



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

HCCR NO. 72 OF 2013

STATE.....PROSECUTOR

VERSUS

PETER ONYANGO

VITALIS ADERO.....ACCUSED

**RULING**

1. The two accused persons were arraigned in this court on 8<sup>th</sup> November, 2013 charged with murder Contrary to **Section 203** as read with **Section 204** of the Penal Code. They pleaded not guilty to the charge.
2. On 18<sup>th</sup> December, 2013 this court granted their application for bond pending trial and the record shows that on 19<sup>th</sup> December, 2013 their sureties were duly examined by a Deputy Registrar and approved. They were therefore released from custody.
3. On 20<sup>th</sup> February, 2014 when their trial was to commence the witnesses were not present and Mr. Oluoch counsel for the Republic informed the court that the reason the witnesses had not attended was because once the accused persons were released their kin visited the police station with two of the prosecution witnesses and sought to have their statements withdrawn.
4. This court did not take the matter lightly and so it suspended bond for the accused persons pending a formal application to revoke their bond to which they would respond. That application was filed on 20<sup>th</sup> February.
5. The application brought by way of Notice of Motion seeks a cancellation of the bond on the ground that the accused persons have interfered with witnesses. The application is supported by the affidavits of Corporal Joseph Nyamai, - the investigating officer and one Agalla Mathoro the father of the deceased in this case. They depose that the 1<sup>st</sup> accused person's kin one Patrobas Ogaja did in fact visit the office of the Investigating Officer and asked that the statements of the two witnesses be withdrawn. They further depose that without the evidence of these two witnesses the prosecution's case will be weakened and the accused persons are likely to be acquitted.
6. The accused persons have also sworn affidavits in which they dispute interfering with witnesses and contend that the allegations are fabricated because the prosecution knows it has a weak case. That moreover there is no affidavit from the witnesses to the effect that they have been interfered with. They also depose that it is not their responsibility and it would be unfair to clothe them with the responsibility of ensuring that witnesses attend court.
7. The application was canvassed before me on 26<sup>th</sup> February, 2014 and upon hearing counsel appearing for the State and for the accused persons reserved my ruling.
8. I have now had ample opportunity to consider the application, the affidavits in support, annexures thereto, the replying affidavit and also the rival submissions interference with witnesses is a grave

matter and where it is proved that the security of witnesses is threatened or that they have been intimidated by an accused person then in my view that would be a ground for cancellation of bond so as to minimize contact between the witness and the accused person. However it is evident from the affidavits and the submissions of counsel for the State that the accused persons have not by themselves interfered with the witnesses. It is deposed that it is one Patroba Ogaja a kin of the 1<sup>st</sup> accused who went to the police station with the two witnesses. There is nothing whatsoever to demonstrate or even suggest that any of the accused persons were privy to that visit let alone that they were the ones behind it. It behoved the prosecution to prove the nexus between the action by the said Kelvin and the two accused persons. This is given the fact that bond is a Constitutional right which may only be limited on reasonable grounds. There would have to be a compelling reason to withhold bond and that compelling reason would in the circumstances of this case be demonstrated by cogent evidence that the accused persons have interfered with witnesses. That has not been demonstrated. That could have been done by getting the witnesses to swear affidavits.

9. Cpl Joseph Nyamoi has deposed that Patroba Ogaja went to his office with the two witnesses and made a request that their statements be withdrawn. He does not however state what he did with the said Patrobas.

**Section 117** and more particularly **subsection (b)** makes such conduct an offence. The same provides as follows:-

***“Any person who***

- a. ....
- b. ***In order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so is guilty of an offence and is liable to imprisonment for five years.”***

The question that then begs an answer is why Corporal Nyamai took no action against the said Patrobas. It is also instructive that counsel for the Republic conceded to having one of the witnesses in his chambers on the day we were to hear this application yet he did not get her to swear an affidavit.

10. In the end I find that the allegation against the accused persons has not been proved. I agree with their Advocate’s submission that it would be unfair to clothe them with the responsibility of ensuring that witnesses attend court. Accordingly the application is dismissed. Their bond shall be reinstated with a strict warning that they should keep off the prosecution witnesses or else they risk to have their bonds cancelled. It is so ordered.

Signed, dated and delivered in open court this 13<sup>th</sup> day of March, 2014.

**E. N. MAINA**

**JUDGE**

**In the presence of:**

Mr. Oluoch for Republic

Mr. Nyauke for both accused

Both accused

Risper – Dholuo Interpreter