



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HIGH COURT CRIMINAL CASE NO. 9 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FRANCIS MURIUNGI NKUNJA.....1<sup>ST</sup> ACCUSED**

**CONSOLATA KONJA.....2<sup>ND</sup> ACCUSED**

**VILVINA KABEA.....3<sup>RD</sup> ACCUSED**

**ANDREW MUTIRIA.....4<sup>TH</sup> ACCUSED**

**FABIAN MAUKI IKUNGA.....5<sup>TH</sup> ACCUSED**

**NATHAN KIGACHA KIRUGI.....6<sup>TH</sup> ACCUSED**

**CICILIA GATUMI IKOJE.....7<sup>TH</sup> ACCUSED**

**BERNARD MUNYAMBU.....8<sup>TH</sup> ACCUSED**

**R U L I N G**

1. **FRANCIS MURIUNGI NKUNJA , CONSOLATA KONJA, VILVINA KABEA, ANDREW MUTIRIA, FABIAN MAUKI IKUNGA, NATHAN KIGACHA KIRUGI, CICILIA GATUMI IKOJE and BERNARD MUNYAMBU** , the applicants herein face a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and the particulars as per the information are that on the 8<sup>th</sup> November 2016 at around 15 hours at Kirundi Sub-Location of Thiiti Location, Tharaka North Sub-Location within Tharaka Nithi County jointly with others not before court murdered **SISINOH KILONZO KATHENYA**. All the accused/applicants denied the charge and the case is now pending for trial in this court.

2. The applicants have now moved this court vide a Notice of Motion dated 2nd February, 2017 under Article 49 (1) (h) of the Constitution of Kenya 2010 for the following substantive orders:-

**(i) That this honourable court be pleased to admit the accused persons to bail pending trial on terms that are fair, affordable and just.**

