



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI**  
**CRIMINAL CASE NO. 57 OF 2016**

REPUBLIC.....PROSECUTOR

V E R S U S

FREDRICK OLE LEILMAN.....1<sup>ST</sup> ACCUSED

STEPHEN CHEBURET MOROGO.....2<sup>ND</sup> ACCUSED

SILVIA WANJIKU WANJOHI.....3<sup>RD</sup> ACCUSED

LEONARD MAINA MWANGI.....4<sup>TH</sup> ACCUSED

PETER NGUGI KAMAU.....5<sup>TH</sup> ACCUSED

**R U L I N G   O N   B A I L**

1. The 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> accused persons, herein after the Applicants, together with another, the 5<sup>th</sup> accused in the case are jointly charged with four counts of murder contrary to **section 203** as read with **section 204** of the **Penal Code**.
2. Each Applicant has, through Mr. Ombetta advocate filed a Notice of Motion application dated 18<sup>th</sup> July 2016 seeking bail pending trial. Each application is supported by the affidavit of the respective Applicant. The applications for the Applicants were argued by Mr. Ombetta advocate.
3. Mr. Ombetta urged that Article 49 (1) (h) of the Constitution granted the accused persons the right to be released on bond. Counsel urged that the accused persons could only be denied this right if there were compelling reasons.
4. Counsel cited **Articles 20 (1)** and **20 (3) (b)** and urged the court to adapt the interpretation of the Constitution that most favored the Applicants and the enforcement of fundamental freedoms enshrined in the Bill of Rights.
5. Mr. Ombetta urged the court to consider the Bail and Bond Policy Guidelines that clearly sets out what the court should bear in mind when considering such an application.
6. On the severity of the offence, Mr. Ombetta urged that even though this was a case of murder, it was bailable. Counsel submitted that during investigations the Applicants presented themselves to the police and kept reporting duly before their arrest. He urged the court to consider that the Applicants did not abscond even when they had opportunity to do so and therefore they were not a flight risk, and further that they will abide by any condition the court would impose on them.

7. Mr. Ombetta submitted that, the main ground the court should consider in granting bail is whether the accused persons will avail themselves for the trial when required to do so until the determination of the case. He urged that no evidence had been adduced to show that the Applicants would not attend court when required.

8. Mr. Ombetta identified interference with witnesses; the seriousness of charge; the likelihood of the Applicants causing a breach of peace; the likelihood of the lives of the Applicants being in danger; the likelihood of the Applicants being a flight risk, and the issues of public interest and uproar all being the factors raised by the prosecution and the other interested parties in their respective replying affidavits as the reasons why the application should not be granted.

9. Mr. Ombetta urged that all the issues raised were not proved as no tangible proof supporting evidence was placed before the court. Counsel urged the court to dismiss them as mere allegations since for instance witness interference must be proved by some material to show actual interference or attempt to interfere. For that proposition counsel cited the case of **Rep. Vs. Dwight Sagaray & 4 others Milimani HCCRC NO. 61 of 2012, and Republic Vs. Richard Alden Milimani HCCRC NO. 48 OF 2016.**

10. Regarding breach of peace Counsel urged that the threat that the accused persons would breach peace was just fertile imagination of the prosecution as there were no antecedents to prove this tendency. Counsel further urged that what the prosecution needed to show was that the accused persons were so afraid of the case that they would not come to court a factor the prosecution had failed to prove.

11. Regarding the threat to the accused lives Mr. Ombetta submitted that none of the accused persons had complained that their lives were in danger or that there were threats to their lives.

12. Regarding the issue that the accused persons were a flight risk, Counsel cited **Dwight Sagaray**, supra, and argued that the court held that in as much as such allegation could not be taken lightly, the possibility of Applicants being a flight risk would not result in the automatic denial a bail but that the imposition of stringent bond terms and conditions would cure such threat.

