



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 18 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SILAS MWANGI KIREMA.....1ST ACCUSED

MISHECK MUKINDA MAJURA.....2ND ACCUSED

JOEL KINOTI MUTHENGI.....3RD ACCUSED

LUKE MUTHURI MAKEMBO.....4TH ACCUSED

BENARD KIMATHI.....5TH ACCUSED

JOHN MUKUNDI MUCENA.....6TH ACCUSED

STEPHEN GITONGA MUCENA.....7TH ACCUSED

PETER MUTIRIA MUCIMI.....8TH ACCUSED

TARACIRIA KANGARIA.....9TH ACCUSED

ESTHER KARAUKI MUCHUNKU.....10TH ACCUSED

DAVID MUTEGI KARIGI.....11TH ACCUSED

R U L I N G

1. The accused persons herein are all charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information presented to this court are that on 4th September 2017 at Twanhanjo Sub-Location, Kathangacini within Tharaka North Sub-County the accused jointly with others before court unlawfully murdered **DELINA GACUE**.

2. The accused persons have all denied the offence and the case is pending for trial. They have now through a Notice of Motion dated 17th October, 2018 applied to be released on bond pending trial on the following grounds namely:-

(i) That the Constitution of Kenya provides that every person has a right to be released on a reasonable cash bail or bond terms pending trial.

(ii) That a primary consideration for bond is whether the accused persons shall appear in court for trial.

(iii) That the all accused persons here shall appear in court when they are required to appear.

(iv) That the accused persons will not interfere with witnesses.

3. All the accused persons have sworn respective affidavits in support of the above grounds. In their affidavits the applicants have reiterated

their rights to bail under the Constitution and have undertaken to appear in court whenever they are required in court. They have further promised not to interfere with the witnesses.

4. In their submissions made through vide their learned counsel Ms Magara, the applicants contended that the prosecution despite its objection to their application of bond has not disclosed any compelling reason. They have further cited the social inquiry done on them contending that the social findings are not adverse to their application.

5. The State through the Director of Public Prosecution has opposed this application through a Replying Affidavit sworn by Inspector Kyalo Maeke, the Investigating Officer in this case. In the Replying Affidavit sworn on 24th October, 2018, the Investigating Officer has deponed that the number of accused suspected to be involved in the incident or crime and the manner it was carried out shows that incitement took place on the pretext that the deceased was a witch. The Respondent contends that the deceased was set ablaze in broad daylight and that the witnesses to the incident would feel intimidated owing to the large number of accused persons and may be intimidated to come and testify particularly because of the fact that they suspect that incitement led to the deceased being lynched.

6. The Respondent have also expressed fear that the applicants have not disclosed their place of abode which in their view does show some likelihood of absconding if released on bond.

7. The State has further submitted that through Ms Maari, learned counsel from the Director of Public Prosecution, that the applicants are all from the same area with the witnesses and contended that because of the number of the accused persons, chances of interfering with the witnesses are high. She further submitted that the offence was committed recently and that the ground/community where the accused came from is still volatile and the safety of the accused persons may be at risk.

8. This court has considered this application and the opposition of the same by the State. It is now well settled that all accused persons in Kenya are entitled to bond as a matter of Constitutional right. Under the provisions of **Article 49(h)**, only compelling reasons can impede that right. The Respondent has stated that the accused persons are facing a serious charge which is true but the Constitution does not state that only those facing minor/misdemeanor charges are entitled to those rights enshrined in the Constitution. The Constitution states that "**arrested persons(s)**" are entitled to the right to bond. This right to bond is enjoyed by all the accused persons including those facing serious charges or felonies such as murder.

9. The other reason given is that the safety of the accused would be at risk if released but this court has over time and again held that arrested persons have all their Constitutional right intact including their fundamental rights to life (**Article 26**), freedom from torture and cruel treatment (**Article 25**), rights human dignity and security (**Article 29**). The State cannot be heard to justify their abdication of duty (that is failing to ensure the protection of those rights) and use the same failure (which is an infringement of the Constitutional right in itself) to promote the denial of accused's right to bail. It is true that safety of an accused person can at times be at risk but the State should be the last person to concede to inability to provide security to all persons. I am unable to be persuaded that safety of an accused persons as advanced in the circumstances of this case should be used to deny accused persons their rights to bail.

10. The State contends that the accused persons are suspected to have incited themselves and others to commit the heinous crime. However under Article **50(2)** of the **Constitution**, every accused person has a right to a presumption of innocence. So while the deceased may have been murdered because of suspicion of witchcraft which is unfortunate, the law presumes that as of now all the accused persons until the contrary is proved are innocent because they have denied committing the offence.

11. The Respondent has not given the details of instances of interference or intimidation of witnesses which could have given weight to their opposition to bond. This court therefore does not find compelling evidence that the accused are likely to interfere with witnesses.

12. This court also ordered for the social inquiry on all the applicants and save for 8th applicant (Peter Mutiria Mucimi), this court finds that the social inquiry carried out did not reveal any factor that is compelling to deny bond to the accused persons.

13. In the premises this court finds that there is compelling reason to deny one of the accused (8th Accused- Peter Mutiria Mucimi) because he is a flight risk. He has no known place of abode and can abscond if released. The other accused persons are granted a bond of **Kshs.2 million** (two million Kenya Shillings) with one surety of a similar amount. If released the accused persons are required to strictly attend court whenever required and on time. They are also directed to strictly keep away from all the witnesses and their families and not to directly and indirectly contact any of them.

Dated, signed and delivered at Chuka this 17th day of December, 2018.

R.K. LIMO

JUDGE

17/12/2018

Ruling signed, dated and delivered in the open court in presence of Momanyi for Director of Public Prosecution and Magara for accused.

R.K. LIMO

JUDGE

