



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.83 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

HILLARY NDHIWA.....1ST APPLICANT

STEPHEN KARIKO2ND APPLICANT

RULING

1. **Hillary Ndhiwa** and **Stephen Kariko** are the 1st and 2nd accused respectively in Criminal Case No. 83/2013. They are charged with the murder of Joseph Wanjohi Nderitu. The offence was allegedly committed on 1st August 2013 at Makongeni Estate in Ruai, Njiru District within Nairobi County. Both accused were arraigned in court on 1st August 2013 when they pleaded not guilty to the charge and were remanded in custody.
2. Both accused have now applied for bail pending trial. In their application dated 1st August 2013 filed by **Gachau & Co. Advocates**, they state in their respective supporting affidavits that they have no intention of interfering with investigations; that they have never interfered with witnesses; that they are willing to attend court whenever required; that they are willing to comply with any conditions imposed by the court.
3. Both applications are opposed by the State through the Replying affidavit of **No. 230822 Chief Inspector John Wainaina** of Kayole Police Station who is the investigating officer in the case. In his affidavit sworn on 12th August 2013, he deposes that the applicants were AP officers previously attached to Makongeni AP Camp where all the witnesses hail from; that the evidence against both applicants is strong and irrefutable as they were positively identified as the ones who arrested and beat up the deceased; that the civilian prosecution witnesses would likely be scared and intimidated by the fact that both applicants are serving Administration police officers; that the applicants would be tempted to abscond owing to the seriousness of charge and likely sentence of death if convicted; and that it will be in the interests of justice to deny the applicants bail.
4. At the hearing of the application on 26th September 2013, **Mr. Kaikai** for the applicants submitted that both applicants were law abiding citizens who trust the due process of law and would attend court dutifully. He stressed that there was no risk of the applicants absconding as they were public officers. He further submitted that they would not interfere with prosecution witnesses and that if released, the 1st applicant would relocate to join his family in Mt. Elgon while the 2nd applicant will relocate to his rural home in Laikipia.
5. In her submissions, **Ms. Magoma** for the respondent stated that the applicants were likely to interfere with witnesses and that their position as Administration police officers was likely to intimidate the civilian witnesses whose testimony was critical to the case.
6. I have considered the application. I take guidance from the law as provided in the Constitution.

Article 49 (i) (h) of the Constitution gives an arrested person the right to bond or bail pending a charge or trial. This right in my understanding is not unqualified as submitted by the 1st applicant. It is a right that can be curtailed by the court where there are compelling reasons. The right too is available to citizens and non-citizens alike. The Constitution has however in its wisdom left the task of deciding on the compelling reasons to the court so that the court can, taking into consideration the circumstances of each individual case, exercise discretion in granting or refusing to grant bail. Needless to add, the court is obligated to exercise its discretion judiciously and on the basis of the law and facts before it. See **Criminal Case No. 45 of 2013 Republic –Vs- Antoinette Uwineza Alias Michelin Uwababyi & another.**

7. In this application, the State has expressed many fears as outlined above. Having critically considered the rival affidavits and submissions, I find no merit in the fear that the applicants were likely to abscond. On the contrary, the applicants have proved that they were public servants with no prior criminal record, were family persons of fixed abode and have undertaken to attend their trial. I do find the respondents' fears in this regard unfounded and deserving of dismissal.
8. However, on the issue of likely interference with witnesses, I am persuaded that the prosecution has discharged its burden of demonstrating that there was a likelihood of civilian witnesses being fearful owing to the perceived position of influence occupied by the applicants by virtue of being administration police officers. It is in the interests of justice that this court ensures that the said witnesses testify in an environment free of fair. On this score, I observe that the matter is scheduled for hearing on 11th and 12th March, 2014. I order that the prosecution presents all its witnesses on the two days. The applicants shall be at liberty to renew their application then.

The applications dated 1st August, 2013 are dismissed.

Orders accordingly.

Ruling delivered and signed at Nairobi this 12th day of February, 2014.

R.LAGAT-KORIR

JUDGE

In the presence of:

..... :Court clerk
..... :Counsel for 1st & 2nd Applicant
..... :Counsel for the State/Respondent