



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 49 OF 2014

REPUBLICRESPONDENT

VERSUS

1. RASHID JUMA
2. MWINYI HAMISI MASUDIACCUSED

RULING

An oral application for bond was first made by Shimaka Counsel for the first Accused on 28th November, 2014 but the prosecution was not ready and it was deferred to 9th December, 2014 and heard on 16th December, 2014.

Before a ruling could be delivered, the 2nd Accused was arrested and Criminal case No. 49 of 2014 was consolidated with Criminal Case No. 52 of 2014. A fresh bond application was made by Mr. Khatib Counsel for the 2nd Accused and the Court ordered that a single ruling be delivered in respect of both applications.

The two Accused persons face four charges of murder contrary to section 203 as read with section 204 of the Penal Code.

On the 1st Count – The particulars are that on the 3rd day of March, 2013 at Jomvu area, within Miritini in Kilindini Mombasa County, jointly with others not before the Court murdered No. 217778 Senior Superintendent of police **OTIENO OWUOR**.

On the 2nd Count - The particulars are that on the 3rd day of March, 2013 at Jomvu area within Mombasa county, jointly, with others not before Court murdered **CHIEF INSPECTOR SALIM KIMUTAI CHEBII**.

On the 3rd Count - The particulars are that on the 3rd day of March, 2013 at Jomvu area within Miritini – Kilindini – Mombasa County, jointly with others not before the Court murdered police **CONSTABLE STEPHEN MAITHYA**.

In the fourth Count – The particulars are that they, jointly, with others not before Court murdered police Constable Andrew Songwa.

Brief facts

On the eve of the last General election a rag tag militia styled as the military wing of Mombasa

Republican Council attacked and brutally murdered in cold blood four policemen who were on duty on that fateful night.

Five suspects were later arrested and charged in Court vide Criminal Case No. 12 of 2013 which is still on going.

Bond for the Accused persons in that case was denied save for one. One and a half years later the two Accused persons were arrested at different times and their cases were consolidated.

Bond is opposed. The investigating officer **PC JAMES MWISA** in his affidavit deposes that

(1) The Respondent (Accused persons) were arrested on different dates in the month of November, 2014 in connection with the offence of murder after having disappeared for several months.

(2) That before their arrest they had been at large since the commission of the said offence and police had difficulties in tracing their whereabouts

(3) If admitted to bail there is fear that they will abscond.

(4) That the 1st and 2nd Accused persons are influential members of the Mombasa Republican Council where they are regarded as a Trainer and elder respectively.

(5) That a number of Witnesses have raised fears that their safety may be prejudiced if the Respondents are admitted to bail.

(6) That the security situation is still volatile as MRC continues to wage attacks such as the one on Nyali Military barracks and Kaloleni police post where 3 police officers were hacked to death and their firearms and ammunition were stolen.

The 2nd Accused in his replying affidavit deposes that at no time did police seek for him and at no time had he run away to avoid arrest. He further deposes that he is a hawker at Jomvu Chamunyu and further that he is not an elder and an influential member of the Mombasa Republican Council.

That he has not been supplied with Witness statements and therefore he is not aware of the likely ones to testify against him and it is far-fetched to allege that he will interfere with Witnesses. He denies having been a member of Mombasa Republican Council. This Court called for pre-bond reports which are favourable for bond but which cite some hiccups which are not clearly explained.

These reports triggered the summoning of the investigating officer by the prosecution to clarify on some issues. He testified on oath on 18th May, 2015 to the effect that he had visited the house of the 2nd Accused twice and on the third time they found him hiding under a seat. He further testified that there are seven known suspects who are still at large.

Article 49(1) (h) of the Constitution provides,

“An arrested person has the right

(1) To be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released. The Courts have grappled with the issue of what are compelling reasons and the parameters required to be ascertained before the grant of bond which are among others

- 1. The seriousness of the offence***
- 2. The weight of the evidence***
- 3. The possibility of the Accused interfering with Witnesses.***
- 4. The safety and protection of the Accused.***

5. ***Whether the Accused will turn up for trial.***
6. ***Whether the release of the Accused will jeopardize the security of the Community”.***

O the issue of the seriousness of the offence. The Court takes Judicial notice of the fact that the main agenda of the Mombasa Republican Council was to secede from the rest of the country hence the slogan “***Pwani Sikenya***”.

They were opposed to the Elections which were carried on 4th March, 2013. The murder of the police officers was an attempt to stop the elections (at least in Coast Province).

Counsel for the Respondents contention is that the situation obtaining is presently has changed and the Court should consider granting the Accused bond. The Court has been invited to take Judicial notice of the attacks at Nyalii barracks and Kaloleni administration police post where three officers were slain and which bear the hallmarks of the Mombasa Republican Council activities. This Court is of the considered view that for all intents and purposes this is a very serious offence which goes to the core of the security of the State.

Article 24 (1) (d) of the Constitution provides for the limitation of rights and fundamental freedoms in the following terms,

“A right or fundamental freedom in the bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

(h) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others”.

The Court is alive to the Accused right to a fair hearing found under article 50 of the Constitution and in particular article 50(a) which is the right to be presumed innocent until the contrary is proved but its also the duty of the Court to balance this right with the provisions of article 24 of the Constitution ***Supra***.

Upon a careful analysis of the facts before this case I am satisfied that the prosecution has proved on a balance of probabilities that there are compelling reasons to deny the Accused persons bond. These are

1. That this is a very serious case with considerable security implications.
2. That the Accused persons have been on the run and the possibility that they will attend Court if granted bond is very minimal.

I accordingly, by reason of the foregoing, decline to grant the two Accused persons bond and order that the case does proceed for trial at a later date and they remain in custody till full hearing and determination, or any other appropriate order of the Court.

Ruling delivered dated and signed this 15th day of July, 2015.

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M. MU YA

JUDGE

15TH JULY, 2015

In the presence of:-

Learned Counsel for the prosecution Miss Ogweno.

Learned Counsel for the defence Mr. Khatib for 2nd Accused holding brief Shimaka for the 1st

Court Assistant Musundi

M. MUYA – JUDGE

Mr. Khatib:

I apply for certified proceedings of the ruling.

Court:

Certified copies of the ruling to be furnished to the Director of Public Prosecutions and the Defence.

Mr. Masila:

We have no objection with the release of the Identity card to the 1st Accused. The money attained from police was 1,700/= and not Ksh. 17,500/=.

Court:

The identity card belonging tot the 1st Accused to be released to him and cash Ksh. 1,700/= which police admit they are holding and the phones to be released. Mention on 20th July, 2015. Hearing 9th September, 2015.

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M. MUYA

JUDGE

15TH JULY, 2015