



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.92 OF 2015

REPUBLIC.....RESPONDENT

VERSUS

RESTUS KITHINJI GITONGA.....1ST ACCUSED

PENINAH KANANA MWENDIA.....2ND ACCUSED

RULING

The accused persons are charged with the offence of murder contrary to **Section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya**. By two Notice of Motion Applications brought pursuant to **Article 49 (1) (h) of the Constitution of Kenya and Section 124 of the Criminal Procedure Code CAP 75 of the Laws of Kenya**, the applicants have sought to be released on bail pending the hearing and determination of this suit.

The gist of the applications is that the accused persons have children who require constant care which cannot be given while they are in custody; that the hearing of this matter is likely to take a considerable period of time before its finalization and that the accused persons are ready and willing to abide by all the terms and conditions that may be imposed by the court and will attend court when required to do so.

The application was opposed. Mr. Mulochi, Counsel for the State, in opposing the application, sought to rely on an affidavit sworn by PC Evelyn Akoth, the investigations officer in this case. She deposed that following her investigations, the accused persons if released on bail might endanger their lives as the community is still angry with their actions and will most certainly take the law in their own hands and harm the accused persons.

The court requested for pre-bail reports. According to the pre-bail report in respect of the 1st accused filed in court on 4th March 2016, he is said to be a notorious petty thief and is a vagabond. The family of the deceased is still bitter about the incident and was of the opinion that it was too soon to consider releasing accused 1 on bond as the matter was still fresh in their minds. The area assistant chief informed the probation officer that the accused 1 is known to be idle in the market and sometimes does casual jobs; that many petty cases had been reported about him and that he could not guarantee the safety of the accused 1; that members of the community wanted to hold demonstrations as they felt the area was becoming insecure.

With regard to the 2nd accused, the same sentiments were expressed by deceased's family and community. The area assistant chief stated that he could not concretely rule out the possibility of the accused interfering with witnesses and that further he could not guarantee the safety of the accused because after the incident members of the community wanted to hold demonstrations as they felt the area was becoming insecure.

I have considered this application, submissions by Counsel and the pre bail reports. The principles to be considered in such an application include:

- 1. Whether the accused will turn up for his trial;**
- 2. The seriousness of the charge;**
- 3. Character and antecedents of the accused person;**
- 4. Whether the security of the accused will be guaranteed if released;**
- 5. Whether there will be delay in hearing the case.**

Even though an arrested person has a Constitutional right to bail/bond pursuant to **Article 49 (1) (h) of the Constitution (2010)**, the said right is not absolute since the same provision provides that an arrested person shall not be released if there are compelling reasons. The Constitution does not define what compelling reasons are and each case will depend on its own special circumstances taking into account the above principles.

The offence herein was committed in December, 2015 only three months ago and the incident is still fresh in the minds of the deceased's family and the community. From the pre-bail report, the local administration interviewed were of the view that the situation is still volatile and may be the court should decline bond at this time till a later time when hostilities will have subsided. It seems that if the accused are released on bond, their security cannot be guaranteed because the community tried to harm them before their arrest.

Of the 1st accused, the social inquiry report indicates that he is an idler and a petty thief which touches on his character negatively.

The Investigating Officer has deponed that the accused will interfere with witnesses but he did not avail any evidence to support that allegation and it remains as such.

The primary consideration in such an application is whether accused will turn up in court for his trial. This court takes into account the fact that the deceased was a co-wife to accused 2. Accused 1 is a nephew to deceased's husband. They are all related. The tempers are said to be still high. It is also contended that the accused persons were nearly lynched by the mob before arrest and their security cannot be guaranteed if released on bond. For the above reasons, I decline to grant bond at this stage. Bond application may be reviewed after about 6 months. Application is declined at this stage.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

12/4/2016

PRESENT

Mr. Mulochi for State

Mrs. Ntarangwi for Accused

Ibrahim/Peninah, Court Assistants

Both Present, Accused