



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 82 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH THIONG'O WAWERU.....1<sup>ST</sup> ACCUSED**  
**HENRY NGUGI KARUGA alias MWENE CIO.....2<sup>ND</sup> ACCUSED**  
**JULIUS KANYIRI WAMBUI alias KAMURANG'A.....3<sup>RD</sup> ACCUSED**  
**JOHN NJOROGE GACHO alias NJINALO.....4<sup>TH</sup> ACCUSED**  
**HARRISON KIBANDE MARUBU.....5<sup>TH</sup> ACCUSED**  
**JOSEPH MUCHUI MUIRURI.....6<sup>TH</sup> ACCUSED**  
**BERNARD MURIGI KARANJA.....7<sup>TH</sup> ACCUSED**  
**JOSPHAT MACHARIA MARUBU alias KASEE.....8<sup>TH</sup> ACCUSED**  
**MARY MUGECHI MBURU alias WAMUGECHI.....9<sup>TH</sup> ACCUSED**  
**JOSEPH NYAMU KAGO alias KIMANGU.....10<sup>TH</sup> ACCUSED**  
**PATRICK IKUU MUGO.....11<sup>TH</sup> ACCUSED**  
**SAMWEL NJERU MBURU.....12<sup>TH</sup> ACCUSED**  
**PETER MBURU MUNGAI.....13<sup>TH</sup> ACCUSED**  
**PETER MURIGI NGIGE.....14<sup>TH</sup> ACCUSED**  
**ZACKARIA NGARUIYA MUTWE.....15<sup>TH</sup> ACCUSED**  
**JOHN KAMAU KARIUKI.....16<sup>TH</sup> ACCUSED**

## RULING

### Background

All the sixteen (16) accused persons are charged with four counts of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the murders were committed jointly with others not before the court on various dates as follows:

**In Count 1: On 10<sup>th</sup> May 2015 at Kihui Mwiri in Murang'a North District in Murang'a County. The victim is Peter Kimani Kuria.**

**In Count 2: On 28<sup>th</sup> June 2015 at Majengo Estate in Thika Township within Kiambu County. The victim is Paul Muhuhi Bernard.**

**In Counts 3 and 4: On 29<sup>th</sup> July 2015 at Kihui Mwiri in Murang'a North District within Murang's County. The victims are Josphat Kibe Nyoike and Zakary Chege Kiratu respectively.**

The 16 accused persons appeared in court on 2<sup>nd</sup> August 2015 but the plea was not taken until 28<sup>th</sup> September 2015. They are represented as follows:

Mr. Okatch, instructed by Okatch & Partners, appears for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> accused persons. At the hearing of this application, Mr. Okatch told the court that he was holding brief for Mr. Githui for the 10<sup>th</sup> and 11<sup>th</sup> accused persons. There are two applications in the file in respect of the 7<sup>th</sup> accused: one filed by Okatch & Associates dated 7<sup>th</sup> October 2015 and another by Mbiyu Kamau dated 7<sup>th</sup> October 2015. Mr. Mbiyu argued his application in respect of the 7<sup>th</sup> accused. Mr. Ratemo Oira appears for the 13<sup>th</sup> accused person. His application is dated 22<sup>nd</sup> October 2015. The 9<sup>th</sup> accused person is represented by Mr. R.M Njiraini and his application is dated 29<sup>th</sup> October 2015.

All the accused persons are seeking, through their respective applications, to be admitted to bail pending the hearing and determination of this case. I will address all issues raised in all the applications in one ruling because although each of the accused person before the court has come before this court seeking to be admitted to bail, the applications raise similar issues in respect to bail/bond pending the hearing and determination of this case.

The grounds each applicant relies on are also similar except where there are a few differences.

### The applications

I have read all the applications and the respective supporting affidavits. All the accused persons have deposed that they are Kenyan citizens with fixed abode; that they will not interfere with investigations or witnesses; that they have families who depend on them; that their respective families continue to suffer while the accused persons continue being held in custody; that the offence is bailable; that there are no compelling reasons advanced by the prosecution; that each of them is not a flight risk and that each will abide by the terms and conditions of bail set by this court; that all of them save for 9<sup>th</sup> accused suffer from various ailments including hypertension, diabetes, headaches, eye problems, ulcers etcetera, as the case may be; that they are law abiding citizens with no criminal records and that they will cooperate with the court. All the applications save for the 9<sup>th</sup> accused were canvassed on 29<sup>th</sup> October 2015. The application for the 9<sup>th</sup> accused was heard on 2<sup>nd</sup> November 2015.

