



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 94 OF 2012

REPUBLIC.....
.....RESPONDENT

VERSUS

JOSEPH MARANGU M’MURIITHI alias KIHARA alias JAMES MWANGI NDIRANGU
alias.....1ST APPICANT

GERALD WAHOME MAINGI
.....2ND APPLICANT

RULING

Joseph Marangu M’Muriithi alias Kihara alias James Mwangi Ndirangu and Gerald Wahome Maingi are the 1st and 2nd accused respectively in Nairobi Criminal Case No. 94/2012. They are charged with the murder of **Omit Shah**. The offence was allegedly committed on 13th September 2012 at 5th Parklands Avenue in Parklands within Nairobi County. Both accused were arraigned in court on 22nd November 2012. They pleaded not guilty and were remanded in custody pending trial. Both accused have now applied for bail. Their respective applications dated 7th and 6th December 2012 have been consolidated hence this single Ruling.

The 1st applicant states in his supporting affidavit sworn on 7th December, 2012 that the offence is bailable; that he has a fixed abode at Makongeni Phase 3 in Thika town; that he is married with 8 children, 3 of whom are minors; that he is the sole bread winner of the family; and, that there were no compelling reasons to deny him bail. He further avers that he will be ready and willing to attend court and abide by any orders of the court.

The 2nd applicant states in his supporting affidavit sworn on 8th December 2013 that the offence with which he is charged is bailable; that he is a father of 3 minor children; that he is the family’s bread winner; that he will attend court; and that there were no compelling reasons to defeat his application.

Both applications are opposed by the State through the Replying Affidavit of **No. 50897 Cpl. Gerald Kamwaro** of Flying Squad Unit Nairobi who is the investigating officer in the case. In his lengthy affidavit, he makes averments on the shooting incident which led to the death of the deceased **Omit Shah** and one other person; and the recovery of a sub-machine gun and several rounds of live ammunitions. He

states that the investigation revealed sufficient evidence to link the accused and others who are still at large to the present offence; and that the release of the accused would elicit fear on the witnesses and jeopardize ongoing investigations to arrest other culprits who are still at large.

Both applicants have filed further affidavits to dispute the averments in the investigating officer's replying affidavit. In particular they deny knowledge of any of the witnesses and any intention to interfere with investigations or the arrest of any other suspects. They further dispute averments that touch on evidence and in particular those relating to the firearms and ammunition said to have been recovered at the scene.

Several issues have been raised in this application. The first relates to the accused's right to liberty and the right to be presumed innocent until proved guilty. The second relates to the likelihood of interference with witnesses and on-going investigations. The third issue relates to the likelihood that the accused may abscond.

I will begin with the issue of the accused's right to liberty and the right to be presumed innocent until proved guilty. It has been argued by **Mr. Mathenge** for the applicants that the applicants have the right to liberty and that such liberty cannot be limited without lawful reasons provided for under **Article 24(3) of the Constitution**. **Ms Mwaniki** the prosecuting counsel has not contested this position. It is my view that the position stated by the applicant is correct. However **Article 49(i)(h) of the Constitution** which provides the right of any arrested person to bail also gives the court the discretion to limit the right to liberty where there are compelling reasons.

Further, it is my view that where the court finds compelling reasons to limit an accused's right to liberty, such a limitation cannot be equated to loss of or interference in any way with the right to be presumed innocent until proven guilty.

Under **Article 50(2) of the Constitution** the accused will at all times be presumed innocent until proven guilty by a court of law. However, where the court finds compelling reasons not to admit an accused to bail and proceeds to deny bail, such denial is not a statement on the accused's guilt but rather is a safeguard to ensuring that the interests of justice are served in each individual case. In my view, denial of bail is not an antithesis to the presumption of innocence. See **Dancun Livingstone Kimanthi and Winnie Wairimu Kariuki Vs. Republic, Nairobi Criminal Case No. 50 of 2012**.

The second and more critical issue in this application is the likelihood of interference with prosecution witnesses and on-going investigations. It has been submitted by the prosecuting counsel that the eye witnesses who witnessed the shooting of the deceased would be intimidated or scared off if the applicants were released. This is because the said witnesses saw both the shooting and the recovery of a sub-machine gun and live ammunition from the scene of the shooting. According to counsel, those are circumstances that may make the witnesses fear to testify against the accused.

Counsel has further submitted that the accused were not acting alone and that there are other suspects who are still at large and therefore that the release of the applicants may jeopardise on-going investigations to recover guns and ammunition and arrest other suspects.

On the issue of the suspects who are still at large, I take the view that the Investigation cannot shift its duty to track and arrest the suspects to the accused but that it is the citizens' duty of the accused to merely assist the law enforcement agencies in their lawful duty of investigation. See **R. Vs. Dwight Sagaray & 4 others, Nairobi Criminal Case No. 61 of 2012**. However, in the circumstances of the present case, it is clear to me from the lengthy depositions of the investigating officer and the submissions of the prosecution counsel, that the investigations to nab other suspects are still on-going and that the release of the applicants at this stage may not only jeopardise such investigations but instill real fear in the witnesses.

I take the view that it is in the interest of justice that the testimony of the witnesses must be safeguarded and produced in an environment-free of fear and intimidation. I am therefore persuaded that

the prosecution has demonstrated the existence of compelling reasons not to admit the applicants to bail. It is to be remembered that the standard to be applied in so doing, while higher than a balance of probability, is not expected to be one beyond reasonable doubt.

I am disinclined to grant the applicants bail. Their respective applications are dismissed.

Ruling delivered, dated and signed at Nairobi this 30th day of September, 2013

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: **Court clerk**

.....: **1st Applicant**

.....: **2nd Applicant**

.....: **For the 1st & 2nd accused/applicant**

.....: **For the State/respondent**