13. Mr. Nicholas Mutuku learned Prosecution Counsel representing the State opposed the applications. Counsel relied on his filed submissions dated 10<sup>th</sup> October 2016 and the replying affidavit of Mr. Owino dated 16<sup>th</sup> August 2016 and a further affidavit in reply dated 20<sup>th</sup> September 2016 which he urged discharges the Prosecution burden in demonstrating to the court that there were compelling reasons to deny the Applicants bail pending trial.

14. Counsel urged that the gist of their affidavits was that there was credible information on the whereabouts of other probable suspects to this case who were yet to be arrested and that therefore there was credible apprehension that releasing the accused persons on bail, being police officers they would interfere with the efforts to arrest further suspects and with the investigations that were at an advanced stage.

15. Mr. Mutuku argued that there was also fear that the accused persons who had been working at the Syokimau AP Camp had established themselves in the course of their duty and had extensive working knowledge of the area and consequently knew the probable witnesses for the prosecution in the case. Counsel argued that consequently it was important to protect the witnesses as they were in fear that they would be killed just like the 2<sup>nd</sup> deceased person who was killed after he had made several reports against the 1<sup>st</sup> accused and other Administration Police Officers to the IJM, IPOA and the IGP.

16. Mr. Mutuku submitted that the 5<sup>th</sup> accused person had given a detailed chronology of events from the time he met the 1<sup>st</sup> Applicant, planned the murder of the deceased in count 2, and the abduction of the three deceased on the 23<sup>rd</sup> June 2016, to the time culminating in the murder of the three deceased and the dumping of their bodies at Oldonyo Sabuk River in Machakos County.

17. Mr. Mutuku in his submissions cited **Article 49 (1) (h)** of the Constitution of Kenya, 2010 which

provides that upon arrest of any person, that person is to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there were compelling reasons not to be released. Counsel referred the Court to the Bail and Bond Policy Guidelines, 2015 that guides Judicial Officers in the application of the laws on bail and bond and specifically paragraph 4.26 that requires the Prosecution to satisfy the Court on a balance of probabilities of the existence of compelling reasons that justify the denial of bail.

18. Counsel urged that the charge of murder is a serious offence punishable by the death penalty and as such chances of the accused persons absconding out of fear of conviction if released on bail or bond were high.

19. The learned Prosecution Counsel submitted that the evidence gathered from two key Prosecution witnesses whose statements had since been given to the accused persons shows that the three deceased persons were at the Syokimau AP container at the material time when the 3<sup>rd</sup> and 4<sup>th</sup> Applicants were on duty.

20. Counsel urged that there was a likelihood of the accused persons interfering with witnesses if granted bail. The accused persons, he observed had been served with the Prosecution witnesses' statements and were now aware who the key Prosecution witnesses were and the weight of their evidence and that of the Prosecution's case against them thereby increasing the possibility that they would inflict real fear, intimidate and interfere with those witnesses if released on bail.

21. Counsel urged that there were witnesses under witness protection and others who were police officers where the accused persons worked. Counsel submitted that some had already testified in camera before the court and it would not augur well if the accused persons were to be released on bond to mix with the society with these witnesses.

22. Mr. Mutuku submitted that the evidence against the accused persons was strong enough to justify subjecting them to pre-trial detention. Counsel referred to the Safaricom Cell Site Analysis which had been supplied to the defence counsels, and urged that they established that the mobile number 072743343 which was found to have been at Mastermind at 2155 Hrs and later at Kilimambogo at 2357Hrs was registered under the name of Peter Ngugi Kamau who was the 5<sup>th</sup> accused herein.

23. Counsel also referred to the 5<sup>th</sup> accused extra judicial statement supplied to the Defence showing that he was in the company of the 1<sup>st</sup> and 4<sup>th</sup> Applicants during the commission of the offence. Counsel has also referred to three post mortem reports showing the extensive fatal injuries occasioned on the deceased persons.

