



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 31 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENSON MUCHIRI GUCHUE.....ACCUSED**

**RULING**

1. Benson Muchiri Guchue (the “Accused Person”) is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He is alleged to have killed Onesmus Manyara with malice aforethought on 11/7/19. He was first arraigned at the High Court in Nakuru on 23/07/2019 and took plea on 07/08/2019. He pleaded not guilty to the charge.
2. When plea was taken, the Prosecutor, Mr. Chigiti, informed the Court that he would be opposing bail. I set bail hearing for 09/08/2019. I directed the parties to file any documents they needed to before then. The Prosecution did not file any document. However, the Victim’s family, represented by Ms. Chemnetich (holding brief for Mr. Wambeyi) filed an Affidavit in opposition to bail.
3. During the bail hearing, Ms. Chemnetich took the lead in opposing bail. Her arguments were supported by Mr. Chigiti, the Prosecutor. As I understand it, the opposition to bail is based on two arguments.
4. The first argument is that there is fear that the Accused Person will interfere with witnesses. The Victim’s family say that this is not just idle fear. They say that the key witness in the case – who they say is an eye witness to the murder – has already been threatened. They claim that the threat is so severe and real that that witness has already capitulated from his version of events. They fear that he will fail to testify if the Accused Person is released and allowed to bring pressure on this key witness. The evidence the Victim’s family has offered in this regard is a letter written by an organization by the name, Nakuru County Human Rights Network (NAHURINET). This is a Non-Governmental Organization which fights for human rights.
5. The letter is dated 05/08/2019. It gives what seems like a detailed account of what allegedly happened on the night of 11/07/2019 and the days after. The letter does not name its source but it would appear that the major source is the witness whom they are apprehensive will recant his testimony if the Accused Person is granted bail. In the main part, the letter claims that that witness was an eye witness to the alleged murder of the Deceased. The letter also claims that, at some point, that witness was put in the same Police cell as the Accused Person. The letter goes on to allege that the Accused Person explicitly threatened the witness for incriminating him. He allegedly told the witness to “stop interfering with the case because he had money and able to pay for bond if asked to.”
6. The family claims that they are worried that this witness’ evidence will be interfered with if the Accused Person is released on bail.
7. The final claim on this prong is that the victim’s family fears for its own safety. They claim that they have been targeted by unknown people who have called their phones anonymously and made threats to them. In particular, the claim is that the life of the mother of the victim is in danger. It is unclear whether the mother is a witness or not – although the factual predicate would suggest that she does not have any information on the incident that led to the death of the Deceased in the case.
8. The second argument proffered by the Deceased’s family is that they fear that the current Investigating Officer is compromised and is conspiring with the Accused Person to defeat justice. They claim that it was only after pressure from NAHURINET through their letter that charges were brought against the Accused Person. They also claim that the quality of witness statements recorded show that the Investigating Officer is compromised. They say that they have reported this matter to IPOA and that they expect that it will take over the investigations of the case. They fear that if the Accused Person is, indeed, released before IPOA has considered their request and carried out its own investigations, crucial evidence will be lost. This is because, they fear, the Investigating Officer will continue conspiring with the Accused Person.
9. The Prosecutor amplified these concerns. He requested that the Accused Person be held for some time so that either the vulnerable

witnesses testify or for IPOA to complete its investigations.

10. Mr. Ikua appeared for the Accused Person in the case. He vehemently opposed the efforts to deny bail to the Accused Person. He argued that there was simply no good reason to deny bail. He pointed out to the Court the following:

- a. That bail is a constitutional right and that it cannot be denied unless compelling reasons are shown;
- b. That expressed fears by a victim's family without more is not sufficient to constitute compelling reasons to deny bail;
- c. That the letter which formed the basis of the application to deny bail makes serious allegations but the source of the information is unknown; it is neither written by a witness nor an investigator;
- d. That the allegations that the Accused Person will interfere with investigations is not supported by any credible evidence whatsoever;
- e. That investigations ought to have been completed before charging.

11. Mr. Ikua relied on a number of persuasive authorities including: *Danford Kabage Mwangi v Republic (Nyeri High Court Crim. Case No. 8 of 2016)* and *David Muchiri Mwangi v Republic (Nairobi Milimani High Court Criminal Case No. 46 of 2017)*.

12. Bail is a constitutional right enshrined in Article 49(1)(h). An Accused Person can only be denied bail if there are compelling reasons. Hence, the Constitutional standard for denying bail is "compelling reasons" test. The burden is on the Prosecution to establish the existence of the "compelling reasons" that would justify denial of bail. Our emerging jurisprudence is clear as to the kind of evidence needed to establish the "compelling reasons": the evidence presented must be "cogent, very strong and specific evidence" and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, *R v Muneer Harron Ismail & 4 Others [2010] Eklr* and *Danford Kabage Mwangi (supra)*. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point in the trial. See, *Bail and Bond Policy Guidelines* at p. 19.

13. The question presented here, then, is whether the Prosecution has, on a balance of probabilities, raised compelling reasons to deny bail. The Prosecution has made two arguments which, in its mind, cumulatively constitute compelling reasons:

- a. First, the Prosecution argues that the Accused Person is, likely to interfere with witnesses through a scheme of intimidation; and
- b. Second, the Prosecution argues that bail should be temporarily denied in view of the fact that the Investigating Officer is likely compromised by the Accused Person; and IPOA is likely to re-start investigations.

14. While both reasons proffered by the Prosecution could, in an appropriate case, constitute compelling reasons to deny bail, the question is whether, in the present circumstances the evidence is cogent and specific enough to rise to that level. I do not think it does. I say so for at least three reasons:

- a. First, as pointed out by Mr. Ikua, the probative value of the letter relied on by the Victim's family and Prosecution to deny bail is very low. The source of the information contained in the letter is not revealed and there are no means of independently verifying the allegations at this point. It is telling that the Prosecution did not avail any other source of information but wholly outsourced the supplying of all information to the Deceased's family.
- b. Second, there is no affidavit at all by the witnesses who are allegedly fearful for their lives. Neither the alleged eye witness nor the mother of the Deceased who are allegedly apprehensive about their security swore any affidavit. Instead, a third party has sworn the affidavit and put words in their mouths.
- c. Third, the main reason advanced for denying bail – that the Accused Person will interfere with witnesses – appears illogical in the face of the allegations that the witnesses are already being harassed while the Accused Person is in custody.
- d. Fourth, as for the claim that IPOA is likely to come into the case, no convincing reason has been given why IPOA investigations cannot continue while the Accused Person is out on bail. In any event, I note that due to the Court's recess calendar, the requested two weeks' period would have lapsed by the time of this ruling.

15. **I would, therefore, hold that the circumstances here do not objectively warrant a denial of bail seen against the constitutional crucible. However, the circumstances go towards the setting of appropriate conditions for admission to bail. Consequently, I hereby grant the Accused Person bond in the sum of Kshs. 500,000 and two sureties of a similar sum.**

16. **In addition, the following conditions shall apply:**

- a. **Accused Person is ordered to refrain from contacting the Prosecution witnesses in any way whether electronically, in person, through agents or by phone; and**
- b. **The Accused Person shall report to the Deputy Registrar of this Court every alternate Thursday.**

17. Orders accordingly.

**Dated and delivered at Nakuru this 5<sup>th</sup> day of September, 2019.**

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**JOEL NGUGI**

**JUDGE**