



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 97 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**HENRY KAILUTHA NKARICHIA.....1<sup>ST</sup> ACCUSED**

**AMBROSE MUNGATHIA NKARICHIA.....2<sup>ND</sup> ACCUSED**

**RULING**

Before this court is the Notice of Motion dated 22/2/2010 in which the two accused seek to be released on bond pending their trial. They contend that they have a Constitutional right to be released on bond, as they are presumed innocent till proved guilty; that this is a retrial and that they have a fixed place of abode and are willing to abide by all the bond terms that the court may impose. The same grounds are reiterated in the joint affidavit in support of the application.

The application was opposed and two replying affidavits were sworn. One affidavit was sworn by Chief Inspector, Sammy Kamau, the Investigations Officer, who deponed that the key witness is the accused's step-mother, Margaret Karuki who had also been threatened with death by the accused; that she had earlier testified against the accused when they were first convicted before the order for retrial was made by Court of Appeal and she fears being harmed if accused are released; that the 2nd accused's children destroyed Margaret Karuki's crops and it was reported to Subuiga Police Station under OB 9/7/8/2015 and there is a pending criminal case in respect thereof – CRC 1705/2015.

Margaret Karuki, the key witness herein also swore an affidavit expressing fears for her life if the accused are released on bond; that before the murder, the accused had also threatened her with death; that in 2015, the 2<sup>nd</sup> accused's children attacked her, destroyed her house and crops as a result of which they were charged.

The accused's wives, Jennifer Kageta and Mary Karambu swore a further affidavit in which they deponed that Margaret Karuki left the home in 2007, two years after the deceased's death, remarried and has never come back home; that after the accused's arrest, the said lady chased them away and they only returned in 2016 to find a deserted home and that the criminal case does not involve Margaret Karuki.

The court called for pre-bail reports and they were prepared by Mr. Mugambi, a Probation Officer. However, the accused alleged that the said officer comes from their neighbourhood and they wanted another independent officer to prepare others. After Mr. Mugambi was called to the court to respond to their allegations, it turned out that he does not come from their home area. In my view, the accused were not candid.

The court however, went ahead to call for other pre-bail reports which I have considered along with the affidavits by the accused and the defence.

No doubt, this case had been heard and the accused had been convicted but the Court of Appeal ordered a retrial.

In an application for bond, the primary consideration is that the accused will turn up for his trial. Other considerations include the accused's antecedents and past conduct; whether the accused will interfere with witnesses and whether, if released, the accused's security will be guaranteed.

In this case, the pre-bail reports give negative accounts of the accused. An interview with the local administrators of the area and the relatives of the deceased disclosed that the accused had been a nuisance to the parents resulting in one of the deceased's wife deserting the home and that their step-mother, who is the key witness will feel intimidated by their presence in the community. The accused's step-mother had testified against the accused which resulted in a conviction that was later set aside by the Court of Appeal. She is still the key witness. In my view, there is a real likelihood of her feeling threatened and unsafe and that will undermine the administration of justice.

The defence has brought in another angle, that there exists a succession cause No. 267/2007 between the parties. but that succession cause only arose after the murder of the deceased. It cannot be said to be the reason for these criminal proceedings.

Apart from the accused's step-mother, the Probation Officer interviewed the accused's uncles, the deceased's relatives who were also opposed to the accused's release on bond because the accused had violent conduct before the deceased's death and the fact that the key witness had been threatened by them earlier.

Although there is a succession cause, that will take its own course and the accused have been recognized as heirs to the deceased.

However, having considered all the affidavits on record and the pre-bail report, I find that there are compelling reasons to deny the accused bond. The accused will remain in remand pending the trial. The application is hereby dismissed. Since this is a retrial, the court will give this case priority and it will be heard expeditiously.

**DATED, SIGNED AND DELIVERED THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2016.**

**R.P.V. WENDOH**

**JUDGE**

**9/11/2016**

**PRESENT**

Mr. Mulochi for State

Ms. Nelima for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused