REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 34 OF 2016

REPUBLIC ::PROSECUTOR

VERSUS

JOSEPH THIONGO WAWERU :::::::::::::::::::::::::::::::: 1ST ACCUSED

HENRY NGUGI KARUGA ALIASMWENE CIO:::::::::::2ND ACCUSED

JULIUS KANYIRI WAMBUI ALIAS KAMURANG'A:::::3RD ACCUSED

JOHN NJOROGE GACHO ALIAS NJINALO:::::::::::::::4TH ACCUSED

HARRISON KIBANDE MARUBU::::::::::::::::::::::::::::5TH ACCUSED

JOSEPH MUCHUI MUIRURI:::::::::::::::::::::::::::::::::: 6TH ACCUSED

BENARD MURIGI KARANJA :::::::::::::::::::::::::::::::: 7TH ACCUSED

JOSPHAT MACHARIA MARUBU ALIAS KASEE:::::::::8TH ACCUSED

MARY MUGECHI MBURUR ALIAS WAMUGECHI:::::9TH ACCUSED

JOSEPH NYAMU KAGO ALIAS KIMANGU::::::::::::;10TH ACCUSED

PATRICK IKUU MUGO:::::::::::::::::::::::::::::::::::::: 11TH ACCUSED

SAMUEL IKUU MUGO:::::::::::::::::::::::::::::::::::::: 12TH ACCUSED

PETER MBURU MUNGAI:::::::::::::::::::::::::::::::::::: 13TH ACCUSED

PETER MURIGI NGIGE:::::::::::::::::::::::::::::::::::: 14TH ACCUSED

ZACKARIA NGARUIYA MUTWE:::::::::::::::::::::::::::: 15TH ACCUSED

JOHN KAMAU KARIUKI:::::::::::::::::::::::::::::::::::: 16TH ACCUSED

SIMON NGUGI GITAHI:::::::::::::::::::::::::::::::::::: 17TH ACCUSED

DAVID MUIRURI CHOMBA ALIAS:::::::::::::::::::::: 18TH ACCUSED

RULING

A. INTRODUCTION

1. Sixteen of the eighteen (18) Accused Persons in this case were originally arraigned before Justice Stella Mutuku in Nairobi Milimani High Court Criminal Division charged with four counts of murder contrary to section 203 as read together with section 204 of the Penal Code. All the victims of the alleged murders are associated with Kihiu Mwiri Company in Murang'a County. The case was subsequently transferred to this Court when it was established mid-last year.

2. Two more Accused Person were added to the Information bringing the total number of Accused Person to 18. The Information was amended and the Accused Persons pleaded not guilty to the amended Information.

3. Before the matters were transferred to Kiambu High Court, all the 16 Accused Persons had applied to be admitted to bail pending trial. Lady Justice Stella Mutuku heard the applications for bail and, on 03/12/2015, gave a ruling denying bail to the first sixteen Accused Persons.

4. In her ruling dated 03/12/2015, Justice Mutuku found, on a balance of probabilities, compelling reasons to deny bail in this case. In pertinent part, she ruled:

While this court agrees with other courts in various rulings that the paramount consideration in a bail application is whether the accused person will turn up for his trial until the same is concluded, this court considers that where the prosecution satisfies the court on a balance of probabilities that there is a danger that witnesses may be interfered with, the Court cannot turn its back on such a matter. Everyone, the accused and the victim and the family of the victim deserve to be accorded justice. Where evidence will not be forthcoming because a witness has been threatened or killed, then the course of justice is subverted.

After considering that this matter is intricate and evidence may go as far back as the time Kihiu Mwiri came into existence in order to understand what motivated the deaths of the victims in this trial, and having read the attached statements of the victims, it is my view that I am persuaded by the prosecution, on a balance of probabilities, that there are compelling reasons in this case to decline to allow the respective applications.

