REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 78 OF 2014

REPUBLIC……PROSECUTOR

VERSUS

TITUS NGAMAU MUSILA KATITU ……ACCUSED

RULING

The applicant **Titus Ngamau Musila** alias **Katitu** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that he murdered one Kenneth Kimani Mwangi on 14th March 2013 at Githurai 45 Bus stage in Nairobi County. He pleaded not guilty when arraigned in court on 5th September, 2014 and was remanded in custody pending his trial which is scheduled to commence on 11th May 2015. Subsequently on 10th and 11th September 2014 the accused (hereinafter the applicant) through his counsel **Mr. Mbindyo** and **Mr. Ombetta** respectively, applied for bail pending trial. In subsequent proceedings, the applicant abandoned the earlier application and proceeded with the one filed by **Ombetta advocates**.

The application is premised on Constitutional grounds namely that the offence of murder is bailable under **Article 49(i)(h) of the Constitution**; that the applicant has an unqualified constitutional right to be released on bond or bail on reasonable conditions; and, that the applicant has an unqualified constitutional right to be presumed innocent until the contrary is proved. In the supporting affidavit the applicant states that he is a Police Constable (No. 72556) of 16 years active service attached to Kasarani Police Station; that he is a family man married to one Pauline Mwende with whom he has four minor school going children aged 15, 13, 11 & 8; that he presented himself to the OCPD Kasarani on 4th September 2014 when he learnt through the press that a warrant of arrest had been issued against him; that his continued detention undermines his Constitutional rights; and, that he would attend court if released on bond.

The State has through the Independent Policing Oversight Authority (IPOA) and the Office of the Director of Public Prosecutions (ODPP) strongly opposed the application. Diana Watila an investigator with the IPOA has sworn a lengthy replying affidavit opposing bail on grounds that the applicant has during on-going investigations of Criminal Case No. 78/2014 threatened, coerced and intimidated prosecution witnesses leading to their relocation; that the said witnesses had made reports to the IPOA regarding the threats; that on 24th August 2014 three days after the Director of Public Prosecutions recommended murder charges against the accused, he (the accused) shot and killed one Oscar Muchoki Mwangi, one of the said witnesses.

At the hearing of the application on 19th September 2014 I heard submissions from **Mr. Ombetta**

and **Mr. Wandugi** for the applicant. In prosecuting the application, **Mr. Ombetta** laid strong emphasis on the Constitutional guarantees to liberty as enshrined in the Bill of Rights. He cited **Articles 19, 20, 21 and 22.** He submitted that the court as a State organ was enjoined to interpret the Constitution in a manner that favours the enforcement of individual rights. Counsel further submitted that the applicant had the right to the presumption of innocence under **Article 50** and that his incarceration before trial was prejudicial.

On his part, **Mr. Wandugi** submitted that the applicant had a fixed abode and no antecedent of absconding. Citing **Njehu Gatabaki Vs. Republic, criminal Application No. 43 of 1993,** he submitted that the criteria which the courts have been using to determine bail are found in the Bail Act of England which was not part of Kenyan Law. He posited that the ground of interference with witnesses cited in the replying affidavit was one of such criteria not provided for under **Article 49** of the Constitution. On the issue of threat to prosecution witnesses, he submitted that those were mere allegations which were not proved. To buttress his submissions, he relied on **David Njuno Mbiyo Vs. Republic [2011] eKLR, Republic Vs. Danson Mgunya & another [2010] eKLR; and Aboud Rogo Mohammed & Another Vs. Republic [2012] eKLR.**

In contesting the application, the State proceeded vide *Viva Voce* evidence given by the IPOA investigating officer. In sworn testimony, Ms. Watila reiterated the averments in her sworn affidavit aforementioned. She testified that she had been detailed by IPOA to conduct investigations into complaints raised against the accused, a serving police officer. That her investigations revealed that the accused had interfered with investigations by intimidating, threatening and coercing prosecution witnesses in Criminal Case No. 78 of 2014. That in the said criminal case the accused was identified by the witnesses as the one who shot and killed the deceased. She testified that while investigations were on-going, the brother of the deceased one Oscar Mwangi who had reported threats on his life by the accused was also shot and killed.