On behalf of his clients Mr. Okatch submitted in line with the grounds in support of the application found on the face of each application and the supporting affidavits. He told the court that the accused persons were summoned by the police to help with investigations and were detained and later charged with this offence; that they are of different ages and have families who may suffer if the accused persons continue being held in custody; that the accused persons are the sole bread winners of their respective families; that

they are law abiding citizens with no criminal records and that they undertake to cooperate with the police and the court. He further submitted that some of the accused persons are ailing and require medical attention which cannot be availed to them while in custody.

Mr. Okatch submitted that the tone of the replying affidavit discloses the pressure under which the investigating officers were undergoing to arrest and charge the accused persons before investigations were concluded; that the investigating officers, by investigating disappearances of certain persons, went outside the instructions to investigate the deaths of the victims in this case and that this case was poorly investigated. Counsel further submitted that every accused person has a right to a fair hearing; that the prosecution has not established compelling reasons; that the accused persons do not know who the witnesses are and therefore cannot interfere with them and that under the Witness Protection Act the witnesses can be protected.

Mr. Okatch submitted authorities to support his arguments. In **Republic v. John Kahindi Karisa & 2 others [2010] eKLR** counsel argued that the court considered that the paramount consideration in an application for bail is whether the accused persons will turn up for his trial. Counsel relied on **Republic v. Titus Kathurima [2015] eKLR** to argue the point that even where witnesses are known to the accused person this is not a compelling reason. In **Republic v. William Mwangi Wa Mwangi [2014] eKLR** counsel argued that the court was of the view that the mandatory death sentence upon conviction is not a compelling reason and finally in **Job Kenya Musoni v. Republic [2012] eKLR** Mr. Okatch submitted that the court found that the existence of other criminal cases facing an accused person cannot of itself be a basis for denying an accused person bail in subsequent cases.

On behalf of the 7<sup>th</sup> accused person, Mr. Mbiyu while supporting the submissions by Mr. Okatch submitted that his client is aged 68 years and is suffering serious ailment requiring medical treatment out of custody. Counsel referred to two letters, one from the doctor attending to the 7<sup>th</sup> accused person and another from Nairobi Remand Health Centre to support that the 7<sup>th</sup> accused is ailing. He further submitted that the 7<sup>th</sup> accused is not a flight risk and has cooperated with the police when summoned to assist the police with investigations; that the prosecution has not demonstrated that the 7<sup>th</sup> accused is likely to interfere with witnesses and that the 7<sup>th</sup> accused is not mentioned in the replying affidavit.

Mr. Ratemo Oira for the 13<sup>th</sup> accused also supported the submissions made by his colleagues and submitted that his client requires medical attention; that the accused knows the consequences of this case and will not interfere with witnesses and that the prosecution has not demonstrated compelling reasons to deny the accused bond.

Mr. Njiraini on behalf of the 9<sup>th</sup> accused person associated himself with the submissions by the other counsels and submitted that there are no compelling reasons why the 9<sup>th</sup> accused should be denied her constitutional right to bail pending the hearing and determination of this case; that there is no evidence that she is linked with any offence and that there is no evidence to make her apprehensive that she will be convicted. Counsel submitted that the 9<sup>th</sup> accused is a single mother with children at home. Counsel further submitted that the 9<sup>th</sup> accused's application should be treated on its own circumstances. He urged the court to allow the application and admit the 9<sup>th</sup> accused to bail.

### **The response**

The applications are opposed by the state. Prosecution counsel Ms Mwaniki relied on the Replying Affidavit of the Investigating Officer Detective John Wahome; Articles 49 (1) (h), 159 (2) (d) of the Constitution 2010 and the Bail and Bond Policy Guidelines 4. 26. Counsel submitted that it is the duty of the prosecution to satisfy the court on a balance of probabilities that there are compelling reasons to deny the accused bail. Ms Mwaniki submitted that in considering an application for bail, the court takes into account various factors including the nature of the charge, the strength of the evidence, likelihood of absconding and likelihood of interfering with witnesses. She urged the court to consider that there is likelihood that the accused will interfere or inflict fear on the witnesses. She referred to the annexed

letters and statements of some of the witnesses referring to threats on their lives. Counsel further submitted that the witnesses are known to the accused persons. She urged the court to strike a balance and protect the rights of the deceased and their families by securing the evidence of witnesses.