**(ii) That this court be pleased to make any other orders in the interest of justice.**

3. The grounds upon which application has been brought are:-

**(a) That the offence facing the accused persons is now bailable.**

**(b) That there are no compelling reasons to deny them bail or existence of circumstances to warrant denial of bail.**

**(c) That the accused persons have a fixed abode and are not a flight risk.**

**(d) That they will not interfere with witnesses.**

4. The application is supported by various affidavits sworn on 2<sup>nd</sup> February, 2017 by each of the applicants giving various reasons as to why they feel that they should be granted bail. Francis Muriungi Nkunja the 1<sup>st</sup> accused/applicant has deponed that he is the husband of the 2<sup>nd</sup> accused, father to 3<sup>rd</sup> accused and uncle to 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> accused persons respectively, and that the deceased herein was his son in-law. The 1<sup>st</sup> applicant has denied threatening the victim's family contending that save for one married daughter almost the entire family has been in custody and there was no possibility of him or any other member of the family (who are all in custody) threatening witnesses as alleged. He has further deponed that his home is 40 kilometres away from the victim's home and sees no basis for the prosecution's contention that the victim's family or community will be a danger to him and other applicants if released on bond. He has further faulted the probation officer's report saying that the same was tilted against his release on bond due to over reliance by the probation officer on the views of family of the victim.
5. The 2<sup>nd</sup> applicant (Consolata Konja), a wife to the 1<sup>st</sup> applicant, has also sworn an affidavit and majorly supported the 1<sup>st</sup> applicant's sentiments. The 3<sup>rd</sup> applicant (Vilvina Kabea) has deponed that she is the daughter of the 1<sup>st</sup> and 2<sup>nd</sup> applicant and the wife to the deceased in this trial. She has also deponed that she is a cousin to 4<sup>th</sup> to 8<sup>th</sup> applicants herein and has deponed that the bone of contention and cause of the rift between the two families has been a long standing land dispute between the two families. She has deponed that she harbours no ill feeling towards the victim's family and has no intention of interfering with witnesses as at this stage she is not even aware of who they are.
6. Andrew Mutiiria, (the 4<sup>th</sup> accused/applicant) has on his part sworn affidavit deposing that he has a permanent abode, within Thiiti Location Tharaka Nithi County. He has also reiterated the affirmments by the first applicant and further expressed willingness to abide by any terms that may be imposed by this court for his release on bond. The same reasons have been relied upon by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> applicants.
7. The applicants through their Advocate, Mr. Ndubi Advocate at the hearing of this application made passionate representations urging this court to exercise its direction and release the applicants on bond because in their view the respondent through the office of Director of Public Prosecution have not disclosed compelling reasons to warrant denial of bond. It was submitted that the replying affidavit filed in response to this application does not raise any compelling ground to deny any of the applicants bond and relied on a decision in the case of **R- Vs- Kimunya [2011] 2 EA** to support their contention that the state had the burden to prove that compelling reasons exist in this case. He faulted the respondent's contention that there was likelihood of interference of witnesses pointing out that the names of witnesses likely to be interfered with have not been disclosed. It was also argued that interference of witnesses was a criminal offence and no action has been taken against any of the applicants on suspicion of interfering with any of the State witnesses. They also dismiss as mere speculations the assertions made by the state that the applicants are likely to interfere with witnesses because one of the suspects is still at large.
8. Mr. Ndubi further differed with the respondent's contention that it was unsafe to release the applicant on bond because the ground was still volatile, due to the hostility by the victim's family and the community towards the applicants, stating that it is the duty of the state to protect its people and their property. He urged this court to disregard the probation officer's report arguing that the incident took place more than 2 months ago and in his view the wounds caused by the incident have been healed by the passage of time. He further urged this court not to be swayed against the application by the allegations of a land dispute between the accuseds' family and the victim's family arguing that if there was any dispute relating to land, the same should be referred to Environment and Land Court for determination.
9. The respondent has opposed this application through a replying affidavit sworn on 23/2/17 by one P.C EDWIN KIBET, the investigating officer in this case. The investigating officer has deponed that the applicants have been threatening witnesses pointing out a case where one witness named ISIAH BERECE was threatened and a report made at Gatunga Police Station vide OB No. 12/10/12/2016. It is further deponed that one of the key suspects, Gitonga Nkando is still at large and that he keeps constant communication with the accused herein and that releasing the applicants on bail will thwart their effort to arrest him.
10. The respondent have denied the allegations by the applicants that they stay 40 Km away contending that they reside in the same village with some witnesses and ten other families from the victim's side. The respondent has deponed that security of the applicants may not be guaranteed if they are released on bond as the two families have a long standing unresolved land dispute and that the community are unwilling to co-exist with the accused persons.
11. Miss Ndombi learned counsel from the office of the DPP submitted that it would be in the interest of justice to deny the accused bail going by the replying affidavit of the investigating officer and the probation report.
12. The victim's learned counsel Mr. Murango concurred with the state counsel in opposing this application arguing that the incident herein occurred barely 3 months ago and therefore in his view the wounds are still fresh in the minds of the community given the manner surrounding the killing stating that the deceased was killed and set ablaze. It was further contended that there are 2 witnesses in this case who are minors and that releasing the applicants on bond is likely to traumatize them further. Mr. Murango further agreed with the investigating officer's assertion that the applicants are likely to interfere with witnesses and pointed out that it was possible for them to have interfered with witness while in custody as mobile phones can at times be sneaked into prison. He urged this court to be persuaded by the probation report in denying the accused persons bail.
13. I have considered this application, the grounds and all the affidavits in support thereof. I have also considered the replying affidavit and the submissions made by all the three counsels. The right to bail to arrested persons is a constitutional right embedded in the Constitution of Kenya 2010 and unless compelling reasons are advanced an accused person in Kenya is entitled to be released on bond under Article 49(1) (h) of the Constitution.
14. Now the applicants have made this application to be released on bond pending trial citing the above article in the constitution and have expressed willingness to abide by terms that may be imposed by this honourable court. On the other hand, the respondent have advanced what they believe are reasons compelling enough to deny the applicant bond. The respondent's main grounds in opposing this application

are basically two:-

**i. likelihood to interfere with witnesses**

**ii. safety of the applicants if released on bond.**

In their view the two grounds are compelling enough to be used as a basis to deny the applicants bail. The question is are they? A look at the Oxford English Dictionary reveals that the word '**compelling**' as an adjective denotes a strong argument "**arousing attention or admiration not able to be resisted or doubted.**" That is the ordinary meaning of the word "**compelling**" used in the cited Article of the Constitution. I will examine the reasons or the grounds advanced by the respondent one by one to make a finding as to whether or not the ground (s) are indeed irresistible and undoubted.

**15 (i) Likelihood to interfere with witnesses.**

The applicants have stated in their affidavits that they are resident 40 Kilometres away from the victim's family but the respondent have denied this. I have looked at the social inquiry conducted on all the applicants and it is apparent that all the applicants are members of the same family and all hail from KIRUNDI Sub-Location, Thiiti/Nduyo Location where the incident took place but it is difficult at this stage to know exactly how far the victim's family live from the applicants' family given that sizes of Locations and Sub-Locations in various parts of this country differ from place to place. It is not easy to determine that interference of witnesses is possible due to the proximity of the two families.

16. Looking at the 2nd aspect of interference of witnesses particularly the allegations made that one witness named Isaiah Berece has been threatened and a report made to that effect at Gatunga Police Station, is that while the state has given details of the alleged interference including the OB Number that was used to book the complaint, there is a critical failure by the state to reveal the perpetrators of the crime. I do find that generalizing that all the accused persons have been threatening witnesses and specifically the said Isaiah Berece when all of them have been in custody since November, 2016 is doubtful. I have doubts in my mind about the allegations that the accused persons while remanded in custody were still able to communicate with the outside and able to effect threats on the said witness. In any event if that is true fact (which I highly doubt) that the applicants are able to threaten the witnesses while in custody, then that very ground ceases to be compelling enough to deny the applicants bail. This is however does not mean that this court does not take serious considerations on allegations of interference of witnesses because if proved or established interference of witnesses besides being criminal offence really compromises dispensation of justice and that is why courts of law will take such claims seriously. The respondent in this case has however failed in their duty to provide the specifics of the interference and the persons involved in threatening the said Isaiah Berece who is a witness in this case. I do not see why the respondent could not state that on a given date a specific applicant herein or all the applicants (if they were acting in unison) either directly or indirectly threatened the said complainant. That way I would perhaps have found this ground compelling enough but in the absence of the same, I must say that though the allegations are serious I do not find basis to find them compelling in the context of the meaning of the word compelling ascribed above. I also find that the names of the minors likely to be traumatized if the application would be allowed have not been given. The State has failed to provide the particulars and the number of these minors and state whether they will be called as witnesses in this case.

