



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 49 OF 2016**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**LEONARD KANARI GITAU .....ACCUSED**

**RULING**

1. The applicant **LEONARD KANARI GITUI** is 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 night of the 26/27 May, 2016 at Icon flats Garden Estate at Kasarani sub-county within Nairobi County murdered **CHRISTOPHER MUGANDA ADAGI**.
2. He pleaded not guilty to the said charge and by a Notice of Motion dated 10/6/2016 under Articles 165(3) and 49(1) (h) of the Constitution of Kenya 2010 sought to be admitted to bail on such terms and conditions as the court may find just, reasonable and expedient on the grounds that the same had been in custody from 31/5/2016 after he voluntarily surrendered to the police at Kasarani police station.
3. The application was supported by an annexed affidavit sworn by his wife (RWN) in which it was deponed that the incident relating to a shoot out occurred on 27<sup>th</sup> day of May, 2016 of which the applicant reported to the Kiambu Police Station and was attended to in hospital before he voluntarily presented himself at Kasarani Police Station where he also surrendered his civilian firearm to the police for their investigation.
4. It was further deponed that on 8<sup>th</sup> and 9<sup>th</sup> of May, 2016 he was produced before the Chief Magistrate court at Makadara for plea taking and bond application respectively and before this court where he denied murdering the deceased.
5. It was stated therein that the applicant is a Director of Regional Royal Transmission Ltd and that his continued absence therefrom may be detrimental to the livelihood of more than one hundred people in his employment together with his family and other dependants. It was further stated that he had nothing to hide to the court and had so far co-operated with the police investigations and was therefore not a flight risk or likely to abscond the trial if released on bond.
6. It was deponed further that he was a person of fixed abode with a family and dependants and a Director of Regional Royal Transmission Ltd with head office in Nakuru where he operated from. It was stated that he had no previous criminal record and was not a danger to the public.

7. The application was opposed by the State through a replying affidavit sworn by CPL KIMANSI MUKITI in which it was deponed that the applicant was likely to interfere with one witness namely (E W K) who was a close friend to the applicant and who saw the applicant and the deceased together before the incidence therefore there were chances of the applicant influencing, interfering and or intimidating her. It was therefore in the interest of justice for the applicant to be in remand custody during the hearing.

8. The family of the victim also filed a replying affidavit sworn by one (INB) the widow of the deceased in which it was deponed that when the applicant shot the deceased, he fled the scene and instead of reporting to the nearest police station chose to report in Kiambu without even attempting to take the deceased for medical attention an action that expressed his intention to flee from the scene of crime.

9. It was deponed that the applicant allegedly reported conflicting stories in Kiambu and Kasarani police stations respectively and allegedly met and conspired with one (E W K) in whose house he shot the deceased and tried to interfere with evidence and witnesses including attempts to influence his charge to a lesser charge of manslaughter. It was further deponed that the applicant's unnamed friends and agents had been heard saying openly in public that they had allegedly paid about 3 million to make sure that the applicant is not charged with murder and to be released on favourable terms.

10. It was deponed that the only logical explanation of the applicants surrendered at Kasarani police station was because the incident was highly publicized by media houses. It was stated that the deceased had left her with two children aged 8 years and 4 months respectively and being their breadwinner had left them exposed.

## **SUBMISSIONS**

11. When the matter came up for hearing before me, Mr. Kang'ahi appeared for the Applicant, Mr. Kemo for the State and Mr. Kamande for the family of the deceased. On behalf of the applicant it was submitted that the rights under Article 49 (1) (h) can only be curtailed if there were compelling reasons provided by the State. It was submitted that the seriousness of the offence on its own cannot be the only consideration to deny an accused person bond. Reliance was placed on the case of **REPUBLIC v THOMAS MUTHUI NZII Criminal Case No. 13 of 2010 Nairobi** where Justice Ochieng held that if the sole basis for determining eligibility to bail was the nature of the offence and the sentence the offence attracts, it would imply that notwithstanding the provision of Article 49(1) (h) of the Constitution persons charged with capital offence would never be admitted to bail.

12. It was submitted that the State had not demonstrated the nature of the allegation of the likelihood of interference with prosecution witness namely (E W K) and that on the strength of the case of **GEORGE ANYONA & 3 OTHERS v REPUBLIC High Court of Kenya at Nairobi Misc Criminal Appl. No. 358 of 1996** there must be evidence which is not rebutted and that there should be a definite allegations of tampering or attempted tampering with witnesses supported by proved and admitted facts showing reasonable cause for the belief that such interference with the course of justice was likely to occur. It was submitted further that there must be evidence that the court is unable to put conditions on bond as to stop such interference.

13. It was submitted that the applicant upon hearing of the incidence voluntarily subjected himself to the CID Kasarani having reported to Kiambu Police Station in addition to surrendering his gun. It was submitted that the rights of the victim are not superior to those of the accused person since Section 13 of the Victim Protection Act spells out the rights of the victim in a criminal trial. It was submitted that Section 9 of the Act only allows the victim to submit on the issues which are not prejudicial to the rights of the accused. It was submitted further that the only consideration for the court is whether the accused will turn up for this trial and can put conditions to stop interference with witnesses.

14. Mr. Kemo for the state submitted that the prosecution opposed the accused being released on bail on these main grounds:-

1) Interference with the witnesses namely a civilian witness by the name E W K. It was submitted

that in the first report OB No. 6127/5/2016 the impression created was that the accused was the victim. He reported that when he dropped his girlfriend E W K he was attacked by unknown person who got hold of his neck and he fired one shot in the air and the people ran away. It was submitted that evidence will be tendered to show that there was only one gunshot and that the court should take into account the close relationship between the accused and that one witness who was with him on the fateful night and that the accused is a businessman of means who owns a gun.

