



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL MURDER CASE NO. 17 OF 2015**

**REPUBLIC.....RESPONDENT**

**-VERSUS-**

**ELIAS CHOMBA.....1<sup>ST</sup> APPLICANT/ACCUSED**

**PATRICK NJIRU MWAI.....2<sup>ND</sup> APPLICANT/ACCUSED**

**PAUL WARUI.....3<sup>RD</sup> APPLICANT/ACCUSED**

**RULING**

1. **Elias Chomba, Patrick Njiru Mwai and Paul Warui** the applicants/accused persons herein are all charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 12<sup>th</sup> September, 2015 at Komboni Sub location, Kangai Location, Mwea East sub county within Kirinyaga County unlawfully murdered one JOHN MUSEBIU. All the accused persons denied the offence and the case is pending for trial.
2. The applicants/accused persons have moved this court vide a Notice of Motion dated 5<sup>th</sup> February, 2016 for bond pending trial citing the following grounds as a basis for their application.
  - i. ***That they have pleaded not guilty to the charge and the case is scheduled for hearing on 3<sup>rd</sup> May, 2016 coincidentally the same date set for this ruling.***
  - ii. ***That the accused persons have a right to be admitted to bail and that there are no compelling reasons.***
  - iii. ***That the applicants have a right to a presumption of innocence until the contrary is proved.***
3. The application for bond was supported by an affidavit sworn commonly by all the accused persons on 5<sup>th</sup> February, 2016. In the said affidavit, it is deponed that Paul Warui, the 3<sup>rd</sup> applicant is sickly and requires daily medication as he is asthmatic. A medical document has been exhibited as a demonstration of the medical condition.
4. The applicants' counsel **Mr. Ngigi** in his oral submissions placed emphasis on the constitutional rights of the applicants provided under **Article 49 (h)** of the **Constitution** and argued that there was nothing to suggest that the applicants were likely to abscond if granted bond. He faulted the investigation officer's assertions in the replying affidavit that an attempt to interfere with witnesses had been made by friends to the applicants arguing that there is no affidavit by any witness deposing that he/she had been threatened and by whom. The applicants further submitted that the alleged third parties interfering with witnesses were at large and so keeping them in custody would not solve the problem if any.

5. The respondent/state through **Mr. Sitati** learned counsel from the Office of the Director of Public Prosecutions opposed the application by the trio and relied on the replying affidavit of inspector Anselmy Inyanga, the investigating officer in this case, to support his objection to the applicants being granted bond pending trial. His objection was based on 2 grounds namely:
  - i. *That the applicants are likely to abscond if released on bond.* and
  - ii. *That they are likely to interfere with witnesses occasioning miscarriage of justice.*
6. Mr. Sitati relied on a report made to the Police by what the investigating officer termed as key witnesses to the effect that ‘boda’ ‘boda’ riders said to be friends to the applicants herein had threatened them and drew the court’s attention to the copy of Occurrence Book extract detailing the report. The state expressed their fear that releasing the applicants on bond may precipitate more threats to the witnesses.
7. On the question of absconding, the respondent pointed out that the applicants were arrested 13 days after the incident and were arrested at night as they could not be traced during the day. He added that an accomplice to the offence is still at large and this in his view demonstrated that the applicants were a flight risk. Mr. Sitati urged this court to find the reasons advanced compelling enough to deny the accused persons right to bail and if the court was inclined to grant bail then it should only consider doing so after all the key witnesses have testified.
8. I have carefully considered the application and oral submissions made by both learned counsels.

The right to bail is in the Constitution as conceded by both counsels. **Article 49 (1) (h)** provides that an arrested/accused person has the right to be released on bond or bail on reasonable terms pending trial unless there are compelling reasons to deny him/her that right. This is premised on the right to fair trial which includes the right to be presumed innocent until the converse is proved. The state under the law has the burden to prove or demonstrate that they have reasons that are compelling enough to deny the accused persons their right to bail given that they are still presumed innocent in the eyes of the law.

9. The state has argued that the right to bail is not absolute which is correct as the same is left to the discretion of the court to determine whether the reasons given by the state in objecting the release of the accused person on bail is indeed compelling. Although the law does not define what constitutes ‘compelling reasons’ the ordinary meaning of the word compelling according to Oxford English Dictionary means that which “powerfully evokes attention and admiration.” Black’s Law Dictionary defines the word as that which a court finds convincing. The above definitions therefore calls upon the prosecution to bring out strong and convincing reasons to deny the accused persons their right to bail.
10. The prosecution’s argument that the applicants are likely to abscond if released on bond because it took time for the Police to arrest them in my considered view is not compelling enough even if they were arrested at night. If time of arrest was to determine whether a person was to be granted bond or not, the right to fair trial would be compromised. The state needed to have done more to demonstrate that the applicants’ conduct demonstrated that they wanted to evade justice. The claims by the investigating officer that the applicants are flight risk is not well substantiated. This court is persuaded by the authority cited by the applicants’ counsel in the case of **WILLIAM MWANGI WA MWANGI -VS- R (Kerugoya Murder case No. 6 of 2012)** where the court held that the main consideration in determining whether an accused should be granted bond or not is whether the accused will turn up in court for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bond. This Court asked for a social inquiry to be conducted on all the accused persons herein and though the report is not binding to this court the reports show that all the accused persons have fixed abodes and are all married with families. This court considers that with adequate security and reasonable terms, the prosecution’s concerns can be addressed adequately.
11. On the issue of interfering or intimidating witnesses in this case I find that the prosecution’s contention in that regard is remote and not compelling enough. The investigating officer has deposed that a report was made at Sagana Police Station that people believed to be friends of the accused persons herein threatened witnesses in this case. I have looked at the report made as per

the copy of Occurrence Book extract exhibited by the investigating officer and the reasons advanced by the investigating officer and find the same to be speculative. There is nothing to show that the accused persons had anything to do with the alleged threats and there is nothing to show that the Police took action against the culprits. Furthermore the alleged culprits are still at large and keeping the accused persons in custody merely on this ground will not serve any useful purpose.

In the end I find that the reasons given by the prosecution to deny the applicants their rights to bail are not convincing to this Court. I find merit in the application dated 5<sup>th</sup> February, 2016. The same is allowed. Each of the accused persons may be released on a bond of Kshs.1,000,000/= each with a surety of a similar amount. I further direct that the accused persons while on bond shall not either by themselves or through agents try to contact the witnesses in this case in any way. The accused persons shall strictly adhere to the terms herein and appear in court every time they are required to do so without fail.

***Dated and delivered at Kerugoya this 3<sup>rd</sup> day of May, 2016.***

**R. K. LIMO**

**JUDGE**

3.5.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Accused 1 present

Accused 2 present

Accused 3 present

Interpretation English-Kikuyu

Ngigi for accused persons present

Sitati for State present

**COURT:** Ruling dated, signed and delivered in the open court in the presence of Ngigi Advocate for all the accused persons and Mr. Sitati appearing for State.

**R. K. LIMO**

**JUDGE**

3.5.2016