**17. ii) Safety of the applicants if released on bond**

The respondent has made representations to the effect that the safety of the applicants can only be guaranteed while in custody because the situation on the ground is still volatile. While I agree with the state that the safety of an accused person especially when the case is still fresh can be a factor for denial of bail it is important in my view to look at every case in its unique circumstances and exercise some caution and restrain in view of the tenets of law and the constitution that presumes that every accused person is presumed innocent until proven guilty.

18. I have studied in detail the social inquiry reports, on all the accused persons and the reports all point to the fact that the situation on the ground is still volatile in view of a long standing dispute on a parcel of land between the family of the accused person and the victim's family. I am however not convinced that denying bail to the accused person would solve the land dispute. I agree with the applicants' counsel that the best way of resolving the land dispute is to refer the matter to an ELC Court which is seized with the jurisdiction to resolve such disputes but denying bail to one side of the divide so that the others can breath easy will not solve the problem and least of all will not be in the interest of justice. I do not find that a land dispute obtaining between the two warring families is compelling enough to persuade this court against the application for bond.

19. It is also surprising to note that a state that cherishes democratic principles and the rule of law, can openly tell its citizens that they are on their own on matters on security. Doing so in my view will be akin to abdication of a constitutional duty. The respondent has stated that the state may not guarantee security to the applicants if released on bond but I find such assertions to be contrary to the Constitution of Kenya 2010. The right to life security and freedom are embedded in the Constitution of Kenya 2010. I do find that the rights articulated under **Articles 26 and 29** of the Constitution are sacrosanct and must be protected. For purposes of clarity the provisions of **Article 29** specifically states in the relevant part as follows:-

**"Every person has the right to freedom and security of the person which includes the right not to be -**

**a. deprived of freedom arbitrarily or without just cause;.....**

**(c) subjected to any form of violence from either public or private sources;....."**

The allegations by the state that the applicants should be denied bail for their safety or their own good really fly in the face of the above provisions. No person or authority has a mandate to try and find any person guilty of any crime leave alone murder except the courts of law. It is no longer okey for courts to give in to forces of lawlessness hiding under the veil of "**mob justice**", local "**community**" "**vigilance**" or

other forces of impunity. Members of public in the name of "*community*", "*mob justice*" etc have no right whatsoever to purport to "*dispense justice*" to suspected persons or deny them their constitutional rights including the right to bail. It is not right for the state to use safety, which it is supposed to guarantee as explained above, as a ground to deprive its citizens their constitutional rights.

This court is persuaded by the reasoning and the observations made in the decision in the case of **R- VS- JOHN KAHINDI KARISA & 2 OTHERS [2010] eKLR** where the court in part made the relevant observations.

**"I also reject the idea that the accused should be remanded and not granted bail for their safety, security and good. Any accused person released on bail has his constitutional rights secured and protected. No member of the public or any other person can try him or punish him..... as it would amount to a judicial aiding and abetting of this criminal trend of public murders or so called mob justice for the court to purport to deny bail to the accused so as to protest them from being lynched by members of the public....."**

This court finds that it would be a travesty of justice if a riotous mob or any group of persons described above is given room to determine the fate and the constitutional rights of accused persons. The applicants' constitutional right to bail can only be limited by law and in this context by a compelling reason. Their right to presumption of innocence is valid and must be seen to be protected. The probation report though against the release of the accused persons on bond is not binding and not compelling.

In the premises, I find that the reasons advanced by the respondent to deny the applicants' their rights to bail are not compelling enough. The application is merited. The same is allowed under the following terms:-

- i. Each accused/applicant may be released on a bond of Kshs.500,000/- with a surety of similar amount.**
- ii. The accused persons are directed not to either directly or indirectly get in touch with any of the witnesses and keep away from them completely.**
- iii. The accused persons if released on bond are required to strictly attend court on time if and when they are required to attend court.**
- iv. This trial shall be given priority on view of the underlying issues highlighted by the probation officer.**

**Dated and delivered at Chuka this 7<sup>th</sup> day of March, 2017.**

**R. K. LIMO**

**JUDGE**

**7/3/2017**

Ruling dated, signed and delivered in open court in presence of Mrs Ntarangwi holding brief for Ndubi for all accused persons, Mr. Bett for state and Murango holding brief for the deceased family.

**R.K. LIMO**

**JUDGE**

**7/3/2017**