On the issue of the ailing accused persons, counsel submitted that Kenyatta National Hospital is well equipped to provide medical treatment while the accused persons are held in custody. She distinguished the authorities cited by submitting that in those authorities the prosecution had not provided evidence to support the averments in the replying affidavits unlike the instant case where there are annexures in terms of statements and letters as proof of threats to the witnesses.

Ms Mwaniki further submitted that some of the accused persons were charged in Murang'a Criminal Case No. 388 of 2015 and upon their release on bond some witnesses in that case were shot dead and that the remaining witnesses will be scared; that this case relates to Kihui Mwiri Company and all the deaths occurred there; that the accused persons know the witnesses and that the prosecution has satisfied the court that on a balance of probabilities that there are compelling reasons to deny the accused persons bail.

### **Determination**

I have carefully read the applications and the supporting affidavits. I have also carefully read the replying affidavit. I have considered the submissions by all the counsels in this case and the authorities cited by Mr. Okatch in support of the applications by his clients, which authorities were relied on by other counsels. Bail is a constitutional right. It is not an absolute right. It can be denied where compelling reasons exist. The court holds the final say whether to grant or not to grant bail by exercising its discretion.

My reading of the attached statements, specifically the statement by Peter Kimani Kuria, stated victim in count 1 ("CM3"), and that of Paul Muhuhi Bernard, stated victim in count 2 ("CM4"), it seems to me that the issues surrounding this case are intricate and go far back into history of Kihui Mwiri Company. At this stage of the trial this court is not able to know the motive for these murders or who committed them. However, the two statements I have mentioned allude to threats to the lives of the two victims, Peter Kimani Kuria and Paul Muhuhi Bernard. They had complained to the government security agencies that their lives were in danger. They are now victims in this trial. I have also taken into account the averments that other witnesses were killed following other criminal charges in other courts respecting Kihui Mwiri. Although these cases have no bearing to this case, it is not lost to this court that they are related to some extent with Kihui Mwiri.

While this court agrees with other courts in various rulings that the paramount consideration in a bail application is whether the accused person will turn up for his trial until the same is concluded, this court considers that where the prosecution satisfies the court on a balance of probabilities that there is a danger that witnesses may be interfered with the court cannot turn its back on such a matter. Everyone, the accused and the victim and the family of the victim, deserve to be accorded justice. Where evidence will not be forthcoming because a witness has been threatened or killed, then the course of justice is subverted.

After considering that this matter is intricate and evidence may go as far back as the time Kihui Mwiri came into existence in order to understand what motivated the deaths of the victims in this trial, and having read the attached statements of the victims, it is my view that I am persuaded by the prosecution, on a balance of probabilities, that there are compelling reasons in this case to decline to allow the respective applications. The sheer number of the accused persons, coupled with the fact that some of the victims in this case had reported threats to their lives as well as the fact that the deaths in this case are interlinked with Kihui Mwiri Farmers Company Limited, is persuasive to this court that for ends of justice to be met, it would be better to decline the applications for bail, which I hereby do.

For the avoidance of doubt, this court finds that the prosecution has satisfied it on a balance of probabilities that there are compelling reasons in this case to deny all the accused persons (applicants) bail pending the hearing and determination of this case. Consequently, I decline to grant bail to the 1<sup>st</sup>

accused to 16<sup>th</sup> accused persons, all inclusive. They shall remain in custody until the key witnesses specifically the civilian witnesses have testified.

I have taken into account the averments of the accused persons on their various ailments. I am alive to the fact that the Remand Prison has a health centre where all persons held in custody are attended to medically. Where need arises to be referred to another health institution with better facilities then reference is made to that effect. Where need arises for a court order, then this can be sought to ensure that anyone who requires medical treatment receives it.

Orders shall issue accordingly.

**Dated, signed and delivered in open court this 3<sup>rd</sup> December 2015.**

**S.N.MUTUKU**

**JUDGE**

**In the presence of:**

Ms Mwaniki for the prosecution

Mr. Okatch for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> accused

Mr. Mbiyu for 7<sup>th</sup> accused person

Mr. Njiraini for 9<sup>th</sup> accused person

Mr. Githui for 10<sup>th</sup> and 11<sup>th</sup> accused persons

Mr. Ratemo Oira for 13<sup>th</sup> accused

All accused persons present

Mr. Daniel Ngumbi, court clerk