5. When the case was transferred to Kiambu Law Courts, I directed that the ruling dated 03/12/2015 by Justice Mutuku is still in force and controlled the case and the reasoning therein would now be extended to the 17th and 18th Accused Persons and cover the case as consolidated. I also directed that the Court will hear the case on a priority basis and scheduled a status conference for 14/09/2016 and hearing on 5th, 6th and 7th December, 2016 and again on 16th, 17th and 18th January, 2017.

6. However, Justice Mutuku's explicit ruling was that bail would be considered after the vulnerable witnesses in the case had been heard. The early hearing dates were therefore set for the testimonies of these vulnerable witnesses. The Prosecution has presented ten witnesses that it considered most vulnerable. All the Accused Persons have now renewed the applications for bail.

B. THE CASE AGAINST DENIAL OF BAIL

7. The Prosecution opposed bail as did the Counsel for the victim's families, Mr. Irungu. Both Mr. Irungu and Ms. Maari, for the Prosecution, reminded the Court that Justice Mutuku had made a finding that there was credible evidence, on balance, that releasing the Accused Persons on bail would likely interfere with witnesses. Our Courts have previously held that where there is more than speculative apprehension that an Accused Person could inflict genuine fear and anxiety in potential witnesses, the Courts ought to consider that as a factor in denying bail. (See ***R v Joseph Wambua Mutunga & 3 Others*** **[2010] eKLR**.)

8. Both the Prosecution and the Victim's Counsel argued that the finding of credible apprehension of a likelihood of interference and intimidation of witnesses as well as the need to protect the victims of the crimes still subsists and that the need to keep the Accused Persons in custody to maintain peace and

security at Kihiu Mwiri subsists.

9. Detective Wahome put in two affidavits in opposition to the bail application. In the first affidavit, he has attached a letter, which was also copied to the Court, by one of the witnesses who has testified which describes his security concerns after he testified in the case. In his second affidavit, Detective Wahome attached three statements – one by the same witness who wrote the letter of concern and two by two other witnesses who have testified. Due to the sensitivity of this case, I will not mention the witnesses by name.

10. All the statements are to the same effect: the witnesses are apprehensive that if the Accused Persons are released on bail they will target and eliminate them for testifying against them. Given the history of Kihiu Mwiri, the Prosecution and Victim's Advocate say that these are not idle threats. Mr. Irungu exhorted the Court to note that it took extreme courage for the wives and children of those killed to come to Court to testify and, in some instances, walk up to the Accused Persons and literally point them out in Court. These witnesses are justifiably apprehensive, Mr. Irungu argued, that they will be killed as soon as the Accused Persons are released on bail. The only way to protect the judicial process, Mr. Irungu argued, is to deny bail in this case.

11. Mr. Irungu also argued that the threats to the witnesses who have already testified also has a chilling effect on other witnesses how have not testified who are also vulnerable. His position is that all the remaining witnesses are equally vulnerable and he sees no distinction put by the Prosecution between the witnesses who have testified and those who have not. Mr. Irungu therefore urged the Court to deny bail until all witnesses have testified.

12. Mr. Irungu also urged the Court to deny bail on the following three other grounds:

13. The Strength of the Prosecution Case: While Mr. Irungu concedes that the very nature of the offence an Accused Person is facing is not a per se reason to deny bail, he argued that when combined with other factors, it is a legitimate factor to consider in a decision whether to grant bail or not. Here, Mr. Irungu argues, the Court has had the opportunity to hear key witnesses and the veracity of their testimonies has been tested through cross-examination hence the Court is able to appreciate that there is credible evidence against the Accused Persons. Given the strong evidence adduced, at least against some of the Accused Persons, it seems likely that those against whom strong evidence has already been adduced might be tempted to abscond.

14. Character and Antecedents of the Accused Persons and their Ties to the Community: Though benignly stated, Mr. Irungu packs a lot of accusations into this head. He begins by reminding the Court that Kihiu Mwiri "is a society that has witnessed killings, daylight murders, threats and intimidations. Women and children have lived in fear that their loved ones will not see the end of the day, something that has come to pass."

