



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 37 OF 2018**

REPUBLIC .....PROSECUTION

VERSUS

JOTO KAPHUTO..... 1<sup>ST</sup> ACCUSED

KADILO MASKANI KAVUO..... 2<sup>ND</sup> ACCUSED

KHATIB JUMAA DUDU..... 3<sup>RD</sup> ACCUSED

MWADZIWE LWAMBI DUDU..... 4<sup>TH</sup> ACCUSED

WALE KAVUO DUDU..... 5<sup>TH</sup> ACCUSED

RAJAB DUDU ..... 6<sup>TH</sup> ACCUSED

**RULING**

1. The applicants are charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the charge were that on the 23<sup>rd</sup> day of May, 2018 about 2200 hours at Mwawesa location, Bwagamoyo sub location in Rabai sub County within Kilifi County jointly murdered Mwinga Dudu Kavuo. After the plea was taken on 19<sup>th</sup> September, 2018, through their Learned Counsel Mr. Magolo, they applied for their release on suitable bond terms pending the hearing and determination of the case.

2. Ms Ogwen, Learned Counsel for the prosecution opposed the application and relied on the affidavit of PC Kubai Mungania. She submitted that the accused persons and most of the prosecution witnesses share a common place of residence thus creating high chances of witness interference. She further stated that there are still other suspects who are yet to be arrested and there is a likelihood of the accused persons absconding due to the seriousness of the charge. She indicated that investigations are still ongoing.

3. Mr. Magolo responded by submitting that the affidavit does not disclose any compelling reasons to deny the release of the accused persons on bond. He further submitted that no examples had been given of witness interference and the witnesses that are likely to be interfered with had not been disclosed.

4. Counsel argued that the accused persons had been in custody since 17<sup>th</sup> of July, 2018 and there was no way in which they were preventing Police Officers from arresting the other suspects at large. He argued

that despite the seriousness of a murder charge, the Constitution of Kenya in Article 49 provides for release of accused persons on bond on conditions set by the court.

5. I have considered the application by the accused persons and their right to release on bond pending hearing of their case under the provisions of Article 49(1)(h) of the Constitution of Kenya. I have also considered the Bail and Bond Policy Guidelines that guide the Police and Judicial Officers in the application of bond terms to suspects and accused persons. The guidelines are similar to the considerations set out under Section 123A of the Criminal Procedure Code, namely;

- (i) the nature or seriousness of the offence;
- (ii) strength of the prosecution case;
- (iii) character, antecedents, associations and community ties of an accused person; and
- (iv) failure by the accused person to observe previous bail or bond terms.

6. Other considerations that a court takes into account are:-

- (i) witness interference or the possibility of witness interference;
- (ii) protection of the victim;
- (iii) relationship between the accused and potential witnesses;
- (iv) whether the accused is a child offender;
- (v) whether the accused is a flight risk;
- (vi) if the accused is gainfully employed;
- (vii) public order, peace and security;
- (viii) whether there is need for the protection of the accused person; and
- (ix) The sentence that is likely to be imposed if an accused person is convicted.

7. The right of an accused person to be released on bond pending the hearing and determination of a case is not an absolute right as the court has to consider all the relevant facts surrounding the case. In this case, the Investigating Officer in his affidavit sworn on 19th September, 2018 deposes that there are other accused persons at large and the release of the accused persons will interfere with the ongoing investigations to apprehend those at large. He also deposes that there is the possibility of the accused persons absconding the proceedings, given the seriousness of the charges they are facing. The Investigating Officer further deposes that there are high chances of witness interference, intimidation of the witnesses and even the possibility of elimination of witnesses which is borne by the circumstances surrounding the death of the deceased. He further states that most of the witnesses are relatives of the accused persons and that they share a common place of residence.

8. In **Hassan Mahati Omar & Another vs Republic** [2014] eKLR, Judge Achode stated as follows with regard to the provisions of Article 49(1)(h) of the Constitution of Kenya:-

***"What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail.***

***However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England***

***and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."***

9. Bearing in mind the above decision, the depositions of the Investigating Officer in his affidavit opposing the release of the accused persons on bond and the submissions by both Counsel on record, I am not persuaded that the fact that the accused persons are charged with murder is a compelling reason to deny them bond as this court has to look at the totality of the circumstances surrounding the case herein.

10. The fact that investigations are still ongoing, three months after the accused persons were first arraigned in court is not a good reason either for not releasing the accused persons on bond pending trial. I am satisfied that the reasons advanced that the accused persons are likely to interfere with the witnesses in this case for the former and the latter live in a common place of residence is a valid reason. I do not agree with Mr. Magolo's submission that evidence of witness interference and identity of witnesses that have been interfered with must be given in this instance as the claim made by the Investigating Officer is that the accused persons are likely to interfere with witnesses and not that they have interfered with witnesses. It is my finding therefore that at the moment, compelling reasons do exist that are not favourable to the accused persons being released on bond.

11. The accused persons will therefore be held in custody until such time that the witnesses who are said to reside with them in a common place of residence will have testified. This case is scheduled for hearing on 5th December, 2018. The prosecution will avail the said witnesses then to enable the commencement of the hearing of the case. The accused persons will be at liberty to apply for their release on bond, once the said witnesses have testified.

**DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of October, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Ogweno for the Prosecution

Mr. Jared Magolo for the Accused Persons

Mr. Oliver Musundi - Court Assistant