

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 8 OF 2016

REPUBLIC PROSECUTOR

-VS-

SAMUEL KINYUA NCHEBERE 1ST ACCUSED

DANIEL KAREITHI NCHEBERE 2ND ACCUSED

DICKENS MUNGATHIA KARIGI 3RD ACCUSED

RULING.

1. **The accused, Samuel Kinyua Nchebere, Daniel Kareithi Nchebere and Dickens Mungathia Karigi** are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya.

2. The 1st and 2nd accused have sought to be released on bail/bond contending, inter alia, that they were suffering in custody. I am aware that this is the 2nd application that the accused are making to be released on bail/bond. The first application was rejected by this court on 12th June 2017, for the reason that the accused had threatened some of the prosecution witnesses. On 21st March, 2018, the court directed the prosecution to file and serve a replying affidavit within 60 days to confirm if the situation had changed with the probation officer being further directed to prepare and file a pre- bail report within 45 days.

3. A replying affidavit was filed on 9th July, 2018, by Corporal Andrew Odeyo the investigations officer in this case. He stated that the accused had committed the offence on 3rd January 2016, whereby they disappeared from Mulika Shopping Center where they were living as tenants. That it was not until 6th January, 2016 (3 days later), that they were arrested from their hide out.

4. The investigations officer was therefore apprehensive that the accused were a flight risk and would most certainly abscond if granted bail. He further deposed that one of their key witness namely; Anne Gacheri had been warned by the 2nd accused against testifying against him which information was captured in her witness statement that was recorded on the same day that the accused persons were arrested from their hideout. That the said witness had since relocated from her house next to which the deceased was murdered fearing for her safety and was very afraid that should the accused be released, her life would be in danger. He further deposed that further to the said threats, the accused have been sending unfamiliar persons to intimidate the prosecution witnesses against testifying against them.

5. When the matter came up for hearing on 10th July, 2018, Mr. Igweta learned counsel for the accused submitted that the accused were not a flight risk as they were Kenyans with fixed abode and that they would attend court. As regards interference of witnesses, he submitted that there was no evidence to back up these allegations. Mr. Kiarie for the state on the other hand opposed the application and urged the court to rely on the replying affidavit filed by the investigations officer.

6. I have carefully considered the affidavit on record and the rival contentions by the parties. By dint of the Constitution all offences are bailable. Article 49 (1) (h) thereof provides that an arrested person has the 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. There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Thus, the standard is high for it draws from the constitutional philosophy that any restriction of rights and freedoms of persons must be sufficiently justified given the robust Bill of Rights enshrined in the Constitution. I need not over-emphasize these matters except to cite the case of **R vs. JOKTAN MAYENDE & 3 OTHERS [2013] eKLR**.

7. As earlier stated, this is the 2nd application in which the accused are seeking to be released on bail/bond, According to the replying affidavit sworn by the investigation's officer, nothing has changed ever since the earlier application for bail/bond was rejected. The investigations officer deposed, inter alia, that the accused were a flight risk as they had fled from the scene after commission of the offence only to be arrested 3 days later. That further, one Anne Gacheri, a key witness, had been threatened from testifying against the 2nd accused and that these sentiments had been captured in her witness statement.

8. Save for Learned Counsel contending from the bar generally that the accused had fixed abode and that there was no evidence to back the allegations that they would interfere with the prosecution witness, the contents in the replying affidavit remained largely uncontroverted.

9. Applying the test of law and taking into totality all the circumstances in this case, I find that there are compelling for the accused not to be released on bail. Accordingly, the application is hereby declined. The accused shall remain in custody pending the hearing and determination of their case.

DATED and DELIVERED THIS 8th DAY OF OCTOBER, 2018

A. MABEYA

JUDGE