



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 3 OF 2016

REPUBLICPROSECUTOR

VERSUS

ALFRED MARANYA OGESI Alias BROWN 1ST ACCUSED

AMBANI AKASI Alias WASIWASI 2ND ACCUSED

MARIGO PROTUS SARARA Alias SARARA 3RD ACCUSED

JULIUS OMANYO OCHIENG4TH ACCUSED

RULING

1. The applicants herein:-

1. ALFRED MARANYA OGESI alias BROWN
 2. AMBANI AKASI alias WASIWASI
 3. MARIGU PROTUS SARARA alias SARARA
 4. JULIUS OMANYO OCHIENG are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on the 16th day of September, 2013 at about 7.30 p.m. at Nyam Hotel along Duruma Road within Nairobi County jointly murdered IRUNGU KAMAU.
2. They all pleaded not guilty to the said charge and by a Notice of Motion dated 14/1/2016 under Article 49(1) (h) of the Constitution of Kenya 2010 the 3rd accused through the law firm of OSORO MOGIKOYO sought an order to be released on bail pending trial which application was supported by an annexed affidavit of ALPHAXARD MOGIKOYO, in which it was deponed that the trial relates to an incident that took place in 2013 and that the applicant was arrested on 7/1/2016, produced before the magistrate court on 8/1/2016 and detained at Central Police station until 12/1/2016 when he took plea. It was stated further that an applicant who is an employee of Nairobi City County will abide by all conditions that court might impose upon him if released on bond.
3. By an application dated 28/1/2016 the 2nd accused through the law firm of S.J Nyang & Co. advocates also sought an order to be granted reasonable bond and bail terms pending the hearing of the case. The application was supported by an annexed affidavit sworn by the applicant BENSON AKASI and his Advocate in which it was deponed that the applicant is an employee of Nairobi City County Government with over 23 years of service and the sole breadwinner to his

- young family. It was further stated that the same was under medication which requires consultation with the doctor.
4. The 1st and 2nd accused persons on 22/2/2016 filed an affidavit in support of the applications herein sworn by their advocate on record Mr. Collins Ario in which it was deponed that if released on bail, the applicant undertakes to attend court at the time and place mentioned in the Bond and abide by any condition that the court may attach to their release on bond. It was further stated that being state officers they were not a flight risk with their humble and fixed abode and place of residence within Nairobi. It was further stated that the investigations were complete and prosecution has supplied to them bundle of documents and therefore there was no compelling reason to deny them their Constitutional Right to bond.
 5. In response to the said applications the state through PC VINCENT LANGAT filed an affidavit in which it was deponed that in the month of September, 2013, CID Kamukunji officers received information from various witnesses indicating that on 16th September, 2013 IRUNGU KAMAU being one of the hawkers trading within the Nairobi Central Business Area together with other workers while on their way to KK BAR for a funeral arrangement for one of their colleagues encountered City County askaris armed with various weapons and upon which the hawkers ran to different directions with the deceased entering Nyam Hotel.
 6. That the City County askaris stormed the hotel, pulled the deceased to the corridor thereof and when they came out the deceased followed them bleeding. The deceased was rushed to Guru Nanak hospital and later on to Kiambu hospital where he succumbed to the injuries while being treated.
 7. It was deponed further that upon being directed to arrest the accused persons on 19th June, 2016 by the ODPP, he wrote to the Director of City Inspectorate but received no co-operation. It was further deponed that upon the arrest of the accused persons, various persons had reported bodily assault caused upon them by the accused persons indicating that they could not do so prior as they feared for their lives, thus investigations files are in the process of being opened. It was deponed that there were crucial information that the 2nd accused was wanted at Serem Police station to answer to a charge of murder and there was high possibility of him absconding if released on bond.
 8. It was deponed that if released on bond and the accused persons threaten, intimidate or kill potential prosecution witnesses, the damage will be too late to salvage the situation and therefore public interest, public order, peace and security required that the accused persons be denied bail.

