

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO 5 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

GEDION KAHWAI KIMANI.....ACCUSED

R U L I N G

1. The Accused herein, **Gedion Kahwai Kimani**, is charged with **murder contrary to section 203** as read with **section 204** of the **Penal Code**. It is alleged in the information dated 09/03/2016 that in the night of 22nd and 23rd February 2016 at an unknown time at Ngenda Village in Kariaini Sub-Location within Murang'a County, he murdered one **Mary Wambui Wanyoike**. On 09/03/2016 he pleaded not guilty to the charge. His trial is scheduled to commence on 25/09/2017. In the meantime he has applied to be admitted to bail by **notice of motion dated 13/05/2016**.

2. The Republic has opposed the application by a replying affidavit filed on 10/10/2016. The same is sworn by one PC John Andama, who has described himself as the investigation officer of the case. The grounds for opposing bail include –

(a) That the family of the Deceased objects to the accused being released on bail “for fear of their lives since the Accused has a history of violence”.

(b) That the Accused was rescued from members of the public who had arrested him, and wanted to lynch him, and that “the community is still furious ... and not ready to accept (him) back into the community”.

3. I have considered the submissions of the learned counsels appearing. Bail pending trial is now a constitutional right for any criminal offence that will be denied only for compelling reason; and any condition the court might impose for such bail must be reasonable. **See Article 49(1)(h) of the Constitution of Kenya, 2010.**

4. **Compelling reason** is not defined either in the constitution or in any statute that the court is aware of. However, definitions of the adjective **compelling** to be found in the **Oxford Advanced Learner's Dictionary (International Students' Edition)** are -

“(a) extremely interesting and exciting, so that one has to pay attention: examples – a compelling novel/account/story”.

(b) that one must accept or agree with: example – a compelling reason/argument”.

5. The prosecution, in objecting to bail, must thus establish by evidence the compelling reason in order to deny an accused person his constitutional right to bail pending trial.

6. The investigating officer says that the family of the Deceased “fear for their lives since the Accused has a history of violence”. None of those members of the Deceased's family have been named, and none of them has sworn an affidavit to give the factual foundation for those fears.

7. The investigating officer has further stated that the Accused could be lynched by members of the community should he be released on bail as they are “still furious” at the Accused. Whereas there may be instances where an accused person's safety may be a compelling reason not to admit him to bail, in the

present case not sufficient background facts to support this fear have been placed before the court, except vague references to a previous incident.

8. Whether or not there is compelling reason to deny an accused person his constitutional right to bail is a matter of judgment, not the discretion of the court; that compelling reason must be established by evidence. In the present case there is not such evidence.

9. In the event I will allow the application. The Accused shall be admitted to bail upon his own cognizance in the sum of KShs 500,000/00 plus one surety in like sum. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF JUNE 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 16TH DAY OF JUNE 2017