



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL MURDER CASE NO.41 OF 2010

REPUBLIC PROSECUTOR/RESPONDENT

VERSUS

DANIEL AREBA 1ST APPLICANT

JOHN KEBASO NYAKUNDI alias MOSOMBA 2ND APPLICANT

RULING

1. The applicants herein Daniel Areba and John Kebaso Nyakundi alias Mosomba have been charged in High Court Criminal Case No.41 of 2010 with murder contrary to **Section 203** as read with **Section 204**. The two had been granted bail sometime on 4th April 2011 but on the 24th June 2011 the state applied that the said orders be vacated and the orders were so vacated as prayed. They have now approached this court with an application for review of the orders vacating the orders granting them bail and are again seeking to be released on bond/bail pending the hearing of their case.

2. The application is brought under **Article 49 (I) (h)** of the **Constitution** and **Section 124** of the **Criminal Procedure Code Cap 75 Laws of Kenya** and is grounded upon their annexed affidavits and upon the further grounds that the Witness Protection Act is in force, and that it is their constitutional right to be released on bail. They also contend that they have families to take care of and that they are ready to abide by any conditions that may be imposed by this court.

3. The application, dated 1st December 2011 is filed by J.M. Nyagwencha Advocate who acts for both the applicants. The main case has been fixed for hearing on the 27th February 2014. Before proceeding with the application the court on 19th November 2013 ordered for Bail Assessment Reports which have been availed by Mr. Kirui.

4. Mr. Nyagwencha for the applicants submitted that from the replying affidavit sworn by Cpl Joshua Tobole NO.46478 he was not the investigating officer and he had not recorded any statement and therefore there was no reason why accused persons should be denied bond. That in paragraph 7 of the affidavit it is alleged that the family of one Rodgers cannot live peacefully as it is under threat of the accused persons. Counsel submitted that there is no witness by the name Rogers and that the only Rodgers mentioned in this matter is the deceased. He concludes by submitting that there is no good reason to deny the accused persons bond.

5. Mr. Wainaina for the state requested for time to confirm whether Cpl Tobole is the Investigating Officer and to respond to the allegations raised by the applicants' counsel but the same was denied.

6. When issuing its orders on the 4th April 2011 Justice Makhandia allowed the accused persons herein to

be released on a personal bond of Kshs.500,000/= each with two sureties each in the same amount to be approved by the Deputy Registrar of the court. Upon release the accused were required to attend court for the mention of their case after one month.

7. From the Bail Assessment Report by the Probation Officer, the same seem favourable to the applicants. It is not clear whether Cpl Joshua Tobole is the Investigating Officer in this case and whether he had recorded a statement, but the Bail Assessment Report on John Kabaso Nyakundi shows that there is still tension on the ground, although he is recommended for bond.

8. The applicants herein are quite elderly. Though there seems to be some tension on the ground, I find that there are no compelling reasons given by the State to deny them their constitutional right of being admitted to bail as provided under **Article 49 (I) (h)** of the **Constitution of Kenya**. Moreover the accused persons have been in custody from 2011 to 2014 (about two and a half years).

9. Having said the above, I find no reason to detain the accused persons in remand pending the hearing of their case on 27th February 2014 subject to the conditions set out herein. The accused persons shall be released on a personal bond of Kshs.1, 000,000/= (Kshs. One Million) each with two sureties each in the same amount to be approved by the Deputy Registrar of the court. Upon release the accused shall attend the mention of their case after every thirty days. They are also to present themselves before the area chief on Friday of every week until their case is heard and determined. Failure to abide by the conditions set herein will have dire consequences, including cancellation of the bond. Hearing of the case on 27th February, 2014.

Dated, signed and delivered at Kisii this 6th day of February, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Nyagwencha (present) for the Applicants

Mr. Ochieng (present) for the Respondent

Mr. Bibu - Court Clerk