SOCIAL INQUIRY REPORTS

9. In compliance with the provisions of the Victims Protection Act No. 17 of 2014 and in particular Section 4 (1)(b) thereof which provides that every victim is as far as possible given opportunity to be heard and respond before any decision affecting him/her is taken and Section 10(b) to have their safety and that of their family considered in determining the condition of bail and release of the offender and taking into account the provisions of the Bond and Bail Policy Guidelines, the court ordered for a social inquiry report on the accused persons which have been presented in court and in which the following recommendations were made:-

a. 1ST ACCUSED

It was stated that the family of the accused is desirous that he be granted bond since his wife is jobless and children depend on him. He has a fixed abode in Kitengela and his employer still has a positive view on him. On the other hand the victim's family claimed that they may not be safe should the accused be granted bond since they were familiar to each other.

b. 2ND ACCUSED

It was stated that the same had very supportive relatives. He had a fixed abode and a father of nine children in school and the sole bread winner. He was known to the local Administrators and his church. The wife of the deceased on the other hand felt insecure should the accused be released on

bond before she and other witnesses testify. The hawkers representative were allegedly reported to had pointed out that they could not guarantee that nothing untoward shall befall the accused person if released on bond.

c. 3RD ACCUSED

It was stated that the family of the accused was desirous that he be granted bond. His wife was an employee of Nairobi City County and the accused was a family man with a fixed abode and a job to protect and therefore not a flight risk. It was stated that the wife of the deceased being a hawker was apprehensive about her security should be accused be released on bond and that the other hawkers were contemplating to take the law into their hand should the accused be seen in the streets before the hearing and conclusion of the case.

d. 4TH ACCUSED

It was stated that he had been an employee of Nairobi City County Government for many years and would not abscond if released. It was further stated that his two children who were staying with him at Kayole were now depending on relatives for their upkeep. On the other hand it was stated that the victim's family on other hand saw the accused as a threat to their security and that he may be endangered if seen on his normal duties as they are likely to take the law into their hands.

SUBMISSIONS

10. On behalf of the 1st accused, it was submitted that he had fully co-operated with the investigation and that none of the prosecution witnesses had expressed any fear of the accused person. It was submitted that no compelling reasons had been advanced to deny the accused person his right to bail with the threat by the hawkers to take law into their hands bordering on criminality. On behalf of the 2nd accused it was submitted it was speculative that there was a case at Serem Police Station in respect of the same since no specifics were provided by the prosecution. It was submitted further that there was nothing to stop the police from arresting the accused even if he was on bond and further that the pre-bail report was favourable to the same being released.
11. It was submitted further that the matter was a 2013 matter and since that time all the accused persons have been in Nairobi. On behalf of the 1st and 4th accused it was submitted that the accused persons were family men who should be allowed to continue taking care of their families. It was submitted that the fear of the wife of the deceased was not grounded upon any fact and that she had not reported to the police any alleged threat. It was submitted that since 2013, there has not been any indication that the accused persons had acted in any prejudicial manner. It was further submitted that the nature of the job of the accused person is a risky one since they must maintain law and order in the city.
12. On behalf of the prosecution it was submitted that the rights of the accused persons must be balance with that of the public. It was submitted that if convicted the accused persons will be sentenced to death and therefore the possibility of absconding was high. It was submitted that the prosecution had a very strong case against the accused persons and that there was real likelihood of the accused persons interfering with witnesses since the relationship between the accused persons and the potential witnesses is that of an implied master and servant. It was submitted that the court had a duty to protect the accused persons by placing them in custody until the case is heard.
13. It was further submitted that the court take into account the preservation of public order. It was submitted that the 2nd accused only came to court after a warrant had been issued for his arrest which confirmed that he was a flight risk. It was submitted that since the year 2014 when the CID Kamukunji was directed to arrest the accused persons, there was no co-operation from the Directorate of City Inspectorate and that the 1st, 3rd and 4th accused were only arrested by the flying squad.

DETERMINATION

14. Bond is now a Constitutional Right of every accused person under the provisions of Article 49 of the Constitution of Kenya, 2010 which can only be limited if compelling reasons are advanced in the following terms:-

“49 (1) (h) An arrested person has a right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.”

15. The Constitution does not define what compelling reasons are but they must be those that will make a court exercising in its judicial mind, limit the enjoyment of the rights provided therein while balancing the applicant’s right to be presumed innocent at this time with the public interest on the other hand, taking into account the fact that if released on bond the accused person may endanger the safety of the public or any person, attempt to evade trial, attempt to influence or intimidate witnesses or to interfere with evidence.

16. It should also be noted that Section 124 of the Criminal Procedure Code provides that the bond if granted must be conditional that the person so released shall attend at the time and place mentioned in the bond shall continue to attend until otherwise directed by the court or police officer. It therefore follows that the primary consideration to an application of this nature is that the accused person shall be available to stand trial until the case is completed.

17. It is the duty of the state to provide the compelling reasons which must be done on a balance of probability. It must also be noted that the Bond and Bail Policy Guidelines requires the court to take into account the rights of the victims as provided for under the provisions of Section 4(1) of Victim Protection Act which I have herein done.

