



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 5 OF 2016

REPUBLICRESPONDENT

VERSUS

CHARLES GITAU MBURU1ST APPLICANT

FRANCIS GACHANJA MBUGUA2ND APPLICANT

RULING

1. The accused persons herein **CHARLES GITAU MBURU** and **FRANCIS GACHANJA MBUGUA** faces the charges of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which are that on the 26th day of October, 2015 at about 10.30 a.m. at Quincy Mall in Otiende Estate Langata Area within Nairobi County jointly with others not before the court murdered **MOSES MUCHANGI NJIRU**.
2. They both pleaded not guilty to the charge and in exercise of their Constitutional Right under **Article 49(1)(h)** of the Constitution of Kenya 2010 moved the court to be released on bond pending trial.
3. In opposition of the application herein the State filed a Replying Affidavit sworn by **CPL JOSEPH CHIRICHIR** in which it was deponed that the accused did not qualify to be admitted to bail since the prosecution had a strong and irrefutable evidence that point to the guilt of the accused persons who were positively identified by the intended prosecution witnesses.
4. It was further deponed that the accused persons face a very serious offence of murder and therefore the temptation to abscond the jurisdiction of the honorable court is real should they be released on bond. It was further stated that there was a risk of intimidation of prosecution witnesses who identified the applicants and that D1, D2 and D3 who were working with Rasasi Investment Ltd are likely to be patronized by the applicants if released on bond.
5. It was further stated that the accused person only stated that they have business at Soweto slums but did not state where their houses were located in the expansive Kibera slums therefore the risk of the accused person fleeing from the jurisdiction of the court was real.

SUBMISSIONS

6. On behalf of the 1st accused it was submitted by Mr. Kangahi that the accused persons are at this stage presumed innocent and therefore the seriousness of the offence does not take away the accused persons' rights under Article 49(1)(h) to bail. It was submitted that the prosecution had not demonstrated how and the nature of the alleged interference and or intimidation of witnesses who are alleged to be working at Rasasi. It was submitted that the issues of the accused not

having a fixed abode can be cured by reliable sureties approved by court. These submissions were supported by Mr. Kimani for the 2nd accused and added that suitable sureties will secure the attendance of the accused persons to court.

7. Mr. Magoma for the state reiterated the content of the Supporting Affidavit and submitted that the accused persons were identified by witnesses whom they know and that since the accused person stay in the expansive Kibera slum if released on bond it will not be possible to trace them should they abscond.
8. In compliance with the provisions of Victims Protection Act 2014 and the Bail and Bond Policy Guidelines, the court ordered for a social inquiry report on the suitability of the accused persons being released on bond in which it was stated that the 1st accused is a resident of Kibera Soweto who was at the time of offence working as a Matatu tout having lost both his father and mother. As regards the second accused it was also stated that the same was working as a matatu tout at Route No. 8 in Kibera.
9. Bail is now a Constitutional Right of every accused person under the provisions of Article 49(1) (h) of the Constitution of Kenya 2010 though not absolute as the same can be denied where there are compelling reasons to do so. Whereas the Constitution has not defined what compelling reasons to be considered are, the principles upon which application for bond ought to be considered were set out by Chesoni J as he then was in the case of **Nganga v Republic (1985) KLR 451** in the following terms:-

“1. the court in exercising its discretion to grant bail to an accused person under Section 123(1) or (3) of the Criminal Procedure Code (Cap 75) should consider the following factors:-

- a. ***In principle, because the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that-***
 - i. ***The accused will fail to turn up at his trial on to surrender to custody***
 - ii. ***The accused may commit further offences or***
 - iii. ***He will obstruct course of justice.***
- b. ***The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration the court must consider-***
 - i. ***The nature of the charge or offences and the seriousness of the punishment to be awarded if the applicant is found guilty.***
 - ii. ***The strength of the prosecution case.***
 - iii. ***The character and antecedents of the accused.***
 - iv. ***The likelihood of the accused interfering with prosecution witnesses.***

10. In the matter before the court it has been deponed and submitted by the prosecution that the applicants stays in the expansive Kibera slum and that most of the prosecution witnesses work for Rasasi Investment Ltd which manages matatus plying the route wherein the accused persons have been working as matatu touts and are therefore well known to the accused persons.
11. I would therefore agree with the submissions by the State that there is a real possibility of interference with the said witnesses should the accused persons be released on bond.
12. It has also been submitted that the applicant stays in the expansive Kibera slum, I would agree with the submission by the prosecution that tracing the accused person in the said area if they chose to abscond will not be easy. In this I find support in the holding by Justice Ombija in **High Court of Kenya at Nairobi Criminal Case No. 19 of 2013 Republic v Julius Kaigai Kamande** where the Judge has this to say:-

“Taking judicial notice of the said guidelines (in reference to Bail and Bond Policy Guidelines) and juxtaposing the same against the disclosed facts of the case, it is clear to me that the accused person lives in Mukuru kwa Njenga an expansive slum where the

houses are not numbered and hence it would be difficult to locate him in case he fails to attend court when and if required to do so.....”

13. Applying the above principles in the case before the court, I am persuaded that there are compelling reasons provided for by the State to enable the court deny the accused persons their Constitutional Right to bail at this stage.

14. I therefore decline to grant the accused persons bond or bail at this stage and will remain in custody but are at liberty to review their bail application upon the evidence of D1, D2 and D3 being taken.

DATED, SIGNED and DELIVERED at Nairobi this 14th day of April, 2016

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwenda for the state

Mr. Kimani for the accused

Accused present

Tabitha court clerk