

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.9 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL GITAU MAINA ALIAS STRANGER.....1ST ACCUSED

STEPHEN WAWERU NGUNGU.....2ND ACCUSED

ANTONY KAMWENYI3RD ACCUSED

STEPHEN MWANGI4TH ACCUSED

MICHAEL THUO GIKARU.....5TH ACCUSED

RULING

The Accused, Samuel Gitau Maina, Stephen Waweru Ngungu, Antony Kamwenyi, Stephen Mwangi and Michael Thuo Gikaru were charged with two counts of **murder** contrary to **Section 203** as read with **204** of the **Penal Code**. The particulars of the offence were that on 23rd December 2012 at Mathare 3C within Nairobi County, the Accused, jointly with others not before court, murdered Johnson Kiruthu Kagio and David Njoroge Kiige. When the Accused were arraigned before this court, they pleaded not guilty to the charge. The trial is yet to commence. The Accused have invoked the provisions of **Article 49(1)(h)** of the **Constitution** to be released on bail pending trial. The Accused have averred that the law presumed them innocent until proven guilty. They were constitutionally entitled to be released on bail pending trial unless there were compelling reasons. In their considered view, the Accused stated that there were no compelling reasons why they should not be released on bail pending trial. They stated that they had cooperated with the police during investigations, and further, they posed no risk of obstructing the investigations. They were willing to abide by any terms and condition that the court may impose for their release on bail pending trial. Some of the Accused swore that they were victims of mistaken identity and therefore ought to enjoy their freedom while awaiting trial.

The application for bail pending trial is opposed. PC Steve Owuor, the investigating officer, swore a replying affidavit in opposition to the application. He explained the circumstances under which it was alleged the Accused committed the offence. He swore that there was likelihood that the Accused persons will interfere with the prosecution witnesses if released on bail pending trial. He stated that, taking into consideration the serious nature of the charge facing the Accused, the likelihood that the Accused persons would be tempted to abscond was high. In his view, there were sufficient compelling reasons why the Accused persons should not be released on bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Mr. Oundo for the 1st, 2nd and 4th Accused, Mrs. Omungala for the 3rd Accused, Mr. Tanui for the 5th Accused and Ms. Onunga for the State. The court has carefully considered the said submission. The issue for determination by this court is whether the Accused establish a case for this court to release him on bail pending trial. That the Accused is entitled to be considered for bail pending trial as provided under **Article 49(1)(h)** of the **Constitution** is without doubt. However, the court must be satisfied that there exist no compelling

reasons to deny him bail. Among the compelling reasons to be considered by the court include: the nature of the offence, the strength of the evidence which supports the charge, the gravity of the punishment in the event of conviction, the previous criminal record of the applicant, the probability the accused may present or surrender himself for trial, the likelihood of further charges being brought against the accused, the likelihood of the accused interfering with witnesses or to procure the suppression of evidence that may incriminate him, the probability of finding the accused guilty as charged, the detention for protection of the accused and the necessity to procure medical or social report pending final disposal of the case (see **Republic –vs- Milton Kabulit & Others Criminal Case No.115 of 2008 (Nakuru)** – unreported). The above reasons are not by any means exhaustive. The court hearing the case will have to determine each case based on its merits and circumstances.

In the present application, it was clear to the court that the prosecution did not place before the court any compelling reasons to persuade this court not to release the Accused persons on bail pending trial. The fear expressed by the prosecution to the effect that the Accused persons may interfere with the prosecution witnesses, if released on bail pending trial, is not supported by cogent evidence. It is not enough for the prosecution to allege that the Accused persons may interfere or influence prosecution witnesses. They must present to the court clear evidence which points to the likelihood that the Accused persons will intimidate the prosecution witnesses. This court is aware that the Accused persons are facing a serious offence which, if convicted, will result in the Accused persons suffering the ultimate sentence. However, this cannot be the only consideration that the court will take into account when determining whether or not to release an Accused person on bail pending trial. Taking into consideration the entire circumstances of this case, this court formed the opinion that the concerns raised by the prosecution will be addressed by appropriate orders being issued by this court as condition for the release of the Accused persons on bail pending trial.

In the premises therefore, each accused is released on bail pending trial on condition that each Accused posts a bond of Kshs. 1 million with one surety of the same amount. The Accused persons shall not contact any of the prosecution witnesses before they have testified in court. The Accused persons will appear before the Deputy Registrar of the court at least once a month for mention of the case until further orders of the court. The Accused persons will attend court without fail. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2014

L. KIMARU

JUDGE