15. Mr. Irungu reminds the Court that evidence adduced in the Court established the existence of a criminal network known as Ward 4 that "operates on intimidation and elimination." He then admonishes the Court "not to shy from taking judicial notice that order has returned to Kihiu Mwiri since the [Accused Persons] were arrested…No executions have been experienced of the same nature…."

16. The argument is that since the absence of the Accused Persons has led to peace and tranquillity in Kihiu Mwiri and since some of the Accused Persons were explicitly linked with Ward 4 in the witness testimonies, it is a permissible inference for the Court to draw that the Accused Persons were somewhat involved in the reign of terror characterised by "intimidation and elimination" at Kihiu Mwiiri.

17. To this extent, Mr. Irungu urged me to take the Bail Reports filed by the Department of Probation and After-Care Services at the request of the Court with a pinch of salt. This is because, Mr. Irungu argues, the Probation Officers who made the reports are "also in fear of making any adverse comments against the accused persons."

18. Detective Wahome and the Prosecution are of the same mind in this regard: they are persuaded that

public order and security – another legitimate factor to take into consideration in a decision whether to grant bail or not – militate against granting bail in this case. Their argument, as I understand it, is that Kihiu Mwiri is a society on edge at the moment – and the members of the community who have been enjoying relative calm and peace since the Accused Persons were arrested, will likely see the release of the Accused Persons on bail as an affront to that peace and the community might react by attacking the Accused Persons and their families. They remind the Court that is not a wild speculative theory only: After the Court hearing on 27/07/2016, word spread in the village that the Court was considering bail for the Accused Persons. The community reacted by attacking the home of the 1st Accused and razing it to the ground. The Police are apprehensive that the community might react in similar fashion.

19. The Need for Case Management and Practicability of Concluding the Hearings: Mr. Irungu is worried that if the 18 persons are all released, it will be almost impossible to proceed with the hearing since the absence of one Accused Person will mean that the case against all the 18 Accused Persons cannot proceed.

C. ARGUMENTS IN FAVOUR OF GRANTING BAIL

20. I will briefly rehash the arguments made for each of the Accused Persons in urging the Court to grant bail.

21. Mr. Okatch appears for the 1st, 2nd, 5th, 10th, 12th and 16th Accused Person. He filed a formal Notice of Motion dated 09/02/2017 with respect to all six of his clients. He also led in general for all Accused Persons and so most of his arguments apply to all the Accused Persons.

22. Mr. Okatch argued that the main issue is the security for the remaining witnesses and as well as security for those who have already testified. He pointed out that none of the witnesses had said that there was bad blood between them and the Accused Persons and so there is no reason to believe that the Accused Persons will go after them.

23. Mr. Okatch began by situating the personal details of his six clients as under:

a. Respecting the 1st Accused, he pointed out that he is married to three wives and that he has two residencesin Kihiu Mwiri and one in Kiserian, Ngong'. He has 18 children all of whom rely on him as all his wives are stay-at-home mothers.

b. The 2nd Accused is married to one wife and they reside in Thika. He has 3 children.

c. The 5th Accused has one wife and 3 children. He lives in Kihiu Mwiri. All his children are school-going and he is the sole bread-winner. Two of his children are at home for lack of school of fees.

d. The 10th Accused has one wife and four children and is, similarly, the sole bread winner in this family.

e. The 16th Accused Person is 80 years old

24. Mr. Okatch made the following salient points in the case with respect to his clients:

a. None of his clients have criminal records or even any pending cases unrelated to Kihiu Mwiri.

b. There were serious issues concerning the letter written to the Court and statements made to the Police about threats to the witnesses who had testified since these documents only speak about threats communicated from certain quarters without specifying the source. Mr. Okatch was of the view that the statements should not be acted on without further information.

c. Finally, Mr. Okatch argued and submitted at length about the nature of the Prosecution case and

what he perceives to be an extremely weak case against all the Accused Persons. In his opinion, the Prosecution case is based solely on "rumours, hearsay, suspicion, jealousy, rivalry and propaganda." Further, Mr. Okatch believes that the fact that there appears to be two sets of witness statements which, at times are inconsistent with each other, in the case indicates that the Prosecution is only trying to concoct evidence against the Accused Persons.