The witness produced OB No. 61/24/8/2014 of Kasarani Police Station (DW3) which shows that a report was booked that **PC Musila** (the applicant) had pursued and fatally shot a suspect named John Mwangi Muchoki alias Oscar. She stated that Oscar Mwangi was an eye witness in Criminal Case No. 78 of 2014 and had not only recorded a statement but made a report to IPOA that the accused had threatened him and members of his family. She exhibited the statement of Oscar Muchoki Mwangi as DW1 in which he details instances of alleged threats by the accused against him and members of his family after the accused allegedly shot and killed the deceased Kenneth Kimani Mwangi.

In further testimony, **Ms. Watila** stated that two other witnesses one Purity Wanjiku (mother) and Stella Wachira (sister) of the deceased were out of jurisdiction due to fear of the accused. She displayed their statements DW4(a) and DW4(b) respectively which detail incidents of intimidation. She further displayed the statements of Shilton Indumuli (DW5A) and Victor Omondi (DW5B) whom she said have had to relocate from their homes in Githurai area out of fear.

The issue before court is whether the accused who is entitled to bail under the Constitution should be denied bail. However, from the affidavits filed in court, the sworn testimony of the investigating officer and the submissions of learned counsel I see a number of issues which merit consideration in this application.

1. **The right to bail.**

The Constitutional basis in the application is not contested and neither is it contestable. **Article 49 (i) of the Constitution** provides that “An arrested person has the rights.....(h) to be released on bond or bail,

on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released"

The applicant has in his supporting affidavit and in submissions through learned counsel stated categorically that his right to bail under the Constitution is unqualified. I must state from the outset that that is not so for the Constitution itself while granting the right to bail has allowed the limitation of the same or in other words qualified the right where there exist compelling reasons.

Since the promulgation of the Constitution in 2010, courts have grappled with the interpretation of the phrase 'compelling reasons'. While some courts have fallen back on the Dictionary meaning, others have equated the same to the criteria which has been used traditionally to grant or deny bail. Concise Oxford Dictionary 9th Edition defines the word 'compelling' as 'rousing strong interest, convictions or admiration." See **David Njuno Mbiyu V. Republic [2011] eKLR; Mohammed Abdulrahman Said & Anor V. Republic [2012] eKLR.**

In **Republic -Vs- Danson Mgunya & Another (supra) Ibrahim J** (as he then was) elucidated both the meaning of compelling reasons and the criteria for considering bail. He cited the Nigeria case of **Alhaji Mujahid Dukubo-Asari V. Federal Republic of Nigeria S.C 20A/2006** which lists the following criteria:

i. *The nature of the charges*
ii. *The strength of the evidence which supports the charges*
iii. *The gravity of the punishment in the event of conviction*
iv. *The previous criminal record of the accused if any*
v. *The probability that the accused may not surrender himself for trial*
vi. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him*
vii. *The likelihood of further charges being brought against the accused*
viii. *The probability of guilty*
ix. *Detention for the protection of the accused*
x. *The necessary to procure medical or social report pending final disposal of the case.*

In commenting on the criteria above, **Ibrahim J** rightly pointed out that some of the criteria "should be applied with great caution and only in exceptional circumstances..." He further stated that "liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted." I cannot agree more.