18. In the matter before the court the State has advanced the following reasons:-

- a. There is high possibility that the accused persons will abscond if released on bail.
- b. The accused persons are likely to threaten, intimidate or kill potential prosecution witnesses.
- c. The members of the Hawkers Association in which the deceased was a member are likely to cause harm to the accused person if released on bond and therefore their security and safety demands that they should not be granted bond.

19. **Mativo, J in Nyeri High Court Criminal case No. 11 of 2014 REPUBLIC vs ABDI OSMAN JIBRIL** quoted with approval the Supreme Court of India case of **MASOOR v STATE OF UTTAH PRADESH and Another (2009) 14 SCC 286** as follows:-

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless such protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case.....”

20. In the matter before the court it must be pointed out that the offence herein is alleged to have been committed on or about 16th September, 2013 and for all this period of time all the accused persons have been performing their duties with the Nairobi City County Government. None of them has attempted to move from the jurisdiction and there has not been any report of any of them interfering with any of the prosecution witnesses including the wife of the accused who has in the copy of statement annexed by the prosecution confirmed that she is known to the accused persons personally.

21. It was submitted by Miss Mwaniki that it was the employer of the accused persons who did not co-operate with the police in having the accused persons arrested. No evidence has been tendered to show that the accused person interfered with the duty of the police to arrest them or attempted to stop the police from arresting them. It is the finding of this court that the duty of arresting any accused person falls upon the police. If the police were unable to arrest the accused persons for whatever reasons, it was open to them to seek appropriate orders. The accused persons cannot be punished for an act that was not within their control and power. There is no evidence tendered by the prosecution to show that the accused persons were aware that they were being sought by the

- police to answer to the charges herein.
22. On the issue of an alleged intimidation of and interference with potential witnesses, the state was under obligation to provide the particulars of any witnesses whom the accused persons are likely to interfere with and it is the duty of all Kenyan citizens including members of the association of hawkers to maintain law and order without attempting to take the law into their hands as stated in the pre-bail report. They must be alive to the fact that at this stage the accused persons are presumed innocent and must enjoy all the Constitutional Rights Kenyans fought for and realized in the enactment of the Constitution of Kenya 2010. It is the duty of the State to provide security to all Kenyan citizens including the accused persons herein if and when the same are released on bond and it is the duty of the members of the Hawkers Association to maintain law and order.
23. I would agree with the submissions by Miss Mwaniki for the State that the relationship between the accused persons and the hawkers has an implied master-servant relationship, but this must be balanced against the submissions by Mr. RIWO for the 1st and 4th accused person that the duties of the accused persons which include among others maintaining law and order is a risky one but must be done by somebody and in respect of this case the accused persons.
24. From the affidavits and submissions before the court, I am not persuaded that the state has provided compelling reasons to the required standard to enable the court deny the accused persons their Constitutional Right to bail/bond pending trial since the issues raised by the prosecution can be dealt with through the provisions of Witnesses Protection Act and Section 117 of the Penal Code which penalizes interference with witnesses.
25. Where the liberty of a Kenyan citizen is at stake and where the court is called upon to deny one his Constitutional Rights there must be placed before the court sufficient compelling reasons to enable the court do so. I therefore find that there are no compelling reasons advanced to enable me deny the accused person their right to bail.
26. Having found out that there are compelling reasons, the next step for the court to do is to set what it considered reasonable terms upon which the accused persons ought to be released. The court is alive to the fact that all the accused persons are employees of the Nairobi City County as enforcement officers. It is also clear that the offence herein is alleged to have been committed in the year 2013 wherein the deceased lost his life. The court is also alive to running battles between the hawkers and the City County personnel. I am therefore of the considered view that all the accused persons be admitted to bond on the following terms:-

- a. Bond of Kshs.2,000,000/- with one surety of similar amount.
- b. In the alternative cash bail of Kshs.500,000/- together with a bond of Ksh.500,000/-.
- c. During the period of this trial all the accused persons shall be redeployed by the Directorate of City Inspectorate to serve in any other Section rather than within Central Business District.
- d. The accused persons shall report to the officer commanding Central police station Nairobi immediately upon their release and shall be reporting to the same once after every 30 days on the last Thursday of each subsequent month until the determination of this case.

DATED, SIGNED and DELIVERED at Nairobi this 6th day of April, 2016.

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Mwaniki for the state

Mr. Riwo for 1st and 4th accused persons

Mr. Mogikoyo for Nyang' for 2nd accused

Mr. Mogikoyo for 3rd accused

All accused persons present

Tom court clerk