25. Mr. Muchiri argued the bail application for the 3rd and 4th Accused Persons. He associated himself with the submissions by Mr. Okatch. He took particular aim at the post-testimony statements and letter by the witnesses on the threats they claim they are facing. His view was that there is no sufficient actionable evidence to warrant the denial of bail.

26. Mr. Njanja appears for the 7th Accused Person. He submitted that with respect to his client, all the witnesses who have testified so far have described him as a respected member of the community – and so did the Bail Report. He is well known in the community and is not a flight risk. He has a fixed abode at Greystone where he has lived all his life. Besides, Mr. Njanja submitted, the 7th Accused Person has not been adversely mentioned by any of the witnesses in the case so far. He thus has little reason to abscond.

27. Finally, Mr. Njanja submitted at length about the medical conditions of the 7th Accused. There is medical evidence to the effect that the 7th Accused is suffering from glaucoma which needs surgery and specialised treatment. A letter from the Prisons' doctor confirms that the conditions at Nairobi Remand Home are not conducive for his post-surgery healing. As things stand, the 7th Accused has undergone surgery for one eye which must heal before the second eye is operated on. Meanwhile, the 7th Accused is semi-blind and going through a particularly hard time in remand without a designated aide.

28. Mr. Mathenge submitted on behalf of the 6th and 8th Accused Persons. He relied on their written Applications and affidavits. He submitted on the personal circumstances of the two Accused Persons – as sole bread winners for their families. The 6th Accused is a widower. He argued that the evidence has not linked the 6th and 8th Accused Person to any of the murders so far. Finally, turning his gaze to the statements and letter by the witnesses who have testified, Mr. Mathenge was of the opinion that they amount to nothing more than mere allegations. Citing ***Panju v R [1973] EA 282***, Mr. Mathenge was of the view that mere allegations should not suffice to warrant denial of bail.

29. Mr. Njiraini argued for the 9th Accused Person. His position was that time is ripe to review the bail ruling since circumstances have changed. Vulnerable witnesses have testified – and, in his view, they have not linked the 9th Accused to any of the murders. The 9th Accused, Mr. Njiraini pointed out, is a mother of 7 children who have been left without anyone to take care of. Some of them are children of tender years.

30. Mr. Magero argued bail for the 13th, 14th, 17th and 18th Accused Person. He associated himself with all the arguments made by his Defence colleagues and added that there was almost no mention – and certainly no adverse mention -- of the four Accused Persons in the evidence of the first, presumably key ten witnesses. After the vulnerable witnesses have testified, he argued, the compelling reason to deny bail has eviscerated. Consequently, bail should be granted at this point.

D. ANALYSIS

31. The singular question would be whether in balancing the rights of the Accused Persons and the interests of justice, in the circumstances of this case, there are compelling reasons to warrant the denial of bail at this stage in the trial.

32. The factors which I must consider in arriving at my decision include the following:

a. There was demonstrable risk of interference with or intimidation of witnesses in the case leading to a ruling of this Court initially denying bail.

b. The decision of this Court was that bail would be considered for the Accused Persons after the

witnesses deemed key and vulnerable by the Prosecution had testified. Those key witnesses have now testified.

c. Is there sufficient evidence to warrant the conclusion that there is likelihood of harm being inflicted on the witnesses who have already testified and those who are yet to testify and, if so, does that constitute compelling reasons to deny bail in the circumstances of this case?

d. Does the general security situation and the imperatives of peace, security and public order constitute compelling reasons to warrant denial of bail?

e. Do case management needs necessitate the need to continue holding the Accused Persons in remand so as to ensure due completion of the case expeditiously?

f. Most of the Accused Persons have been in remand for close to two years.

33. Ten witnesses have now testified in the case. Without embarrassing the possible outcome of the case, I am compelled to say that the overall record of the Prosecution in terms of the strength of its case is decidedly mixed if we assume the ten witnesses who have testified are the key witnesses. The evidence has placed some Accused Persons at the scene of some of the killings or alluded to their alleged participation in their planning for the killings. For many other Accused Persons, there has been not as much as an iota of evidence linking them to the murders of the four victims in the case. Indeed, for some Accused Persons, they have not been mentioned adversely at all in the trial.