24. Counsel in his submissions urged that the first deceased person Willie Kimani Kinuthia was an Advocate working with the International Justice Mission (IJM) and was representing the second deceased person and providing him with security as he had already complained to the Independent Policing Oversight Authority (IPOA) prior to his death of harassment by the 1<sup>st</sup> Applicant.

25. Counsel submitted that at the material time, there was an ongoing judicial process and in addition investigations were being conducted against the 1<sup>st</sup> Applicant and other police officers by IPOA. He urged that the second deceased person had presented himself as a potential witness. Counsel therefore urged that in view of the above, there was no other way that they could prevent the accused persons from planning and executing any criminal act to subvert justice again by eliminating, threatening and inflicting fear upon the witnesses other than the pre-trial detention.

26. Counsel for the State urged that there was need to protect the victims of the crime who had filed replying affidavits pursuant to their right Under the Victim Protection Act, 2014 opposing the release of the accused persons' on bail or bond. The victims, Counsel explained had suffered intense anguish and trauma over the disappearance and subsequent deaths of their loved ones and therefore the release of the accused persons on bail or bond would only cause more trauma to them.

27. Counsel urged that the Applicants were Administration Police Officers who held positions of influence and authority in the Society, further they were trained and able to use firearms which fact raised legitimate anxiety and apprehension on the part of the victims and witnesses if they were released on bail or bond.

28. Learned Prosecution Counsel submitted that the other compelling reason not to release the Applicants on bail/bond was due to the numerous demonstrations that resulted from the murder of the deceased persons. These, he urged were widely covered by the media and there was real fear of undermining Public order, peace and security were the Applicants released on bail, and further that the protection of the accused persons would be jeopardized as this would incite public anger and uproar. Counsel urged that for these reasons there was need for pre-trial detention of the Applicants to forestall all these.

29. In regard to 1<sup>st</sup> Applicant's claims that he was allergic to cold and dust, and those of the 2<sup>nd</sup> Applicant that he was anaemic; and by the 3<sup>rd</sup> and 4<sup>th</sup> Applicants that they were asthmatic, Counsel submitted that the accused persons failed to prove that they were suffering from any of the alleged ailments as no medical documents or treatment notes were produced to confirm the claims. Counsel urged that they had also not indicated that they had been denied access to medical attention at the Kenyatta National Hospital or at the Prison Clinic.

30. Professor Sihanya representing the Law Society of Kenya , hereinafter the 1<sup>st</sup> interested Party relied on the affidavit of Mercy Wambua, Secretary and Chief Executive Officer of the LSK sworn on 22<sup>nd</sup> day of August 2016 and associated himself with the filed submissions by the State and the 2<sup>nd</sup> Interested Party.

31. The gist of Ms Wambua's affidavit is that there were many witnesses that were expected to come from Syokimau who would be intimidated by the presence of the accused in their midst and therefore the court needed to take this into account. Further she deposed that the Applicants were in a position of power and influence and had the potential to interfere with investigations or even harm witnesses. The deponent urged that there was reliable information that there were at least five fugitive suspects on the run and if the Applicants were to be granted bail there was a likelihood that they would collude with these fugitives to defeat the ends of justice.

32. Prof Sihanya in his submissions urged that this was a complex criminal enterprise to harass, intimidate, Kidnap and cause disappearances of victims. Counsel explained that the Constitution does not avail a right to bail/bond if compelling reasons exist. He referred to the case of **Republic v Taiko Kitende Muinua (2010) Criminal Case No. 65 eRLR**, where the accused that was facing a charge of murder was denied bail even though the Court accepted the availability of bail under **Article 49** of the **Constitution**, it held that this was not an absolute right and proceeded to deny the accused bail on account of Compelling circumstances.