15 (i) It was submitted that the offence was serious and based on the evidence collected if convicted the accused will be sentenced to death which makes the accused person a flight risk, since he is a man of means with extensive international links and that the court is only supposed to satisfy itself on a balance of probability the disposition that the accused is a flight risk.

16. It was submitted that the accused was not candid when he reported to the police and only reported that he was a victim which confirms that he is a person who, had the matter not gone viral, would have taken advantage and moved out of the jurisdiction of the court and should therefore not be released on bond until the said witness testified.

17. On behalf of the family of the victim Mr. Kamande submitted that the Constitutional right under Article 49(1) (h) is limited by compelling reasons. It was submitted that the accused who is a firearm holder shot the deceased and therefore since the evidence collected by the prosecution have been presented to the applicant there was a real likelihood of the accused absconding.

### **DETERMINATION**

18. Under Article 49(1) (h) bail is now a constitutional right of every accused person which can only be limited where there are compelling reasons. A clear reading of this provision of the Constitution means that every accused person has a right to be released on bond unless the State provides compelling reasons to enable the court deny the same the Constitutional rights. To my mind then the correct procedure should be for the State to submit the compelling reasons which are then served on the accused person to enable him/her respond. In the alternative the accused can submit compelling reasons for his release on bond and the State to reply thereto.

19. I take the view that it is for the State to prove on a balance of probability the existence of compelling reasons to enable the court deny an accused person bond. Whereas the Constitution does not define what constitutes compelling reasons the following have been identified by courts and reinstated in the Bond/Bail policy guidelines:-

- a) The likelihood of the accused interfering with witnesses.
- b) The likelihood of the accused absconding from trial.
- c) Security of the accused and or witnesses.
- d) The weight of evidence against the accused person.
- e) Whether the release of the accused will jeopardize the security of the community.
- f) Safety and protection of the accused if released on bond.
- g) The likelihood of the accused suppressing any evidence that may incriminate him.
- h) The likelihood of further charges being brought against the accused.

See **REPUBLIC v KUNGURU MARTIN ODIYO JUNIOR High Court at Nairobi Cr. Case No. 2 of 2016.**

20. In this matter the following facts have emerged from the affidavit evidence and documents presented before the court:- The accused and the key prosecution witnesses one EWK had a special relationship with the accused calling the said witness his girlfriend while the said witness had described him as either a business mentor or intended Associate. The deceased was also a boyfriend of the said witness with whom they had a child. Most of the prosecution witnesses are associated with the said key prosecution witnesses in one way or the other with one being the house girl, her two taxi drivers and the caretaker of the flat wherein she lived.

21. It is further not disputed that the accused is an influential member of society and as submitted by Mr. Kemo, a businessman with wide international link who was a gun holder at the time of the incidence herein and that based on the information he initially gave to the police he was charged with manslaughter which charges were subsequently withdrawn to enable him face the current charge before the court.

22. Based upon the facts stated herein and whereas the accused person is at this stage presumed innocent I am satisfied that there exist compelling reasons to enable this court deny the accused his Constitutional Right to bail at this moment these being:-

a) The special Relationship between the accused and the said key prosecution witnesses gives arise to a real possibility of there being interference with the said witnesses either physically or emotionally now that the deceased who was alleged to had been romantically involved with the said witness and therefore a rival of the accused is dead. See the case of **REPUBLIC v CHRISTOPHER MULEI MUTA Nairobi High Court Criminal Case No. 7 of 2016** where the court said

***“Given the close relationship between the accused person and the possible prosecution witnesses it is clear to my mind that if released on bond the accused will be in contact with the said witnesses either physically or emotionally.”***

b) This fear is supported by the allegations made in the affidavit of the wife of the deceased should the accused be in an emotional contact with the said witness, then the same interference will likely be extended to the house help of the said witness and her two taxi driver friends or contact them by compromising the prosecution case against the same.

c) The fact that the accused is an influential member of society who is a licenced gun holder is likely to create fear in the potential prosecution witnesses should the same be released on bond at this stage. In this holding I find support in the decision by Ochieng J in **REPUBLIC v AHMED MOHAMMED OMAR & OTHERS High Court of Kenya at Nairobi Criminal Case No. 14 of 2010** where the judge had this to say:-

***“I would only add that potential witnesses in murder case is similarly susceptible to humanity. He knows that it is the evidence he tenders that might lead the trial court to convict the accused person. He also knows that if he did not testify there were chances that this would lead to acquittal of the accused. Therefore he is fully aware that if the accused could ensure that he (the witness) did not testify he might be tempted to do so, in order to enhance his self preservation.***

***If the accused was granted bail and had access to a gun, the potential witness might prefer to preserve his life by keeping away from giving evidence.***

***By so doing I am not saying that the applicant would necessarily go out to threaten the witnesses whilst that is a possibility I am also saying that the witnesses could become genuinely apprehensive about giving evidence against a person who had access to a gun and who was moving around freely.”***

23. Having taken into account the material presented before the court, the submissions by the Advocate and the authorities in support and against and balancing the right of the accused person to bail against the

rights of the victim under the Victim Protection Act and the prosecution duty to present evidence at the trial I am satisfied that it will not be in the best interest of the Administration of justice if the accused is released on bond at this stage.

24. The accused shall therefore remain in remand custody until two key prosecution witnesses namely E W K and her house-help testify, thereafter the accused shall be at liberty to renew his bail application and it is so ordered.

DATED, DELIVERED and SIGNED at Nairobi this 6<sup>th</sup> day of July, 2016.

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Ikor for the state*

*Mr. Kang'ahi for the accused*

*Mr. Olewe for Mr. Kamunda for the family of the victim*

*Accused present*

*Pamela court clerk*