



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 61 of 2012

REPUBLIC .....RESPONDENT

VERSUS

DWIGHT SAGARAY .....1<sup>ST</sup> ACCUSED

MOHAMED AHMED MOHAMED HASSAN .....2<sup>ND</sup> ACCUSED

AHMED MUTIVANE OMIDO .....3<sup>RD</sup> ACCUSED

ALEX SIFUMA WANYONYI .....4<sup>TH</sup> ACCUSED

MOSES KIPROTICH KALYA .....5<sup>TH</sup> ACCUSED

RULING

The five accused persons **Dwight Sagaray, Mohammed Ahmed Hassan, Mutivane Omido, Alex Sifuna Wanyonyi, and Moses Kiprotich Kalya** (1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused respectively) are facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 26<sup>th</sup>/27<sup>th</sup> July 2012 at the residence of the Venezuelan ambassador in Runda Estate within Nairobi County, jointly with another not before court, murdered **Olga Fonseca**.

The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused were arraigned in court to plead to a consolidated charge on 12<sup>th</sup> November, 2012. They pleaded not guilty and were remanded in custody. The 2<sup>nd</sup> accused is yet to be arrested and arraigned in court. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons have applied to be granted bail or bond pending their trial. Their four applications have been heard together and are the subject of this Ruling.

The applications on record for the consideration of this court are as follows;-

1. The notice of motion filed by the 1<sup>st</sup> accused dated 29<sup>th</sup> November 2012 through the firm of **Katwa & Kemboy advocates**. It is supported by the affidavit of the 1<sup>st</sup> accused sworn on 28<sup>th</sup> November 2012. Submissions thereon and list of authorities were filed by the accused's counsel on 4<sup>th</sup> December, 2012.
2. The notice of motion dated 13<sup>th</sup> November 2012 filed by the 3<sup>rd</sup> accused through the firm of **Odiwuor Aomo Kelly & Associates** on 14<sup>th</sup> November 2012. It is supported by the affidavit sworn by the 3<sup>rd</sup> accused on 13<sup>th</sup> November, 2012. Submissions thereon were filed by the accused's counsel on 13<sup>th</sup> March

2013.

3. The notice of motion filed by the 4<sup>th</sup> accused on 4<sup>th</sup> December 2012 through the firm of **F.N. Njanja & Company advocates**. It is supported by the affidavit of the applicant sworn on 4<sup>th</sup> December 2012. Submissions thereon were filed by the accused's advocate on 14<sup>th</sup> March 2013.

4. The notice of motion filed by the 5<sup>th</sup> accused on 17<sup>th</sup> December 2012 through the firm of **Ondieki & Ondieki advocates**. It is supported by the affidavit of the 5<sup>th</sup> accused. Submissions thereon were filed by the accused's advocate on 12<sup>th</sup> March 2013.

All the applications on record are opposed by the state through the sworn affidavits of the Investigating Officer, One **Number 215805, Supt Peter Mungai** dated 11<sup>th</sup> December 2012 in respect of 1<sup>st</sup> and 3<sup>rd</sup> accused/applicant; respectively and dated 13<sup>th</sup> March 2013 in respect of the 4<sup>th</sup> and 5<sup>th</sup> accused respectively. The state through prosecuting counsel **Ms Ouya** also filed skeleton arguments in opposition on 13<sup>th</sup> March 2013.

I will begin with the 1<sup>st</sup> application by the 1<sup>st</sup> accused.

The application by the 1<sup>st</sup> accused is basically an application for review, his first application having been rejected by the court (differently constituted) on **29<sup>th</sup> October 2012**.

In his lengthy supporting affidavit, the applicant has made several averments including that he is a Venezuelan citizen on diplomatic posting to Kenya for a period of 3 years ending 2013; that the prosecution had had ample time to arrest the 2<sup>nd</sup> accused; that he is a man of good standing, integrity and responsibility; and, that he has co-operated with the investigation and will abide by any bail or bond terms imposed by the court.

In opposing the application, the investigating officer averred that the accused was a senior diplomat at the Venezuelan embassy and therefore was likely to interfere with prosecution witnesses who previously worked under him. He further deposed that the accused was a close friend to the 2<sup>nd</sup> accused who is yet to be arrested and that the release of the accused was likely to compromise investigations. Finally, the investigating officer avers that the applicant being a foreigner was a flight risk; and that if released, the applicants safety may not be guaranteed due to the public interest in the case.