33. Professor Sihanya referred to the paragraph 4.9 of the Bail and Bond Policy Guidelines on compelling reasons. The said Paragraph 4.9 of the Guidelines provides:

**"In terms of substance, the primary factor considered by the Courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the Courts face since the promulgation of the Constitution of 2010 is determining the existence of Compelling reasons for denying an accused person bail, particularly in Serious offences. ... the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial..."**

34. Professor Sihanya submitted that the Bail and Bond Policy Guidelines urge Courts to evaluate the presence of Compelling reasons based on twelve criterion out of which nine Criteria do not favor the Applicants' application for admission to bail/bond. Counsel listed the criterion as follows:

- i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty**
- ii. The strength of the prosecution case**
- iii. The failure of the accused person to observe bail or bond terms**
- iv. Likelihood of interfering with witnesses**
- v. The need to protect the victim or victims of the crime**
- vi. The relationship between the accused person and potential witnesses**
- vii. The accused person is a flight risk**
- viii. Public order, peace or security; and**
- ix. Protection of the accused person**

35. Counsel observed that the Applicants being Police Officers were a special status category of accused persons. Counsel referred to **section 27** of the **National Police Service Act** (Revised edition 2015 2014), hereinafter the Amended NPS Act that lists the functions of the Administration Police Service. Counsel noted that the suspension of a police officer from duty is provided for at section 89(6A) of the Amended NPS Act and observed that none of the Applicants had deposed to have been suspended from duty.

36. Prof Sihanya submitted that ordinarily Police Officers would be suspended when they have such matters, however in this case no clear disciplinary action had been taken against the Applicants which meant that if granted bail they would resume their jobs and continue harassing the members of the public.

37. Counsel urged that save for **S. 94(2)** of the **Amended NPS Act** which was silent on the status of arrested police Officers, Administration Police Officers (APO) were not bound by the Force Standing Orders which meant they wield immense police powers with which they can individually and collectively intimidate witnesses if released. Counsel urged the court to take into account the position of the accused, the Victims and the public when deciding whether to grant or deny bail.

38. The 2<sup>nd</sup> Interested party who are the families of the victims of the offence opposed the application for bail. They were represented by their Counsel Mr. Fred Ojiambo assisted by Mr. Ahmed. Mr. Ahmed argued the application on behalf of the victims. He relied on their filed submissions and the replying affidavit of Rebecca Wanja a widow to the 2<sup>nd</sup> deceased sworn on 14<sup>th</sup> September 2016.

39. In her affidavit she deposed that some of the witnesses mainly resided in the Mlolongo area, in close proximity to the accused persons and since the Applicants wielded considerable influence in the area where they were stationed, there was likelihood that they would interfere with or influence witnesses during the pendency of this trial if released on bond.

40. Rebecca deposed that even without direct interference, the witnesses might be intimidated by virtue of the fact that the accused against whom they were bound to testify against was living amongst them and therefore, she feared that their personal security and that of their close family members would be at risk. The deponent further added the threat posed to witnesses was so real and cited the orders by the Hon. Justice Luka Kimaru issued on 12<sup>th</sup> August 2016 directing that the witnesses in this matter be allowed to testify in camera and to use pseudonyms in the process.

41. The deponent said she had lost her husband who was the sole breadwinner for their family and she had suffered intense anguish and trauma over his disappearance and subsequent brutal death.

42. Mr. Ahmed urged that the Right to Bail under Article 49 (1) (h) of the Constitution was not absolute and could not be construed as such. Counsel urged that this position was further affirmed under Articles 24 and 25 of the Constitution where the right to bail is not amongst those that are non-derogable provided that there were compelling reasons provided. Counsel cited the test for compelling reasons as set out in paragraph 4.9 of the Bail and Bond Policy guidelines as set out herein above.

43. Mr. Ahmed urged that the accused persons were charged with murdering three innocent people which murders were conducted with a savagery that set this case apart from the usual murders that occur.