34. In the face of this, I am now required to make a determination of bail with respect to all the 18 Accused Persons. In doing so, I am faced with three landmines which, it will only be fair for all the parties involved for me to readily acknowledge:

a. First, I am required to make individual determinations of bail and not a collective one. This is because bail is an individual constitutional right to which every Accused Person is individually entitled unless compelling reasons are shown with respect to that particular individual. At the same time, however, evidence in a case such as this one is presented globally – and one must be careful to thread the compelling reasons with respect to each individual.

b. Second, in analysing whether there are compelling reasons to deny bail, one of the considerations the Court must take into account, as I will explain below, is the strength of the Prosecution Case. Yet, in doing that analysis, the Court must, at this point be exceedingly cautious so as not to shatter the presumption of innocence which forms the cornerstone of our criminal justice system.

c. Third, and related to the second consideration, the Court must be extremely cautious in using the strength of the prosecution case as a crucible to determine whether there are compelling reasons to refuse to admit any one Accused Person to bail so that any comments it makes or considerations it takes into account do not impermissibly prejudice or embarrass either the Prosecution or the other Accused Persons through any statements that it makes. This is due to the realization that at this stage the trial is half-way done and the Court must refrain from making statements which might effete the precious right to fair trial which is so highly prized in our Constitutional scheme.

35. Having mapped the conceptual landmines to guide me in this delicate task, I will now venture to do the analysis I am called to do.

36. As all the three parties to the case – the State; the Victim's family and the Defence – readily acknowledged, bail is a constitutional right enshrined in Article 49(1)(h) of the Constitution. The test the Court is required to use to deny bail in appropriate cases is similarly stated in Article 49(1)(h): it is only upon the showing of compelling reasons by the Prosecution that the Court will deny bail.

37. Hence, the Constitutional standard for denying bail is "compelling reasons" test. The burden is on the Prosecution to establish the existence of the "compelling reasons" that would justify denial of bail. Our

emerging jurisprudence on the question is clear as to the kind of evidence needed to establish the "compelling reasons": the evidence presented must be "cogent, very strong and specific evidence" and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, ***R v Muneer Harron Ismail & 4 Others*** **[2010] eKLR**. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons for purpose of bail beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point in the trial. See, ***Bail and Bond Policy Guidelines*** at p. 19.

38. I should preface my analysis by pointing out that Justice Mutuku, after due analysis of the prevailing circumstances at the time, concluded that there was demonstrable threat to certain witnesses to warrant the denial of bail at least until those witnesses had testified.

39. At the time, the Prosecution put the number of vulnerable witnesses at three or four. During our Status Conference hearing, the Prosecution increased that number to six or seven. Ultimately, we ended up taking the evidence of ten witnesses before reconsidering bail.

40. Three of the ten witnesses who have testified have now recorded fresh complaints about threats to their lives which they associate with their testimonies. Both the Prosecution and the Victim's Counsel argue that, in fact, the threat is to all witnesses who have testified as well as to those who have not testified in the case.

41. It appears readily obvious to me that there are serious security issues at Kihiu Mwiri. From the information available to the Court, it would appear that the situation has somewhat improved since mid-2016. Parties disagree on the possible cause of the improvement. The Victim's lawyer claims that it is because the Accused Persons were arrested and denied bail. The Defence argues that there is no demonstrable proof of that at all: indeed, the improved security coincided with Presidential attention to the situation which came concomitant with increased numbers of security apparatuses in the area; change in security personnel (including the transfer of the County Commissioner who had previously been associated with increase in conflict); and enforced issuance of title deeds by the Government at Kihiu Mwiri which has reduced the conflict in the community.

