take judicial notice of.

[6] The accused person averred that, after a period of 6 months of operation duties, he was transferred from **Kajiado** to **Kisumu**; and that all

the while he was in touch with his Advocate, **Mr. Nyamweya**, and was made aware that the court file had gone missing; and that he was assured by his Advocate that once the file was available he would be notified for purposes of court attendance. Thus, according to him, the Petition is yet to be heard and determined; and therefore, he ought not to have been required to take plea herein. He therefore denied having gone underground as alleged by the Prosecution, adding that the Authority has always pursued this matter with a tint of malice, arising from the mere fact that they filed **Petition No. 23 of 2016** and obtained Conservatory Orders therein. He went further and surmised that the Authority may be behind the disappearance of the court file for **Petition No. 23 of 2016** so as to push for his prosecution in spite of the Conservatory Orders therein.

[7] The accused person further discounted the Prosecution contention that he is likely to interfere with the Prosecution witnesses, pointing out that he has been free since **2015** when the offence is alleged to have occurred; and yet he has never interfered with witnesses. He likewise denied that he is a flight risk, contending that he is a serving police officer who fully understands the consequences of jumping bail. The accused annexed to his Replying Affidavit copies of the Petition dated **25 November 2016**, the Notice of Motion dated **29 November 2016** and the Replying Affidavit sworn by **Christopher Ogega** on **14 December 2016** to augment his averments.

[8] I have given careful consideration to all the averments made in the parties' respective affidavits as well as the submissions made herein by Learned Counsel. Needless to say, that bail pending trial is a constitutional right. **Article 49(1)(h)** of the Constitution is explicit that, unless there is some compelling reason, an accused person ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. Hence, in **Nganga vs. Republic [1985] KLR 451**, it was held that:

**"Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions ... generally in principle 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 there are substantial grounds for believing that;**

- a) the accused will fail to turn up at the trial or to surrender to custody or;**
- b) the accused may commit further offences; or**
- c) he will obstruct the course of justice.**

**The primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time."**

[9] The apprehension that the accused is a flight risk was premised on the averments by **Mr. Nyina** that the accused person, through his Advocate, **Mr. C.D. Nyamweya**, all along been opposed his being charged, and that this was why, having obtained Conservatory Orders in **Petition No. 23 of 2016**, the matter has remained unprosecuted to date. It was further the contention of the Prosecution that the accused went into hiding immediately he became aware that he was required to answer the murder charge. **Mr. Nyina** made reference to his conversation with **CI Japheth Nyabengi**, the Officer in Charge of **Langas Police Station**, and the proceedings of **3 April 2019** herein, and asserted that the accused deserted the service to further evade his prosecution herein. I however, no affidavit was filed herein by **CI Nyabengi** to give the Court first hand information about these serious allegations. Instead reliance was made to what **CI Nyabengi** told the court on **3 April 2019**.

[10] The accused person has however refuted those allegations and stated that he is a serving police officer; and that after the issuance of Conservatory Orders in **Petition No. 23 of 2016**, he got transferred from **Langas Police Station** and had to rely on his Advocate, **Mr. Nyamweya**, to keep abreast of the court cases. The court record confirms that the fact of the accused's transfer to **Kajiado Police Station** was brought to the attention of the Court on **10 April 2017**; and that when the Court ultimately issued an order for the issuance of a Warrant of Arrest, it was specific to the 1<sup>st</sup> accused, **Michael Masai**, as can be confirmed from the order of **13 June 2017**. In the premises, it was imperative for the Prosecution to prove, and indeed it had the opportunity to prove, that the accused was a deserter as alleged, which the Prosecution failed to do. It is noteworthy too, that at paragraph 18 of the affidavit of **Raphael Nyina**, it was conceded that the accused is still serving as a police officer. In the premises, I find no basis for holding that the accused is a flight risk.

[11] Likewise, no evidence was presented by the Prosecution to support their assertion that there is a high likelihood that the accused, if released on bond, shall threaten and/or intimidate witnesses with a view subverting the course of justice. As rightly pointed out by the accused, he has been out there since **2015** when the incident occurred; and therefore, what I expected from the Prosecution was proof that he has, during that period, interfered or attempted to interfere with witnesses. Again, no such evidence was presented by the Prosecution in this regard. Thus, I am in total agreement with the viewpoint taken by **Hon. Odunga, J.** in **Republic vs. Robert Zippor Nzilu [2018] eKLR** that:

**". ...in cases where limitations to the right to bail 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. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons."**

[12] In the premises, I am far from convinced that compelling reasons have been given herein by the Prosecution to warrant the continued incarceration of the accused. Thus, it is hereby ordered that the accused be and is hereby released on a bond of **Kshs. 300,000/=** with one surety standing for him in like sum to be approved by the Deputy Registrar.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF JULY, 2019**

**OLGA SEWE**

**JUDGE**