44. Counsel submitted that the severity of the sentence remained a significant factor for consideration in an application for bail pending trial. Counsel referred the court to the case of **Republic v Ahmed Mohammed Omar & 6 Others** |2010 ekLR, where Justice Ochieng stated that;

**"... whereas the applicant is still presumed innocent; if he were to be convicted for murder, there is a possibility that the trial court could sentence him to death. To my mind, therefore, the severity of the sentence remains a significant factor for consideration in an application for bail pending trial."**

45. On the vital component of court attendance, Mr. Ahmed urged that this was the primary question that needed to be answered i.e whether the accused persons will attend court if bail or bond is granted. Counsel relied on **Rep. Vs. Ahmed**, supra where Ochieng J. cited the Supreme Court of Malawi in the case of **John Zenus Ungapake Tembo & 2 Others v The Director Of Public Prosecutions, M.S.C.A. CR. Appeal No. 16 of 1995**, thus:

**"In the case of John Zenus Ungapake Tembo (above-cited) the Supreme Court of Appeal, of Malawi, expressed itself thus;**

**"... where a person has been charged with an offence, the wheels of justice are set in motion and the accused person is expected to be prosecuted for the offence, and the law requires that the accused shall be available to stand his/her trial until the CASE is completed." Their Lordships held that that was the paramount consideration when a court is giving consideration to an application for bail pending trial. The court went on to state that the seriousness of the charge brought against the accused person is one of the factors to be taken into consideration by the court. It was a holding of the court that; "Fear is a natural instinct in human beings, so that generally Speaking, the more serious the Offence, a capital offence for example, and the sentence it may call for upon conviction, the greater the likelihood that the Accused person would be disposed to abscond."**

46. Mr. Ahmed urged that it was not unfathomable that the Applicants all of whom were police officers with significant influence would abscond the trial for the reason that they may be fearful of its culmination as well as their safety.

47. Counsel referred to the orders issued by the Luka Kimaru, J. on 12<sup>th</sup> August 2016 directing that the witnesses in this case be allowed to testify in camera and to use pseudonyms in the process. Counsel submitted that this order indicated that the learned Judge was indeed fearful of the Safety of the witnesses in this matter and sought to protect them even at that very preliminary stage of the case. Counsel submitted that the court therefore ought to consider the safety of the witnesses that were due to testify, which would invariably be placed in jeopardy if the accused persons were set at liberty.

48. Counsel cited the case of **Republic v Joktan Mayende & 3 others** 2012 ekLR where the seriousness with which the court should consider the question of possible interference with witnesses was addressed by the Gikonyo, J. in the following words:

**"All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular**

manner. Interference with Witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused...

In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010.”

49. Counsel has also referred the court to the findings in the case of **Republic v David Ochieng Ajwang Alias Daudi & 11 others (2013) eKLR** where Sitati, J. pronounced herself on this issue as follows:

"In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety."

50. Mr. Ahmed urged the court to take into consideration the accused person's personal safety as well as the emotions of the general public, especially within the area from which the accused persons hail have been extremely volatile in the aftermath of the grisly murders with which the accused persons are charged with and further that given the publicity attached to the case, the accused are well known to their fellow residents, many of whom believe in the accused persons' culpability in this matter and would retaliate against the accused persons if they are released.

51. Mr. Ahmed cited a quotation from the case of **Farriss C.J in Rex Vs. Hawken (1944) 2 DLR 116** where the court took appropriate steps to ensure that the applicant was available during trial. Counsel submitted that the case was relied on by the Judge in **Ahmed Mohammed Omar & 6 Others [2010] eKLR**, where Ochieng, J. relied on the following quotation from the above case of **Farriss C.J in Rex Vs. Hawken (1944) 2 DLR 116**:

"The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the Judge is satisfied that the bail will ensure the accused appearing at his trial."

52. Counsel concluded by urging the court to consider that the right to be presumed innocent under

**Article 50 (2) (a)** of the **Constitution** is also available both to those being held in custody and those admitted to bail and one is not admitted to bail because they are presumed innocent, rather, they are admitted to bail because there are no compelling reasons to deny them that right. This was the holding in the case of **Republic v Nahashon Muchiri Mutua [2016] eKLR.**

53. Counsel urged that it was in the best interest of all parties involved including the accused that the accused be held in custody for the duration of the trial. He urged the court to dismiss the application for bail and hold the accused person in custody until the culmination of the trial.

