



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 26 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

GILBERT MAINA.....1ST ACCUSED

DANIEL THUKU.....2ND ACCUSED

VINCENT KIPNGETICH RONO.....3RD ACCUSED

PAUL ODOYO NGOMA.....4TH ACCUSED

RULING

1. **Gilbert Maina** (1st Applicant) and **Paul Odonyo Ngoma** (2nd Applicant) seek to be released on bail pending trial. The Applicants were arraigned before this court to answer the information of having jointly murdered **Ngandi Malia** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

2. The applications are premised on the grounds set out in the body of the applications and averments as deposed in the affidavits in support of the applications. The basis of the applications being that **Article 49(1)(h)** of the **Constitution of Kenya, 2010** affords them the right to be released on reasonable conditions unless there are compelling reasons to deter them from being released which in their opinion are nonexistent.

3. In a response thereto the State through **No. 62877 Corporal Raphael Wanjohi** opposed the applications arguing that the Applicants may interfere with witnesses if released on bail being officers attached to the **Director of Criminal Investigation Office, Kitui Central Sub-county**.

4. Further, he averred that considering the seriousness of the offence and severity of sentence, and the matter being of high public interest the Applicants should be denied bail.

5. An Accused person's right to be released on bail pending trial is provided for in **Article 49(1)(h)** of the **Constitution of Kenya, 2010** which provides thus:

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

From the aforesaid provision of the law the right to bail is not absolute. In exercising the discretion provided for in law, the court must consider all circumstances of the case. There are various factors that guide the court in reaching its decision. These include:

- The nature of the charge.
- The gravity of the punishment in event of conviction.
- The probability that the Accused may not surrender himself for trial. The likelihood of the Accused interfering with witnesses or may suppress any evidence that may incriminate him.

- Detention and protection of the Acused.

(See Alhaji Mujahid Duboko – Asari vs. Federal Republic of Nigeria SC 20A/2006; Mogotsi and Another vs. The State 1990 BLR 142; Mwaura vs. Republic (1986) KLR 600).

6. The Applicants denied being flight risks but it is averred that the severity of the death penalty is an incentive for them to abscond. Conditions to be set may address the issue of absconding therefore it may not be a good reason. The Prosecution should have demonstrated the propensity of the Accused's likelihood of absconding.

7. It is deponed in **paragraph 4** and **5** of the Replying Affidavit that the Applicants being Police Officers attached to the Office of the **Director of Criminal Investigation Office, Kitui**, the deponent is apprehensive that if released on bond they may inflict real fear or interfere with the Prosecution witness. Other than the allegation averred the officer failed to adduce evidence or even point out the basis of the perceived apprehension. Cogent and overwhelming circumstances are necessary to move the court to consider granting or denying the Applicants bail. This court has not heard any evidence to tell whether or not this is a matter of high public interest. In her response the learned State Counsel, **Mrs Abuga** simply stated that **Corporal Wanjohi** filed a Replying Affidavit that she relied upon entirely and she asked the court to dismiss the application. The nature of public interest should have been disclosed.

8. In the result, I find the Prosecution having failed to demonstrate the existence of compelling reasons that calls for incarceration of the Applicants. In the premises, each Applicant/Accused shall be released on bond of **Kshs. 2 Million** with a surety in a similar sum.

9. It is so ordered.

Dated, Signed and Delivered at Kitui this 10th day of January, 2017.

L. N. MUTENDE

JUDGE