



REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL CASE NO.71 OF 2016

REPUBLICPROSECUTOR

VS

FRANCIS GITONGA.....ACCUSED

RULING

The accused Francis Gitonga was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code.

Particulars of the offence was that Francis Gitonga on the 31st day of July 2007 at Kiamurenga village, Lakathi Division Igembe South / County within Meru County murdered George Kamuindi M'Mpara. The accused was first arraigned in court on 19th October 2016 and information of the offence read over to him on 9th November 2016 whence he pleaded not guilty.

By an application dated 23rd day of November 2016 the accused persons counsel Mr Mutuma applied-

That accused person be admitted to bond on bail pending trial. The application was supported by grounds on the face of application among which were that accused is entitled to constitutional fundamental right to bond or bail pending trial;

That accused is entitled to the inviolable fundamental right of presumption of innocence;

That applicant is a sickly man working for gain and sole bread winner and his health requires constant medical attention and also his family is denied source of livelihood and subsistence.

The application was also supported by accused persons over affidavit sworn on 23rd day of November 2016.

The affidavit of Jotham Njue Mwana sworn on 23.1.2017 and further affidavit of accused sworn on even date also supported applications.

In his submissions in court Mr. Mutuma for the accused argued that accused was in employment of his uncle Njue on date offence was committed. He also claimed that other accused persons had been charged with same offence tried and acquitted and therefore the accused should not have been charged in the first place.

Mr Mutuma Advocate claimed that accused was arrested on allegations that had not been investigated. Mr Namita Counsel for the state place reliance on affidavit of Njue the uncle to the accused who averred that

sometimes in September 2007 he employed accused at Chuka to care for his livestock at Ndagari village Karuga Location. That in 2011 to May 2016 he transferred him to Magundu village in Meru County to continue looking after his cattle and in May 2016 he left employment. He said that at no time between 2007 to 2016 did anyone inform him that accused was wanted.

Mr Namits said accused had gone underground after committing offence and if granted bond is likely to run away from justice of the court.

Mr Mutuma Advocate said accused persons family who have fixed abode were not informed he was wanted.

This court called for Prebail Report and upon interviewing a total of 9 people the probation officer Alice Mugambi concluded and recommended that accused maybe considered for release on bond. According to probation office she established from those interviewed including Chief of Kindain Location one Mr Josphat Murugi that accused persons past conduct was good and that he legitimately occupied himself with food crop farming for his livelihood and that of his young family and that his immediate relatives are welcome to the idea of his possible release on bond.

The father of the deceased strongly opposed accused persons release on bond. He stated that for justice to prevail, accused should remain in custody until the case is heard and determined.

Article 49(1) (h) of the constitution of Kenya 2010 that all offences are bailable except where it is proved that there are compelling reasons that would make the court not to grant bond.

Section 123 A of the Criminal Procedure Code provides for some circumstances that would make court deny bond, but which are subject to Article 49(1) (h). These include:-

- a. The nature or seriousness of the offence.
- b. The character, antecedents, associations and community ties of the accused person;
- c. The defendants reasoned in respect of the fulfilment of obligations under previous grants of bail and
- d. The strength of evidence of his having committed the offence.

In this matter the only reason the prosecution opposed accused persons release on bond is because since offence was committed on 31st day of July 2007 he went underground. His uncle John Njue Imwara accounts for him between September 2007 to May 2016 when he was employed. Accused person in his affidavit where he was from 31st July 2007 until his uncle employed him in September 2007. He was only arrested after he returned to Meru in 2016. The accused person annexed to his affidavit copies of witness statements which from their reading by this court, accused person is implicated by 2 witnesses who witnessed the offence take place. The accused has claimed he is witch hunted because suspects charged earlier with same offence were acquitted. I have not seen the proceedings in previous charge to know reason for acquittal in the other charge but in this matter. The statements of Sabera Muthoni John – annexure FG2 and Joshua M’Thorieri M’Intubiri strongly implicates the accused person. This is a murder charge and therefore quite a serious offence and in essence of an explanation to the satisfaction of the court as to the whereabouts of accused person between 31st July 2007 to September 2007 – this court will conclude he went missing underground after committing this offence and therefore conclude that his trust worthiness is questionable. This court will moreover grant bond and attach conditions that will ensure that accused person attends court as and when required.

He may be released on bond of Kshs. 1,000,000/- plus one surety of similar amount to be examined for suitability by the Deputy Registrar.

The accused person will have his case mentioned by the DR fortnightly to ensure compliance with bond

terms which will include ensuring he doesn't in anyway interfere with witnesses or the due process of the trial.

Order accordingly

A.Ong'injo Judge

13.3.2017

Before Adwera –Ong'injo Judge

Penina C/A

Mr Mungai for State

Mr Mutuma J Advocate for accused

Court

Ruling delivered dated and signed in court.

A.Ong'injo Judge

13.3.2017