



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 80 OF 2016

REPUBLICPROSECUTOR

VERSUS

POLYCARP OCHIENG AMIMO 1ST ACCUSED

KEN OCHIENG OGOLLA2ND ACCUSED

RULING

1. The accused persons **POLYCARP OCHIENG AMIMO** and **KEN OCHIENG OGOLLA** are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which are that on the 14th day of June 2016 at Dandora Phase IV Njiru Sub County within Nairobi County murdered **DENNIS MINANI MWANGI**.
2. They pleaded not guilty and by a Notice of Motion dated 20th December, 2016 they sought to be granted favourable bail and bond terms pending hearing which application was supported by their annexed affidavits sworn on 20th December, 2016.
3. On behalf of the 1st accused, it was deponed that he is engaged in the trade of selling clothes and had a fixed abode at Kariobangi South Estate where he lives with his wife and daughter and was therefore not a flight risk. He further deponed that from the committal bundle supplied to him and the number of intended witnesses, he believed that his trial would take longer to be determined and should therefore be released on bond. It was stated that he had committed not to contact witnesses or obstruct justice upon being released.
4. On behalf of the 2nd Applicant it was deponed that the same was a footballer for Dandora Hot Stars from where he draws allowances for playing football and further that he had a fixed place of abode at Kariobangi South Estate and was therefore not a flight risk.
5. The application was opposed by the prosecution through a replying affidavit sworn by CI Moses M. Mburu on 15th February, 2017 where it was deponed that the prosecution had a strong and irrefutable evidence that pointed to the accused persons' guilt. It was deponed that the applicants were charged with a very serious offence of murder where they stabbed the deceased who was a member of their rival group in Dandora with a knife and the temptation to abscond from the jurisdiction of the court was real.
6. It was further stated that after the incident the accused persons stopped going to Dandora evading arrest

by the police from 14th June, 2015 to 13th November, 2016 and that one of the suspects was still at large so there was a risk of intimidation of the prosecution witnesses who are friends and neighbours of the accused persons. It was further stated that the accused persons had no fixed abode.

PRE-BAIL REPORT

7. The court ordered for pre-bail report in compliance with the provisions of **Victim Protection Act and Bond and Bail Policy Guidelines**. In respect of the 1st accused it was stated that the same played football with Mathare United under 23 Football Club and Supa Loaf. He is married to one Mwanahamisi Ali who is a housewife with one child aged five years. The report confirmed that the accused had a fixed abode and a family that was ready to secure his attendance to court though the same may be considered a flight risk since the police was not able to trace him for a period of one year.

8. On the second accused, it was stated that the same has a degree in Bio Technology from Bungalo University India and at the time of his arrest was operating a small cyber café business in Dandora while playing football for All Starts football club. It was stated that he had a fixed abode with a family which was ready to guarantee his attendance to court if granted bond.

9. On the victim impact report it was stated that the deceased was the firstborn in his family and was trained in computer. At the time of his death he was playing football with Ghetto club. The family felt that the accused persons if released on bond would interfere with witnesses who were well known to them and resided in the same neighbourhood.

ANALYSIS AND DETERMINATION

10. Bond is now a Constitutional right for every accused person which can only be limited if there are compelling reasons to be advanced by the prosecution on a balance of probability. In this matter the only reasons advanced by the prosecution are that the accused are flight risk based on the fact that they could not be traced after the incidence, however the prosecution has not provided any details of the attempts if any which was made by the police to arrest the accused person. Further the fact that one of the alleged suspect has not been arrested cannot be visited upon the accused persons as the duty to arrest any suspect rests with the police.

11. It has also been alleged by the prosecution that the accused persons have no fixed abode, however this is controverted by the accused persons' sworn affidavit and is independently confirmed by the probation officer that the accused persons have a fixed abode with social net work support ready to guarantee their attendance to court if granted bond.

12. On the issue of the likelihood of the accused persons interfering with witnesses, the prosecution is under a duty to name the witnesses who are likely to be interfered with and the nature of the alleged Interference. It has not been shown to court that there is any relationship between the accused and the intended witness noting that it is not enough to allege that they reside in the same area with the accused person, further it has been submitted by the prosecution that the accused persons had been at large for a period of one year after the incidence, but they have not provided any instance of an attempt on the part of the accused persons to interfere with the prosecution witnesses.

13. The prosecution should be reminded that with the advent of the Constitution of Kenya 2010 the seriousness of the offence is now not a reason to deny the accused bond unless the same is supported by other surrounding circumstances.

14. From the analysis herein, it is clear and I find and hold that the prosecution has failed to prove to the required degree any compelling reasons to enable the court deny the accused persons their constitutional right to bond.

15. Having so found, the next issue for consideration is what would amount to reasonable bond terms. It is trite law that the principal purposes of bond/bail is to secure the attendance of the accused person to

attend court as and when required during the period of his trial. In this matter the court has to take into account the fact that the accused persons face a charge of murder where the only available sentence upon conviction is death sentence and therefore the bond terms must be those that shall guard against the temptation of the accused person to abscond the jurisdiction of the trial court in the course of the trial.

16. With that in mind, I would allow the application herein and order that each of the accused persons be released upon the following terms:-

a) Bond of Kshs. Five hundred thousand with two sureties of similar amount.

b) During the period of their trial the accused persons shall have no contact with any of the intended prosecution witnesses.

c) They shall report to the Deputy Registrar of this court for mention once after every ninety (90) days at dates to be fixed by the Deputy Registrar at the time of approval of bond terms.

DATED, SIGNED and DELIVERED at Nairobi this 6th day of April, 2017.

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J. WAKIAGA

JUDGE

In the presence of:-

Mrs. Kinoti for the State

No appearance for the Accused

Accused present

Paul court clerk