54. I have considered the applications for bail by all the Applicants before me together with the submissions by the counsels to Applicants, the Prosecution Counsel as well as all the other parties in this case.

55. There is no dispute that bail is a right to all persons charged before court irrespective of the charge facing them. The only rider under **Article 49(1)(h)** of the Constitution is that bail should be granted unless there are compelling reasons not to release an accused person on bail.

56. The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of **Ng'ang'a Vs Republic 1985 KLR 451** where Chesoni J, as he then was thus:

**“The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should grant bail to the accused person unless it is shown by the prosecution that there are substantial grounds for believing that:**

**i. The accused will fail to turn up at his trial or to surrender to custody;**

**ii. The accused may commit further offences; or**

**iii. He or she will obstruct the course of justice.**

**iv. The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;**

**v. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**

**vi. The strength of the prosecution case;**

**vii. The character and antecedents of the accused;**

**viii. The likelihood of the accused interfering with prosecution witnesses.”**

57. I have heard and considered the rival arguments of all the parties in this case. There are facts which are not in dispute. One that all the Applicants are Administration Police Officers; who at the time the offence is alleged to have been committed were so engaged and on duty within Syokimau area where these incident took place. There are also other relevant facts which are not in dispute, one that the deceased persons were coming from a court case where one of the Applicants was a party; that the 1<sup>st</sup> deceased was the advocate of the 2<sup>nd</sup> deceased in the said case; that the case had just ended and the 1<sup>st</sup> and 2<sup>nd</sup> deceased hired the services of the 3<sup>rd</sup> deceased a taxi driver in the area to ferry them where they intended to go.

58. I am touched by the manner in which Mr. Ahmed put the facts and how, in his own way he felt the scenario in this case affects and stands to affect young lawyers handling case, whether sensitive or not, for

their clients. He said it sends cold chills down the spine when as a young lawyer you think about such a situation.

59. Let me array any fears on the side of the defence. The accused persons have a right to liberty, to be presumed innocent until proved guilty, to be granted bail/bond before trial and to be given reasonable bond terms. The same Constitution has provided that the courts should no longer consider only the rights of the accused person alone.

60. Under the Bail and Bond Policy Guidelines, (BBIC) the courts have a duty to balance the rights of an accused person and the interest of justice. As much as the courts are expected to preserve the liberty of an accused person, public interest must also be taken into account. The State has a duty to preserve public safety between the time of arrest and the trial of the accused, and to protect the integrity of the criminal justice system. (See BBIC).

61. Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger an individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail terms; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.

62. In order to determine the public interest question, the prosecution and through them the investigators have a duty to avail evidence in order to convince the court that there are compelling reasons to deny the accused bail.

63. Apart from accused rights and public interest issues, there are other categories of rights which the court is mandated not to lose sight of. These are the rights of the victims of the offence or crime. The Victim Protection Act gives a broad definition of who victims are. They include the families of the ones against whom the offence was committed. It also includes those directly or indirectly affected by the offence.

64. In this case we have all these categories of victims. They include the family members of the deceased persons; the Law Society of Kenya, IJM, Witness Protection and taxi owners' and boda boda fraternity. Others include a special category of Overseers, iPOA .

65. I have a number of affidavits sworn by a cross section of interested persons opposing bail. I have considered each of these alongside those of the Applicants supporting their release on bail. The counsels' contributions in submissions and cited law and case law both for and against bail all together have been of great help in determining this application.

66. I agree with the sentiments of all the counsels to the parties in this case that this is no simple case. It is a unique case the kind that has not occurred in Kenya before that an advocate is abducted and later murdered together with his client and the taxi man who was ferrying them on a business basis to where they intended to go.