The application was urged before me on 14<sup>th</sup> April, 2013. **Mr. Katwa**, learned counsel for the applicant submitted that the accused was entitled to bail both under the Kenyan Constitution and under Venezuelan law. He cited **Article 49 (i) of the Kenyan Constitution** in support of this. In respect of the prosecution's opposition, he submitted that the failure of the investigation to arrest and arraign another suspect cannot be a basis to deny other suspects their right to bail. He added that in any case the applicant had no knowledge of the whereabouts of the 2<sup>nd</sup> accused; and, that there was no likelihood of applicant interfering with prosecution witnesses as the Investigation had already taken statements from the witnesses.

On the prosecution's assertion that the applicant's safety might not be guaranteed if he was released, counsel submitted that there was no likelihood of public outrage and retaliation as neither the applicant nor the deceased were well known to the Kenyan public both being foreign nationals.

In urging the court not to release the applicant, **Ms Ouya** learned counsel for the state urged the court to consider the real likelihood of the accused absconding particularly because he was not a Kenyan citizen and the likelihood of interference with the witnesses who were his juniors at the Venezuelan embassy. She further submitted that the applicant had been stripped of his diplomatic status by his government and no longer had identifiable residence. She underscored that bail was not an absolute right but was discretionary depending on the facts of every case.

The applications by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused are first applications. The averments in their respective affidavits are similar. They include *inter alia* the opposition to being denied bail on account of the 2<sup>nd</sup> accused who has not been arrested; their undertaking to co-operate with the investigation; not to interfere with witnesses; and to attend court whenever required.

As earlier indicated, all the three applications are opposed through the Replying affidavits of the investigating officer. The common averments in the replying affidavits are that the 2<sup>nd</sup> accused, one **Mohamed Ahmed Mohamed Hassan** is still at large; that the accused are likely to interfere with witnesses; that they are likely to abscond; and, that the accused are likely to be injured by members of the public owing to the public interest in the matter.

In urging the application for the 3<sup>rd</sup> accused, learned counsel **Mr. Olewe** associated himself with submissions on behalf of the first applicant. He emphasized that the 3<sup>rd</sup> accused had demonstrated by his conduct co-operation with the Investigation notwithstanding his opinion that there was hardly any evidence linking him to the offence. He submitted that the applicant was a law abiding citizen of known fixed abode.

**Mr. Okatch** learned counsel for the 4<sup>th</sup> accused while adopting the arguments of both the 1<sup>st</sup> and 2<sup>nd</sup> applicants' counsel submitted that the allegation that the applicants may be attacked if released was not only without basis but that it was the duty of the State to protect its citizens whether in or out of custody.

**Mr. Ondieki**, learned counsel for the 5<sup>th</sup> accused on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> applicants urged the court to give meaning to the principle and constitutional provision on the presumption of innocence and not to incarcerate the accused before trial. While associating himself with the submission of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants, he submitted there was hardly any evidence linking his client to the offence.

The law and practice on bail for murder suspects is now fairly settled. The Constitution under **Article 49 (1) (h)** removed the earlier exception to the right to bail for capital offenders. Article 49 (1) (h) states that "*an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.*" It is the duty of the state through the prosecution to demonstrate to the court any compelling reasons.

The constitution however has not identified what qualifies under the term "compelling reasons." The ordinary meaning according to Thesaurus English Dictionary of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstance brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial. See **Jaffer V. Republic 1973 E.A. 39**. In **Alhaji Mujahid Dukubo – Asan Vs Federal Republic of Nigeria S.C. 20A/2006** Justice Ibrahim Tanko Muhammad J.S.C. enumerated some of the considerations as follows:-

- (i) *The nature of the charges.*
- (ii) *The strength of the evidence which support the charge.*
- (iii) *The gravity of the punishment in the event of conviction.*
- (iv) *The previous criminal record of the accused if any.*
- (v) *The likelihood of the accused interfering with witnesses or suppressing any evidence that may incriminate him.*
- (vi) *The likelihood of further charges being brought against the accused.*

- (vii) *The probability of guilt.*
- (viii) *Detention for the protection of the accused.*
- (ix) *The necessity to procure medical or social report pending final disposal of the case.*

These are the considerations that courts have used time and again. The promulgation of the Constitution 2010 has however upset most of these criteria. The gravity of the charge as well as the likelihood of conviction for example are no longer sound relevant criteria in view of **Article 49(1)**.

I have considered the 4 applications in totality. I have paid particular attention to the rival affidavit evidence as well as submissions in respect of each applicant.

It has been submitted by the prosecution that the 1<sup>st</sup> accused person and indeed all the accused, are likely to interfere with prosecution witnesses. For the 1<sup>st</sup> accused, his position of influence within the Venezuelan embassy has been cited. As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others.

