



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRC NO. 20 OF 2019**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**RIOBA MWITA NDERA ALIAS MWALIMU ALIAS PREMIER...1<sup>ST</sup> ACCUSED**

**JOSEPH GATI BOKE ALIAS SEREHE.....2<sup>ND</sup> ACCUSED**

**HEMEDI NYANDOTO MERAMA ALIAS SOKORO.....3<sup>RD</sup> ACCUSED**

**ROBERT MUGABE MASIAGA.....4<sup>TH</sup> ACCUSED**

**TABITHA WANKURU.....5<sup>TH</sup> ACCUSED**

**DANIEL BOKE.....6<sup>TH</sup> ACCUSED**

**RULING**

On 19<sup>th</sup> June 2019 the six accused persons pleaded “Not Guilty” to the charge of Murder.

1. Immediately thereafter, each of the accused persons sought to be admitted to Bond or Bail pending their trial.

2. In answer to the said application, Mr. Muia, learned State Counsel informed the court that there were compelling reasons which would militate against the grant of Bond or Bail.

3. The court directed the prosecution to serve the accused persons with an Affidavit containing the reasons which the prosecution believed to constitute compelling reasons.

4. CPL Fredrick Odemba swore an affidavit, indicating that he was one of the Investigating Officers in this case.

5. He indicated that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons were found to be in possession of an AK 47 rifle, an assortment of ammunitions, police uniform, handcuffs and mobile phones, at the time of their arrest.

6. CPL Odemba added that the AK 47 rifle, together with an empty cartridge which had been recovered from the scene of murder, had been subjected to examination by a Ballistics Expert.

7. The preliminary report of the Ballistics Expert was said to have confirmed that the AK 47 rifle that was recovered from 3 of the accused persons, was the one which was used in the murder of the deceased.

8. The accused persons submitted that if the rifle had already been connected to the offence, then there would be no possibility of any of the accused interfering with such evidence.

9. In my considered view, the fact that something is possible cannot be construed to mean that it would probably happen.

10. I find that the prosecution have not satisfied the court that any of the accused would probably interfere with such evidence as had already been secured by the prosecution.

11. I further find that at present, each of the accused persons was only facing a charge for committing the offence of Murder.
12. The fact that the State may or may not prefer other charges against the accused persons or any of them, cannot be the basis for depriving the accused of their right to be granted Bond or Bail.
13. Indeed, when it is considered that the accused persons have already been in police custody for two months, and yet the prosecution had not yet preferred any further charges against them, I find that it was simply speculative for the prosecution to suggest that more charges may be preferred against them.
14. In the event that the accused were admitted to Bond or Bail, and they or any of them committed any other offences whilst out of the Remand Prison, the State could have them arrested promptly. If any such an arrest was made, the prosecution would have evidence which it could make available when opposing the release of any such an accused person, on Bond or Bail.
15. But I find no basis in law, for denying the accused Bond or Bail on the grounds that if an accused was released he or she might commit other offences.
16. It is noted that some prosecution witnesses have already been put on Witness Protection because they have expressed fear for their lives.
17. I would have expected that the said Witness Protection should keep the witnesses safe and secure, even if the accused persons were out on Bond.
18. I find that the State has not implicated any particular accused person in the alleged threats or intimidation directed at some witnesses. Therefore, it would not be right to make a finding against either all the accused persons collectively or any one or more of the accused persons individually.
19. As regards the contention that some suspects were still in hiding, the prosecution failed to demonstrate how the accused persons or any of them, were responsible for that.
20. I find that it has not been demonstrated how the continued detention of the accused persons in prison would have any positive impact for the State, in relation to the suspects allegedly in hiding.
21. It is noted that the prosecution had already recovered a Ceska case containing one magazine, 74 rounds of 9mm ammunition and a manual bearing the Serial Number **B. 964373**.
22. If, as the prosecution has asserted, those items belong to the 1<sup>st</sup> accused, and they had been acquired illegally, nothing would have been simpler than preferring appropriate charges in that respect.
23. Evidence that proves that an offence had been committed should form the basis for a criminal charge, rather than be deemed to be a compelling reason to warrant the accused being denied Bond or Bail in a separate case.
24. In any event, assertions made by the Investigating Officer, even if the same are in an affidavit, are not yet evidence that the court can use to find the accused culpable.
25. Of course, affidavits are deemed to be evidence on oath, but an accused person's guilt can only be determined by the court after the accused had been accorded a fair trial, which includes an opportunity to cross-examine witnesses who testify.
26. At this early stage of the proceedings, when the court is called upon to determine whether or not there were compelling reasons to warrant a denial of Bail, the court must exercise a lot of restraint in evaluating any evidence or other material placed before it. It is imperative for the court to bear in mind that the trial of the accused had not yet started, and that therefore every precaution must be taken to guard against anything which could prejudice the right of an accused, to have a fair trial.
27. The accused persons reside along the border between Kenya and Tanzania. That fact, of itself, does not render them persons who are flight risks.
28. If the court were to hold that persons living at border towns were flight risks, simply by virtue of the location of their residence, that would mean that all such persons would never enjoy the right to be granted Bail unless there were compelling reasons.
29. The fact that the 1<sup>st</sup> accused was apparently a successful business-person could imply that he is an influential person in the community.
30. The prosecution states that the said accused could use his influence to intimidate witnesses.
31. The court cannot rely on such speculative assertions to deny him bail.
32. It is a well known fact that politicians such as Members of County Assemblies, Members of Parliament, Senators and Governors are considered to be influential people in the communities where they were elected.
33. However, the courts have not denied them bail or bond based solely on their real or perceived influence.

34. I find no reason to deny the 1<sup>st</sup> accused Bond on the grounds of his alleged ability to influence people within the society where he lives and carried on business.

35. If a person was so well-grounded in the community, it would have been expected that he would have a greater motivation to stay there, rather than to flee across the border.

36. But if the prosecution had reason to satisfy the court that an accused was a flight-risk, even though the said person was well-grounded in the community, the court may deny such an accused Bail.

37. In this case, the Investigating Officer failed to satisfy the court that the accused persons were flight-risks.

38. The 2<sup>nd</sup> accused is said to have been arrested as he was fleeing from lawful custody, when he was being escorted to the Kehancha Law Courts.

39. Of course when a person is apprehended whilst fleeing from lawful custody, the court would be entitled to conclude that he was a flight-risk.

40. In the result, I find no compelling reasons to warrant a denial of Bail to the accused persons, save for the 2<sup>nd</sup> accused.

41. The other accused persons are admitted to Bond on the following Terms;

*(a) Each accused shall execute a Personal Bond for Kshs 500,000/=, with Two sureties each, in the same amount.*

*(b) Each of the accused will report to the Officer Commanding Police Station Kehancha every Monday and every Friday.*

*(c) They will ensure that they refrain from making contact with the witnesses, whether such contact be direct or by proxy.*

*(d) If any of them wishes to travel outside the area that falls within the jurisdiction of the Officer Commanding Police Station, Kehancha, he or she must obtain the written authority of the said Officer prior to such travel. Provided that the OCS shall not withhold his authority unreasonably, if he is provided with the itinerary of the particular accused.*

*(e) If any of them wishes to travel out of the country he or she must first seek authority from the court.*

**DATED, SIGNED and DELIVERED at KISUMU This 4<sup>th</sup> day of July 2019**

**FRED A. OCHIENG**

**JUDGE**