



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 79 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE KUTOSI.....1ST ACCUSED

YUSSUF MATACHI NEMUKOI.....2ND ACCUSED

WAKOYE JOSEPH WAHATA.....3RD ACCUSED

PETER WAMENDU OCHAYA.....4TH ACCUSED

RULING

The four accused persons are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this charge are that on the 7th day of July 2013 at Mlango Kubwa Area in Starehe District within Nairobi County they murdered Stephen Mutabali (deceased). The four have denied committing this offence.

By a Notice of Motion dated 27th April 2016 and filed on 6th May 2016, the four accused persons have moved this court seeking orders to admit them to bail pending the hearing and determination of this case. They have anchored their application on the provisions of the Constitution of Kenya 2010 and other enabling provisions of the law as shown on the face of the application. The grounds in support of the application are found on the face of the application and the supporting affidavit sworn by the 1st accused on behalf of the 2nd, 3rd and 4th accused persons.

The grounds relied on can be summarized that the accused persons have been in custody since 2013; that hearing of this case has not commenced due to lack of witnesses despite the same having been fixed for hearing on various dates; that murder is a bailable offence; that the accused persons have a constitutional right to be presumed innocent until the contrary is proved; that the accused persons are Ugandans who have lived in Kenya for many years and who hold business interests in Kenya and that they will present themselves in court until their case is heard and determined.

The application is opposed by the prosecution. The grounds in support of opposition are contained in the Replying Affidavit of Police Constable Francis Were who describes himself as one of the investigating officers in this case. He states that the accused persons are Ugandan Nationals with no fixed abode in Kenya and that they do not have documents authorizing them to be in Kenya; that the evidence against them is overwhelming and due to these reasons the accused may abscond and that there is likelihood that the accused persons may intimidate and threaten witnesses because they know the witnesses. The

prosecution asked the court to set strict bond terms and ensure that the accused persons have Kenyan sureties if this court is inclined to allow this application.

I have carefully considered this application and the grounds in support and in opposition. Bail is a right available to all accused persons charged with any offence. This right is however not absolute and can be denied where there are compelling reasons. The onus of presenting compelling reasons is on the prosecution. It is not in dispute that the accused persons are Ugandan Nationals. It is deposed in the Replying Affidavit that they are in Kenya illegally. This court tried to follow up this issue with Mr. Kaingu, advocate for all the accused persons in an attempt to determine whether the accused persons are in Kenya illegally. This court was told that the accused persons are not able to present documents to this court authorizing them to be in Kenya because they have been in custody from the day they were arrested.

The paramount consideration in an application like this one is to ensure that an accused persons will attend court until the case he/she is facing is fully heard and determined. The accused persons have not provided this court with particulars of their residence in Nairobi. They have not rebutted evidence by the prosecution that they are in Kenya illegally. They have not provided details of the businesses they are undertaking in Kenya and they have not provided details of relatives, if any, in Kenya. This presents a dicey situation as far as this application is concerned. This court needs re-assurance that the accused persons will be available to face trial in this case. As the situation is currently, they cannot give this court that assurance. For this reason I am afraid I am not able to grant this application and as a consequence, this application for bail is declined. It can be reviewed after the accused persons present to this court documents authorizing them to be in Kenya. Perhaps after such documents are received and reviewed by the court, the court can be persuaded to determine the application and the terms and conditions to set for the release on bond of the accused persons. In the meantime, they shall remain in custody until this matter is heard and determined.

This court has noted the delay in prosecution this case. The major reason for the delay is lack of witnesses. I have seen the list of witnesses in the committal bundles. The list has 9 witnesses. Among them, only two are civilians. The rest (5) are police officers who were stationed at Pangani Police Station at the time of the events giving rise to this case. There are also 2 doctors. It defeats reason why this case should have taken this long to commence trial. The prosecution is put on alert that this court will not entertain adjournments based on lack of witnesses unless sufficient reason is given and effort to secure attendance of witnesses demonstrated. Any continued delay in this case on account of lack of witnesses amounts to subversion of justice given the constitutional promise that justice shall not be delayed. It is so ordered.

Dated, signed and delivered this 13th day of July 2016.

S. N. Mutuku

Judge

In the presence of:

Ms Macharia for the prosecution

Mr. Kaingu for the accused persons

Mr. Boniface Kutosi, 1st accused

Mr. Yussuf Matachi Nemukoi, 2nd accused

Mr. Wakoye Joseph Wahata, 3rd accused

Mr. Peter Wamendu Ochaya, 4th accused

Mr. Daniel Ngumbi, court clerk