I agree with the holding in **Panju Vs Republic [1973] E.A 284**, where the court in dismissing the prosecutor's fear of interference with witnesses stated that before any one can say there would be interference with vital witnesses, at least some facts should be led to the court, otherwise it is asking courts to speculate."

For the 1<sup>st</sup> accused, it is feared that the witnesses are his former junior colleagues at work. However, it has been shown to this court by the prosecution that the accused has already been relieved of his duties and stripped of his diplomatic status. His position of influence is therefore not easily discernible.

For the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused, clearly no possibility of interference with prosecution witnesses has been shown.

Closely linked with the issue of interference with witnesses is the fact that 2<sup>nd</sup> accused is still at large. The fear of the prosecution is that the accused persons, and in particular the 1<sup>st</sup> accused if released is likely to get into contact with the said 2<sup>nd</sup> accused thereby jeopardizing the investigations and prospects of arresting the 2<sup>nd</sup> accused. It has been submitted on behalf of all the applicants that the failure of the investigation to trace, arrest and charge the 2<sup>nd</sup> accused cannot be a ground to deny the accused bail. I agree. It is the duty of the state through its investigative agencies to track down, arrest and arraign the 2<sup>nd</sup> accused and any other suspect or suspects in this case. The duty cannot be shifted to the accused. All the accused would be required to do is to co-operate with and assist the investigative agencies in their lawful duty. I agree with defence counsel that the opposition to bail on this ground must be rejected for the reason that it is not known when the 2<sup>nd</sup> accused will be found and arrested. It is also a relevant fact that there has been a lapse of about 10 months since the offence was committed.

Thirdly and more critically, the accused persons are said to be a flight risk. This issue was canvassed extensively particularly in respect of the 1<sup>st</sup> accused who is a foreign national. It was the prosecution's submission that although the 1<sup>st</sup> accused has been stripped of his diplomatic status, he holds his passport which he can use to leave the jurisdiction of this court and evade trial. It was submitted that besides the likelihood of flight, the 1<sup>st</sup> accused was currently of no fixed abode having been evicted from his previous residence. Indeed as stated earlier, the primary purpose of bail is to secure the accused's attendance at trial. The prosecution's apprehension is therefore a consideration not to be taken lightly. I have treated it

with the seriousness it deserves and come to the considered view that the panacea for possible flight is not to automatically deny bail but to impose stringent conditions that would attract attendance at trial.

On this issue of flight, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused have averred that they have no capacity to leave the jurisdiction of this court being Kenyan citizens, of ordinary means, fixed abode and have strong family and community ties within Kenya.

In considering the 1<sup>st</sup> applicant's review and the initial applications of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused, and as demonstrated in the body of this Ruling, I have found no compelling reasons not to admit them to bail. In the premises I allow all the four applications on the following terms specific to each accused/applicant:

**(1) Dwight Sagaray – 1<sup>st</sup> accused**

- (i) He shall pay cash bail of Two Million shillings (KShs.2 million).
- (ii) He shall provide 2 Kenyan sureties of One million shillings each to be approved by the Deputy Registrar of the Court.
- (iii) He shall deposit his passport and any other travel document in his possession with the court.
- (iv) He shall not leave the jurisdiction of the court without an order of the court.
- (v) He shall furnish the Deputy Registrar of the court evidence of his place of residence within Kenya and inform the court whenever he changes such residence.
- (vi) He shall not communicate directly or indirectly with the 2<sup>nd</sup> accused or with any of the prosecution witnesses.
- (vii) He shall report to the criminal investigation office, Gigiri once every two weeks until further orders of this court.
- (viii) He shall attend court for the mention of this case once every month. The first such mention will be on 4<sup>th</sup> June, 2013

**(2) Ahmed Mujivane Omido – 3<sup>rd</sup> accused, Alex Sifuma Wanyonyi (4<sup>th</sup> accused) and Moses Kiprotich Kalya (5<sup>th</sup> accused) shall each;**

- (i) Pay cash bail of One Million Shillings (Kshs.1Million) with one surety of like sum to be approved by the Deputy Registrar of the court.
- (ii) Not leave the jurisdiction of this court without an order of the court.
- (iii) Report to the CID office, Gigiri once every two weeks until further orders of this court.
- (iv) Not communicate directly or indirectly with the 2<sup>nd</sup> accused or with any of the prosecution witnesses.
- (v) Attend court for the mention of this case once every month. The first such mention shall be on 4<sup>th</sup> June, 2013.

Orders accordingly.

**Ruling delivered, dated and signed at Nairobi this 2nd day of May, 2013**

**R. LAGAT - KORIR**  
**JUDGE**

In the presence of:

- .....: Court clerk
- .....: Applicants
- .....: For the accused/applicants
- .....: For the State/respondent