67. If this case is finally proved, it is a disheartening fact that the only apparent connection between these people, the deceased, was their professional engagement or trade, one to defend a client in court as a lawyer, the other to carry them in a taxi and the other as a litigant needing professional help. The very thought of the inter relationship of the deceased beats any reason why they could have fallen into the catastrophic judgment made to execute them.

68. The judgment that was made to execute the deceased in this case, given their relationships opens a window into the kind of persons involved in this case. As stated the accused are no ordinary people. They are police officers from the AP. They have a duty which they bound themselves to serve diligently with an oath, most likely sworn before the Head of State of this country. If this case is proved, then the

violation of their oath, when they carried out the actions they did which culminated in the loss of three lives is proof of the highest order of impunity.

69. The prosecution has shown that they have a number of witnesses under Witness Protection. These are persons who have expressed fear for their lives. We also have many others not under protection but who have a sense of safety because the Applicants are in custody at the moment. We also have important interested groups including the members of the families of the deceased.

70. Mr. Ombetta has cautioned the court to consider the importance of having tangible evidence of all allegations made against the grant of bail in this case, and has emphasized the importance of preserving the rights of the accused in this case.

71. As I have stated, no rights are of more importance than the other, except that when it comes to the issues of public interest, such issues should weigh more. The standard of proof is not scientific it is on a balance of probabilities.

72. I associate with my brother and sister judges sentiments in cases cited. In regard to public interest and the compromise of the criminal justice system through various forms of interferences with the case, all that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with Witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons.

73. In this case, the drama was when the matter was presented before Kimaru, J. and the fact at the very start of investigations into this case it was clear to the judge the risks potential witnesses in this case faced, behooving upon that judge to give certain directions in their regard are all very telling. Given the facts presented before this court when considering this application, that the 1<sup>st</sup> and 2<sup>nd</sup> deceased were actually leaving court after the hearing of the case involving the 2<sup>nd</sup> deceased herein and the 1<sup>st</sup> accused, it would appear that the attack on the deceased was intended to interfere with the trial before that court.

74. Evidence that an accused person is likely to commit a serious offence if released on bail is a good ground to deny bail. In this case, there is glaring proof, by the very reason why this case is in existence that the likelihood of interference is not a myth, or like Mr. Ombetta wondered, a fertile imagination on the part of the prosecution. It is real. It is a reality.

75. As my brethren have observed in the cited cases Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.

76. The Applicants, or at least one of them was in the process of self preservation when this incident occurred. The likelihood of a repeat of the same cannot be overruled. One because the stakes are now very high. Two because of the very nature of jobs and high degree of influence the Applicants can wield.

77. With these factors in mind, it becomes abundantly clear why the witnesses in this case will not wait for attempts at interference. They will definitely fade away, seeing what the result of the immediate former interference was.

78. It has been shown through the various dispositions filed in opposition to bail that the potential witnesses in this case come from the same area as the Applicants. It is not disputed by the defence that the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the

ghastly death of the deceased persons is a real possibility.

79. The accused in this case are four, that is the ones seeking to be released on bail. It is my belief that the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and drive them into resolving not to appear in court during the hearing of the case even if the accused persons turn up.

80. Finally on the questions of the right to be presumed innocent until proved guilty, the mere fact that an accused is denied bail does not mean that he stands convicted. Such an accused is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty and not just on the necessity of having him available for trial but more importantly on the greater need to preserve the integrity of the prosecution evidence, the safety of the witnesses, victims and other interested persons whose lives may be in jeopardy including that of the accused.

81. In this case I have come to the conclusion that there exists strong compelling reasons why the Applicants should not be released on bond. Stringent bond terms cannot guarantee safeguards to the integrity of the trial process, neither can it guarantee the progress of this case to finality.

82. For this reasons I reject the application by the four Applicants/accused persons in this case. They shall remain in custody during the pendency of this trial.

**DATED, SIGNED AND DELIVERED THIS 8<sup>TH</sup> DAY OF DECEMBER, 2016.**

**LESIIT, J**

**JUDGE**