



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL CASE NO. 34 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NAFTALI CHEGE.....1<sup>ST</sup> ACCUSED**

**CHARLES WANGOMBE MUNYIRI....2<sup>ND</sup> ACCUSED**

**ISHMAEL BARAKA BULIMA.....3<sup>RD</sup> ACCUSED**

**RULING**

1. Three accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence are that on the 19<sup>th</sup> day of May, 2012 together with others not before the court they murdered one ALEXANDER JOHN RUNAN MONSON. The accused were presented before this court on 5<sup>th</sup> July, 2018 for plea taking. They all pleaded "NOT GUILTY". Subsequently, they all exercised their right under Article 49(h) of the Constitution and requested for bail pending trial.

2. **Mr. Aminga**, Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> accused persons submitted that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons are police officers who have presented themselves before the court whenever they were required to without fail. Counsel argued that this was a demonstration that they are willing to diligently attend court. **Mr. Nabwana**, Counsel for the 2<sup>nd</sup> accused person in support of grant of bail submitted that the 2<sup>nd</sup> accused person is 62 years and suffers from arthritis for which he has been continually receiving treatment at the Kenyatta National Hospital every Monday and Thursday. Further, Counsel contended that the 2<sup>nd</sup> accused dutifully attended the inquest proceedings before the Magistrate's court therefore he cannot abscond.

3. **Mr. Jami**, Counsel for the state in opposition to the application for bail submitted that the state had reasonable apprehension that the accused persons may interfere with witnesses or tamper with evidence. Counsel drew the court's attention to the inquest proceedings before the magistrate's court. Counsel claimed that the lower court had observed that there were several attempts by the witnesses, who included the accused persons to obfuscate the facts surrounding the murder of the deceased.

4. Secondly, Mr. Jami submitted that the accused persons are police officers who are in active duty therefore they have access to firearms and other tools that can be utilized to trace and eliminate and/or interfere with witnesses in this matter. Alternatively, Counsel submitted that if bail is granted the same should have strict conditions that the accused persons should not in any manner, whether directly or indirectly be in contact with witnesses who will testify in this case.

5. **Mr. Aboubakar**, Counsel watching brief for the victim's family also opposed the bail application. Counsel contended that the victim's mother resided in Diani, an area he claimed the accused persons knew very well and could easily trace her and harm her. According to Counsel, the evidence tendered during the inquest proceedings was sufficient enough to deny the bail application by the accused persons. Further, Counsel urged this court to consider the nature of the offence before granting bail. Counsel opined that murder is a grave offence that should not be bail able.

6. In rejoinder, Mr. Aminga contended that the state's submissions were not supported by an affidavit thus they were mere hearsay. As to the allegation that the accused persons could interfere with witnesses, Counsel submitted that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons were not based in Mombasa and that they were junior officers who could not manipulate the police force. Further, Counsel stated that the findings of the inquest case were not compelling reasons for denial of bail as the findings are not conclusive.

**The Determination**

7. The right to bail or bond is now a fundamental right enshrined in our Bill of Rights. Article 49 (1) (h) of the Constitution of Kenya 2010 provides that an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are

compelling reasons not to be released. Section 123 of the Criminal Procedure Code also makes provisions for bail. However, this right is not unlimited. The courts are called upon to weigh an accused person's right to bail against the opposition to bail by the State. In the case of **Republic v Danford Kabage Mwangi [2016] eKLR** Mativo J discussed the need to weigh an accused person's right to bail vis-à-vis the interests of the public and the reasons given in opposition to grant bail. He observed as follows:

**“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the constitution and courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.**

**Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive...”**

8. Article 49(h) states that bail should be denied only when there are compelling reasons. There is no standard definition for the phrase “compelling reasons”. However, in the case of **REPUBLIC V JOKTAN MAYENDE & 4 OTHERS Bungoma High Court Criminal Case No. 55 of 2009**, the court defined the term as follows:

**“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.”**

9. Each case presented before a court is unique and the compelling reasons given may differ with each case. However, there are certain principles that may guide the court in determining whether to grant bail. In the case of **REPUBLIC V LUCY NJERI WAWERU & 3 OTHERS, Nairobi Criminal Case No. 6 of 2013**, the court listed some of the factors that a court needs to consider in an application for bail as being:

**“(a) Whether the accused persons were likely to turn up for trial should they be granted bail;**

**(b) Whether the accused persons were likely to interfere with witnesses;**

**(c) The nature of the charges;**

**(d) The severity of the sentence;**

**(e) The security of the accused if released on bond;**

**(f) Whether the accused person has a fixed abode within the jurisdiction of the court.”**

10. The above list is not exhaustive. Other considerations include the accused's previous criminal record; detention of the accused person for his or her own protection; the probability of the accused person tampering with evidence; and the strength of the evidence.

11. In this instant case, the State contended that the accused persons were likely to interfere with witnesses. In support of this assertion, the State observed that in the inquest case before the lower court, the court had noted that the accused persons had obfuscated facts surrounding the deceased's death. The State also contended that the accused are police officers who are actively on duty therefore they have the resources, which includes firearms, that can be used to identify witnesses and tamper with their testimony.

12. I do note that the prosecution placed too much reliance on the inquest conducted by the lower court being Inquest No. 3 of 2015. However, the proceedings in the matter before the lower court were not availed to this court. The assertions by the state can therefore not be verified by this court. This court was not privy to the proceedings before the lower court and can therefore not take cognizance of the accused person's demeanor during those proceedings.

13. The 1<sup>st</sup> and 3<sup>rd</sup> accused are police officers who are still engaged as such. The 2<sup>nd</sup> accused person is a retired police officer. This court does agree with the prosecution that as police officers the accused persons may have access to resources which could be used to interfere with witnesses. The fact that the accused persons are police officers or were officers does provide a unique ground for the denial of bail. However, the state has failed to tender any proof that indeed the accused persons if released on bail will interfere with potential witnesses or that they have already interfered with witnesses in this matter.

14. The accused persons have all indicated that they will dutifully attend court whenever they are required to. They have urged this court to consider that during the inquest proceedings before the lower court they attended court without fail. In my view, the fact that the accused persons attended the inquest proceedings without fail cannot by itself be a sufficient ground to grant bail.

15. Be that as it may, as stated above this court is called upon to weigh the accused person's right to bail under Article 49(h) against the compelling reasons given by the state for denial of bail. I have considered all the information that has been placed before this court. The offence of murder is a serious offence carrying a severe sentence if one is convicted. However, an accused person is presumed innocent until

the contrary is proved. Based on the grounds adduced by the state, this court finds no valid reason to deny bail to the accused persons.

16. Accordingly, I allow the application for bail and make orders as follows:

- i. The accused persons be released on a bond of Ksh. 1,000,000/= and one surety of a similar amount each; or
- ii. Alternatively the accused may be released upon payment of a cash bail of Ksh. 500,000/= each.
- iii. That the sureties shall be approved by the Deputy Registrar of this court.
- iv. That the accused persons must attend all mentions and hearing dates as may be fixed from time to time during the pendency of this case or when required by the court unless such attendance is dispensed with by the court.
- v. That the accused persons should refrain from contacting or in any way interfering with the witnesses in this matter, failure to which the bail and/or bond will be revoked.

Orders accordingly.

**Dated, Signed and Delivered in Mombasa this 19<sup>th</sup> day of July, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Nabwana for the 2<sup>nd</sup> accused person

Mr. Aminga for the 1<sup>st</sup> and 3<sup>rd</sup> accused persons

Mr. Aboubakar for the victim's family

Mr. Kaunda court assistant