2) Presumption of innocence

In opposing the objection to the grant of bail, defence counsel argued persuasively that denial of bail was prejudicial to the accused who has the right to be presumed innocent until proven guilty. That incarceration robs the accused of that right. On this count, I must hasten to add that it is clear to the court that the accused enjoys the Constitutional guarantee on the presumption of innocence in the Criminal Case in which he is charged. A finding that leads to denial of bail is in no way a pronouncement on the guilt of the accused in a matter that is yet to be tried. Similarly, the exercise of judicial discretion to grant bail is not a pronouncement on the innocence of an accused. Both retain the Constitutional presumption under **Article 50** of the **Constitution.**

3) Interference with witnesses

In the present case, the State has opposed bail on only one ground: that the applicant has interfered

with witnesses and is likely to interfere with the investigations. In the case of **Republic Vs. Joktan Mayende & 3 others Bungoma H.C. Criminal Case No. 55 of 2009**, **Gikonyo J** had occasion to examine in depth the issue of interference with witnesses. The learned Judge cited the case of **Republic V. Kellet [1975] ALL ER 468** and posited that "threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice" While denying the accused bail, the Judge went on to state that "In all civilized systems of court, interference with witnesses is a highly potent ground, on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice....."

This court holds the view that interference with witnesses is an affront to the administration of justice as it compromises the flow of justice and goes to the root of a trial. It holds the view as lucidly expressed in **Patius Gichohi & 2 others, Nairobi Criminal Case No. 45 of 2012** that interference with witnesses is a compelling reason within the meaning of **Article 49(i) h** of the **Constitution.**

4) Standard of proof

Having so stated, what is the standard to be applied in arriving at a decision whether or not an accused has interfered with or was likely to interfere with witnesses" I pose the question well aware that an accused should not be denied liberty on flimsy grounds. It is indeed the duty of the court to safeguard individual liberty. While the State must demonstrate, describe and explain the existence of compelling reasons, the court must exercise the greatest circumspection in arriving at a decision to curtail liberty through denial of bail.

From the above, it follows that a general averment that the accused had interfered or was likely to interfere with investigations or witnesses would not suffice. The specific instances of interference or material facts leading to a deduction of interference must be laid before the court and specifically proved so as to persuade the court to arrive at the conclusion that there exist compelling reasons under **Article 49 (1)(h)** of the **Constitution**. See **Republic –Vs- Kokonya Muhssin, High Court Bungoma Criminal Case No. 2 of 2013.** The standard to be applied in so doing though not one beyond reasonable doubt ought to be one higher than a mere balance of probability as it concerns limitation of liberty. In other words, the court must be strongly persuaded and convinced that the objection to bail was compelling within the meaning of **Article 49(i) (h)** of the **Constitution.**

In the present application, the court heard the prosecution's case that the accused while serving as a police officer shot and killed one Kenneth Kimani Mwangi sometimes in March 2013; that while the investigations were still on-going into the incident, the family members of the deceased reported threats from the applicant; that while investigations into the threats were on-going one of the key witnesses one Oscar Muchoki Mwangi, the brother of the deceased was fatally shot by the accused coincidentally again in the course of duty.

5) Decision

I have carefully considered the rival affidavits, submissions by learned counsel, and the testimony of the investigator. The factual basis of her testimony remained unshaken in cross-examination. I must, however point out that the cross-examination largely challenged the qualifications of the investigator and marginally, the mandate of IPOA to investigate crime and not the substance of the claim of interference. I retired to carefully consider in depth the substance of the statements given to IPOA by the witnesses. I formed the opinion that they were consistent and factual to the extent of revealing a thread of threats. I

am persuaded applying the standard set out above that it is more probable than not that the accused did interfere with the prosecution witnesses. The prosecution has demonstrated to the satisfaction of the court that the said witnesses did register their fears with IPOA and have taken the further step of relocating from their usual abode. I am equally persuaded that denial of bail will serve the interests of justice in this case.

For the reasons stated above, I find that there exists a compelling reason to deny the applicant bail. His application dated 11th September, 2014 is dismissed.

Orders accordingly.

Ruling delivered, dated and **signed** at **Nairobi** this **7th** day of **October, 2014**

R. LAGAT - KORIR

JUDGE

In the presence of:

…….: Court clerk

Titus Ngamau Musila alias Katitu : Accused/Applicant

…….....:

……..:. For the accused/applicant

……...:

……..:

…… For the State

…… For deceased's family

…… Watching brief for IPOA