42. As part of these proceedings, I summoned an Assistant Chief who had been adversely mentioned as one of the people actively involved in organising a group that could harm witnesses. My view of the situation is that it is a serious problem of which the Criminal Justice System is but one of the responses – an important one – but perhaps not the most important response. The society at Kihiu Mwiri is riven with mistrust and suspicions based on the ideological divide one belongs to related to the Kihiu Mwiri Company. In the end, it is a literal re-enactment of the famous *mtego wa panya – huwashika waliokuwemo na wasiokuemo*. (The Mouse's trap which ends up trapping those targeted and those innocent.) The mistrust and suspicions are, unfortunately, well founded: too many people are counted dead; too many are missing and presumed dead; too much property had been damaged; too many friendships have been ruined; too many individuals are in prison from convictions on matters related to the land buying company. It is a sordid tale. It is a sordid tale which will not be fixed or unravelled simply by holding 18 members of that society in remand – whatever the level of their suspected complicity in masterminding of some of the happenings at Kihiu Mwiri – would fix.

43. Three witnesses have now recorded statements indicating that they are facing credible threats to their lives because they testified. They are brave enough to name a Chief and an Assistant Chief who, they believe, are involved in a plan to silence them. If this is true, and we must assume it is given the history of Kihiu Mwiri, then it invites the conclusion that the threats that the witnesses in this case face are not at all orchestrated solely by the Accused Persons. Whether the Accused Persons are in remand or not, it seems that there are those who feel powerful enough and feel that they can act with impunity to the extent that they can threaten witnesses and silence them as they deem fit.

44. In that case, while the Victim's families feel that the continued remand of the Accused Person is a necessary preventive measure to ensure their security and those of the witnesses who are yet to testify – and while their feelings are understandable, it is not at all clear that the logical response to the general

security situation in Kihiu Mwiri is to the continued holding in remand of all the Accused Persons.

45. The Defence would be correct to argue that such a blunt response to the break down in law and order would be tantamount to sacrificing the rights of the Accused Persons in order to secure peace and security for the rest of society. Needless to say, our Constitution no longer countenances such an approach. Such was the approach to Law and Order that justified the authoring into our law books the infamous, Public Order and Security Act: the logic that it is necessary to simply detain some "dangerous" citizens in order to maintain law and order for the rest of the society. That logic has been substituted in our Constitution with the opposite logic: that every Accused Person is presumed innocent, and entitled to bail (and not to remain in remand) unless compelling reasons are shown.

46. The authority of the Court to deny bail where compelling reasons are shown can now not be invoked as a reason for the security apparatuses (and the State) to refuse to undertake their foremost duty to protect all citizens and maintain law and order in the society. Where the alleged sources of threat are known and the potential victims of the illicit activities known as here, it would be to reduce the State's monopoly of violence and duty to protect its citizens to a sacrilegious impotence to conclude that only the remanding of particular Accused Persons who are not themselves the alleged sources of threats is the method to protect the potential victims.

47. What the most recent statements by witnesses show is a need for the Police to take the case much more seriously; to devise clear strategies for protecting the witnesses who have testified and those yet to testify that go beyond the duration of the trial and to investigate more thoroughly the threats the witnesses face. Since it is clear that there is a network that goes far beyond the Accused Persons, it follows that keeping the Accused Persons in remand is not the answer to the security situation facing the witnesses and their families.

48. I note that in our Constitutional scheme, the Director of Public Prosecution is given unusually strong powers to order the Inspector General of Police to undertake particular investigations of a criminal nature and report to him. Here, the Prosecution witnesses have reported facing threats for giving testimony in a criminal case brought by the ODPP. The proper response for the DPP would be to order investigations and, if they reveal actionable evidence, the prosecution of those involved.

49. My prefatory remarks are necessarily strident because they put in sharp perspective the other factors that the Prosecution and the Victim's Counsel raised as constituting compelling reasons to deny bail in this case.

