



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**HIGH COURT CRIMINAL NO.45 OF 2014**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**GILBERT CHIRCHIR.....1<sup>ST</sup> ACCUSED**

**VITALIS MAINA.....2<sup>ND</sup> ACCUSED**

**RULING**

1. This ruling relates to the application by the accused persons to be released on bail pending their trial. The applicants are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The facts are that on the night of 27<sup>th</sup> and 28<sup>th</sup> December 2014, at Kitait Village in Bureti District within Kericho County, they murdered Justice Kibet Koech. The application, which is dated 24<sup>th</sup> October 2016, is opposed by the state.

2. The application was presented by Ms. Maritim. She relied on the affidavit sworn in support of the application by the 1<sup>st</sup> accused, Gilbert Chirchir.

3. Ms. Maritim submitted that the accused are seeking bail as they wish to pursue further education; that the 2<sup>nd</sup> accused, who is 17 years of age, is a Form 2 student at Chemumel Secondary School. The 1<sup>st</sup> accused wishes to pursue tertiary education, having finished secondary school in Chebwaga Secondary School in 2012. It was her submission that there are no compelling reasons to justify the denial of bail or bond to the applicants, and they will continue to attend court when required to do so, and will not interfere with prosecution witnesses.

4. With regard to the replying affidavit sworn in opposition to the application for bail, Ms. Maritim's submission was that it does not disclose any compelling reasons to warrant the denial of bail. She relied on the decision in **Kericho Criminal Appl. No.9. of 2016 - Republic vs Kiprono Bett**, in which the court stated that compelling reasons should be stated and bail should not be refused on flimsy grounds and she prayed that the application for bail be allowed.

5. Ms. Mwangi for the state opposed the application. She submitted that the application is brought under Article 49 (1) of the Constitution which provides for the right to bond unless there are compelling reasons, and her submission was that this right is not absolute and the court has the discretion to grant or refuse bail. Ms. Mwangi relied on the decision in **Nairobi Crim. Case No.6 of 2013 - Republic vs Lucy Njeri Waweru and 3 others** with regard to the principles which the court should consider in determining whether or not to grant bail. Among such principles was whether or not the accused persons are likely to interfere with prosecution witnesses.

6. According to the state, the accused persons are likely to interfere with or intimidate two key prosecution witnesses who are the biological brother and sister of the accused if the released on bond. Ms. Mwangi submitted that the court has an obligation to do all in its power to protect the evidence in a case, and where there is likelihood of interference, bail should not be granted. Counsel relied on **Nairobi Crim. Case No.8 of 2014 - Republic vs Paul Wandera and 5 Others** in this regard.

7. While urging the court to exercise its discretion not to grant bail, Ms. Mwangi submitted however that if it was inclined to grant bail, then it should do so after the two prosecution witnesses had testified.

8. I have considered the submissions of Counsel for the prosecution and the accused. I believe that there is no dispute that bail is guaranteed under Article 49 of the Constitution, but that it is not absolute and may be denied where there are compelling reasons not to release an accused person on bail.

9. In the affidavit sworn in opposition to the application for bail sworn on 7<sup>th</sup> November 2016, P.C Carrey Weke deposes that the accused persons are likely to interfere with two prosecution witnesses, Cynthia Cherotich Soi and Enock Kipkoech who are the biological siblings of the accused persons. He therefore avers that bail should not be granted until the two witnesses have given their evidence.

10. Applications for bail in circumstances such as are before me, and whether such circumstances amount to compelling reasons for denial of bail, are not new to our courts. The High Court sitting in Nairobi (Muchemi J) considered the issue in **High Court Criminal Case No. 6 of 2013-Lucy Njeri Waweru vs Republic**. In the said decision, the court observed as follows:

*"It is now time to consider whether the likelihood of interfering with the witnesses, of influencing them or of intimidating them are compelling reasons under Article 49 (1) (h) of the Constitution. The word "compelling" is defined in the Readers Digest Complete Word Finder as "rousing strong interest, attention, conviction or administration." This definition calls upon strong and convincing reasons on part of the prosecution. This is a case where the accused persons who have already been supplied with witness statements know the identities of the prosecution witnesses and the nature and content of their evidence to be adduced at the trial. The accused persons may not care much about the evidence of witnesses outside the family circle. However, there is likely to be some flow of sympathy based on the blood relationships. I rely on the case of *Republic vs Joseph Wambua Mutunga & 3 Others* where Ochieng J found that the likelihood of interfering with witnesses was a compelling reason under Article 49 (1) (h)."*

11. I believe a similar situation obtains in the present case. According to averments by the investigating officer, two of the prosecution witnesses are siblings of the accused. This has not been disputed by the accused, The probability that the accused may interfere with the witnesses can therefore not be ruled out. While Ms. Maritim submitted that the accused will be relocated, as indicated in the Probation Officer's report, there is nothing to guarantee that will happen.

12. In my view, in the present circumstances, the interests of justice lie in expediting the hearing of the matter, so that the two witnesses testify, before the accused are released on bail.

13. Accordingly, I decline to release the accused persons on bail at this stage. The application may be renewed after the two witnesses whom the prosecution fears may be interfered with have testified.

14. In this regard, I must point out to the prosecution that this is a 2014 matter, and the accused persons have been in custody since their arrest. The state must be ready with the two prosecution witnesses at the next hearing date, and ready to proceed. The interests of society to prosecute offenders, and the need to safeguard evidence, as submitted by Ms. Mwangi, must be balanced against the interests of the accused person.

**Dated Delivered and Signed at Kericho this 1<sup>st</sup> day of February 2017.**

**MUMBI NGUGI**

**JUDGE**