



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

H.C.CRIMINAL CASE NO.6 OF 2016

REPUBLICPROSECUTOR

VERSUS

GODFREY MADEGWA alias GODI

AND SIX OTHERSACCUSED

RULING

1. The applicants, **Godfrey Madegwa alias Godi, Joyce Omusula Okoti, Benard Aburili, Parick Anyangu, David Okoth alias Daudi, John Manyasa and Jackson Amukoya alias Dan**, were arraigned before Court on 10th February 2016 for the offence of murder. They pleaded not guilty and the case was fixed for hearing on 18th May 2016. Immediately after pleading to the information, their counsel applied that each of them be released on bond. Mr Athunga was for the 1st accused, Mr Minishi for 2nd accused, and Mr Shifwoka for 3rd, 4th, 5th and 7th accused persons. Mr Oroni was for State and Mr Manyoni was watching a brief for the family of the deceased.

2. Mr Athunga in applying for bail, submitted that the 1st accused person is a person with a fixed abode and is willing to abide by any conditions the court may impose. Mr Minishi for the 2nd accused also prayed that his client be released on bail. Mr Shifwoka for the 3rd to 7th accused urged that his clients be released on reasonable bond terms in terms of **Article 49(1)** of the Constitution. Counsel submitted that the accused persons have fixed abode, are not a flight risk and will abide by bond terms the court may impose. Learned counsel further submitted that the accused will not interfere with witnesses and that there was no risk to their own safety.

The application for bond was opposed by the prosecution counsel. Mr Oroni in opposing the application for bail submitted that releasing the accused persons on bail at the time, was not proper since the situation on the ground was volatile and the victim's family was yet to come to terms with the reality of the death of their kin. According to prosecuting counsel, the situation was unsafe to release the accused persons on bail and asked that the application for bail be deferred to a future date. Counsel submitted that he was aware of the constitutional right to bail but that circumstances then were that it was unsafe to the accused and the villagers.

3. In response to the prosecuting counsel's submissions in opposition to the application for bail, all counsel for the accused were in one accord that the prosecution had not given compelling reasons why the accused could not be released on bail, more so because the prosecution had not alleged that the accused would interfere with witnesses or would abscond and therefore fail to turn up during the hearing of their

case. The defence challenged the prosecution's stand saying that the investigating officer had not sworn an affidavit to show there were compelling reasons or that the accused persons did not deserve to be released on bail.

4. On its own motion, the Court ordered that the County Probation Officer (Kakamega County) prepares a pre-bail report to assist the court in determining the suitability of the accused persons being released on bail and set the matter for mention on 15th March, 2016 for consideration of bail. On that day the report was not ready and the probation officer, M/s Ojwang requested for a further 14 days to complete the reports which the court acceded to and set the matter for mention on 30th March, 2016, on which date, the reports were ready hence this ruling. The reports are now on record.

5. The supreme law of the land allows an accused person to be released on bond pending trial. **Article 49(1)(h)** of the Constitution provides:-

“An accused person has the right –

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(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

6. Bail pending trial is a constitutional right and the only limitation is when there are compelling reasons not to release the accused on bond or bail. The consideration when the court is considering whether or not to release an accused person on bond or bail is primarily, whether the accused will attend court at and during the trial. An accused person is required to be present during the hearing of his case and while granting bail the court should be satisfied that he will be present. That is to say the accused is not a flight risk, one who will get outside the jurisdiction of the court and therefore fail to honour his bond terms to attend court during trial.

7. The other consideration is whether the accused will interfere with witnesses who will testify in the case during the hearing. Such a possibility will inform the court's decision whether to grant bail or not. A threat to witnesses impacts negatively on the fair trial of the case and where such a scenario is shown to the satisfaction of the court to exist, the possibility of releasing an accused on bail will be minimal.

8. It is the duty of the prosecution to demonstrate to the court with probability that there are compelling reasons not to grant the accused persons bail. In opposing the application for bail, the learned prosecuting counsel has not alleged that the accused will abscond and therefore not attend court, or that they will interfere with witnesses. Rather, the prosecution has argued that the situation on the ground is volatile and it will be risky to release the accused persons without elaborating what that means.

9. The accused in this case were arrested between 15th and 17th January 2016 and first appeared in court on 8th February 2016 and the plea was taken on 10th February 2016. This means investigations in this matter are complete and there is no allegation that investigations are still ongoing. That is why the accused have been arraigned in court. Witnesses have already recorded statements and the prosecution knows its witnesses which is not in itself a threat. In any case the law requires the State to protect people and their property and if there is a threat which would appear to amount to a criminal offence, law enforcement Agencies are bound to take appropriate steps in accordance with the law.

10. When the accused took plea and application for bail made, there was no affidavit from the investigating officer giving what would be compelling reasons not to release the accused persons on bail. The learned State Prosecuting Counsel did not rely on any tangible information to oppose the release of

the accused on bail. However on 14th March 2016 just a day before the scheduled mention, an affidavit was belatedly filed which appeared to suggest that there were compelling reasons not to grant bail to the accused. With greatest respect, the affidavit is in general terms and whereas there are 7 accused, it does not point to a particular accused person who is a flight risk or a threat to witnesses or community that would amount to a compelling reason to deny such a person bail.

11. **Chesoni J** (as he then was), addressing himself on the issue of bail pending trial in the case of **Nganga v Republic** [1985] KLR 451 rendered himself as follows:-

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions ... generally in principle and because of 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 there are substantial grounds for believing that;

- a) the accused will fail to turn up at the trial or to surrender to custody or;
- b) the accused may commit further offences; or
- c) he will obstruct the course of justice.

The primary purpose for bail is to secure the accused person’s attendance to court to answer the charge at the specified time. I would therefore agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial.”

12. Although Chesoni J was dealing with the question of bail pending trial under the repealed constitution but which nonetheless he found was a constitutional right, **Article 49(1)(h)** of the Constitution makes bail a constitutional right without exception to the type of offences and the only time bail should be denied is where there are compelling reasons. Those compelling reasons must be clear and demonstrable by evidence but should not hinge on mere speculation.

13. I have considered this matter carefully and the positions taken by the prosecution and the investigating officer whose affidavit does not seem to be in tandem with the probation officer’s reports on each of the accused persons. The situation on the ground seems to be calm now and except in a limited situation, there does not appear to be a problem if the accused are released on bail. I am also satisfied that the security agencies on the ground are capable of dealing with any situation that may present itself.

14. The accused persons have asked this Court to uphold their constitutional right to bail pending trial, and this Court having given due consideration to all matters in this case, I am persuaded that the best course to take is to uphold their constitutional right and grant each of them bail, there being no compelling reason to the contrary. I will therefore admit the accused persons to bond pending trial on the following conditions:-

1. Each accused person shall be released on a bond of Kenya shillings one million five hundred thousands (Kshs.1,500,000/-) with one surety of like sum.
2. The accused persons shall not threaten witnesses or interfere with the case while out bond and shall attend court without fail whenever required to do so.
3. The accused persons shall not leave the jurisdiction of this court without the court’s prior permission.

Dated and delivered at Kakamega this 5th day of April 2016.

E. C. MWITA

JUDGE