50. I feel it necessary, for the sake of the families of the victims of the murders and enforced disappearances at Kihiu Mwiri as well as the general community at Kihiu Mwiri, to say that this Court does not take their risks and security situation at Kihiu Mwiri lightly. This Court empathises with their situation. I feel their anger. I feel their frustrations. But I am obliged to observe that the pathway to peace and justice chosen by our Constitution is one that assumes that aggrandizing personal autonomy and liberties – especially in the context of a criminal trial – is one that ensures our optimum aggregate collective peace, security and justice more than the alternative path that limits individual liberties in order to safeguard these important values and outcomes. Ours is a Constitution that wisely assumes that peace, security and justice can be achieved in the context of Rule of Law. For this to happen, each of the actors in the Governance, Law, Order and Security Sector must play their rightful role in ensuring sustainable peace, prosperity and security. For matters presented to the Criminal Justice System in the form of a criminal trial, the Court stands as the arbiter – sometimes an inconvenient one – who canvasses specific situations, applies agreed principles, and, if necessary, resets the relationships and the assumptions underlying them

51. For the residents of Kihiu Mwiri who, through the Victim's Counsel hoped that denial of bail would be the sine qua non to the sustainability of the fragile peace and security they currently enjoy, I urge them to demand durable peace and security from their Government. Such peace and security is possible without their Government insisting that some of them must give up their cherished Constitutional rights as a negotiated price.

52. In this case, I have carefully and anxiously considered the circumstances of this case, all the representations by the various counsels, the written documents submitted to the Court and the Bail Reports filed by the Department of Probation and After Care Services at the Court's request.

53. As I have remarked above, the existing security situation at Kihiu Mwiri does not, in my view, constitute compelling reasons to warrant continued denial of bail at this stage in the trial. It would be sufficient to warrant stringent bail terms – but not to deny bail.

54. My views are informed in part, by the fact that the Prosecution had informed the Court that there were 3-4 vulnerable witnesses; who needed to testify. They have now testified. I do not think it is fair to the Defence at this point in the trial to reclassify all the remaining witnesses as

> "vulnerable" as the Victims' Counsel suggested. Nothing has really happened on the ground since commencement of the trial to warrant that re-classification.

55. What about the strength of the Prosecution Case? I have thought carefully about this factor. I begin with a clear statement that in my view the strength of the Prosecution case can be, in an appropriate case, a legitimate factor to consider in considering bail. This is even more so when the Court has had an opportunity to hear witnesses and can tell the direction of the trial. However, when considering this factor after the trial has begun and some witnesses have been heard, the Court must be extremely cautious so that it does not violate the Accused's right to be presumed innocent as well as not to generally skew the Accused Person's right to fair trial through the statements, observations or conclusions that the Court may make at that stage.

56. To this extent, this factor more often than not benefits the Accused Person rather than the other way round: where it is clear at some point in the trial that the evidence against the Accused Person is tenuous, incredible, unconvincing, far-fetched or worse, a Trial Court is likely to grant bail where it was previously disposed towards denying it or loosening bail terms if bail had been granted but the Accused Person could not afford and therefore remained in custody. The logic is that for such an Accused Person, the incentive to abscond is much lessened by the quality and quantum of evidence presented at trial at the point of consideration of bail. It would follow that the opposite would be true – but there is a twist: the presumption of innocence and the admonition to Courts to fastidiously stand for fair trial kick in to caution the Court to be careful about making any conclusions about the evidence presented in assessing the incentive to abscond.

57. The care with which the Court must assess this factor halfway through the trial is compounded in a case, such as here, where there is more than one Accused Person. In such a case, any statement made with respect to one Accused Person may have a ripple effect on other Accused Persons by virtue of direct or oblique inference. In such a case, then, the Court is called upon to be even more cautious.

58. Such is the case here. The Prosecution is right that it has presented, up to this point, what would appear to be

> "strong" evidence (in the sense of ***Bhatt v Republic[1957] E.A. 332)*** against some of the Accused Persons on the strength of which the Court might find that there is a case to answer against the Accused Persons. However, it is also true that there are some Accused Persons against whom there appears, so far, to be very little evidence against them that it would appear absurd to conclude that they have any substantial incentive to abscond: no rational person would consider that the payoff for absconding are higher than to stand trial and vindicate oneself.

59. However, the Accused Persons are lumped together (in the "waliokuemo" and "wasiokuemo" style) which creates an opportunistic problem for the Court: commenting on this factor for some of the Accused Persons is necessarily a commentary for their Co-Accused Persons. This, then, makes this factor an incredibly difficult one on which to base a bail decision in the circumstances. More targeted prosecution of only Accused Persons strongly suggested in the investigations would have lessened this problem. In my view, in the circumstances, this factor will, therefore, affect the Court's consideration of bail

conditions but not whether bail should be granted or not.

60. Finally, on the question of the imperatives for case management as a factor in ensuring that the Accused Person turn up for trial and that the trial is concluded with expedition, I wish to state that this will rarely be a factor in whether to grant bail or not. The primary consideration in whether to grant bail is whether the Accused Person will show up for trial. If the Accused Person does not show up, the Court responds, in the first place, by cancelling bail and ordering the arrest of the Accused Person – indeed, this is usually a condition of all admittances to bail. This, then, blunts the fear that an Accused Person who has already been adjudged not to be a flight risk will fail to show up for trial.

61. I should point out that there are other factors which are in favour of granting bail here all things considered. They include the following:

a. The health conditions of some of the Accused Persons including the 7thand 16thAccused Persons whose medical conditions are well documented in the filings before the Court;

b. The fact that most of the Accused Persons are sole-bread winners of their families;

c. The fact that despite the Court's and all the parties' best efforts and cooperation, the trial has dragged on for more than two years.

62. In the end, therefore, I have concluded that there are no longer any compelling circumstances to continue holding the Accused Persons in custody during the pendency of this trial. However, the Court shall release the Accused Persons on stringent terms and conditions warranted by the specific circumstances of this case outlined above.

63. Consequently, the Accused Persons shall be admitted to bail on the following terms and conditions:

a. For the first six Accused Persons (1st Accused – 6th Accused), they each shall be released on their own recognisance in the amount of Kshs. 2,000,000/= (Two Million) and two sureties of a similar sum.

b. For these six Accused Persons, the following conditions shall apply:

i. A residency condition is imposed barring them, during the pendency of the trial, from residing or visiting Kihiu Mwiri without the prior written approval of the Deputy Registrar of this Court.

ii. Each of them shall report in person twice a week – on Mondays to the Investigating Officer in the Case and on Thursdays to the Deputy Registrar of this Court.

iii. Each of them shall report by phone to the Investigating Officer in this case every morning through a mobile phone number they will register with the Investigating Officer in this case as the mobile number which they ordinarily use.

c. For the remaining Accused Persons, they each shall be released on their own recognisance in the amount of Kshs. 1,000,000/= (One Million) and two sureties of a similar sum.

d. For these remaining twelve Accused Persons (7th Accused to 18th Accused), the following conditions shall apply:

i. A residency condition is imposed barring them, during the pendency of the trial, from residing or visiting Kihiu Mwiri without the prior written approval of the Deputy Registrar of this Court.

ii. Each of them shall report in person once a week – on Mondays to the Investigating Officer

in the Case.

iii. Each of them shall report by phone to the Investigating Officer in this case every morning through a mobile phone number they will register with the Investigating Officer in this case as the mobile number which they ordinarily use.

e. The Accused Persons are ordered to refrain from contacting the Prosecution witnesses in this case in any way whether electronically, in person, through agents or family or by phone or any other means directly or indirectly. Any verified reported contact shall automatically lead to cancellation of bail/bond.

f. The Accused Persons shall not participate in any way in the management and running of the affairs of Kihiu Mwiri Company during the pendency of this trial.

g. The Accused Persons shall attend every Court session as ordered by the Court. Failure to attend a court session shall lead to the automatic cancellation of bail/bond with respect to that Accused Person.

64. In view of the public interest and security issues concerning the case, the Court pledges to do all it can and utilise all the powers and authority inherent in it to ensure the due expedition of the hearing and finalisation of the case. All the parties are urged to play their respective roles to ensure this objective is realised.

Dated and delivered at Kiambu this 6th day of March , 2017.

JOEL NGUGI

JUDGE