



**REPUBLIC OF KENYA**

Cases in Magistrate Courts

**Criminal Case 15 & 19 of 2012**

**STATE.....PROSECUTOR**

**VERSUS.**

**DAVID ONGATA OPIYO & 5 OTHERS.....ACCUSED.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**HCCR NO. 19 OF 2012**

***FORMERLY HCCR 81 OF 2012***

**STATE.....PROSECUTOR**

**VERSUS.**

**PETER OTIENO ONYANGO.....ACCUSED.**

**RULING.**

The accused persons are charged with 2 counts of murder c/section 203 as read with Sec. 204 of the Penal Code.

On Count 1 it is alleged that on the night of 16<sup>th</sup>/17<sup>th</sup> August 2010 at Dhogunda Beach, Usao Sub Location Gembe East Location in Suba District within Nyanza province, jointly with others not before the court, they murdered Lamek Olima Ochieng.

On count 2, it is alleged that on the same night and at the same place jointly with others not before court, they murdered Felix Ouma Odhiambo. The accused in HCCR 19/2012 is charged separately but the State intends to consolidate his case with HCCR 15 of 2012.

All the accused persons pleaded not guilty to the charges. The accused persons in HCCR.15/2012 are represented by Mr. Andiso Advocate. This is as per a notice of appointment filed herein on 3.9.2012. Mr. Andiso also appears for the accused in HCCR 19/2012.

The application for bond was made formally and canvassed before me by Mr. Nyauke and Mr. Andiso on 28.3.2013. For the accused persons it was argued that they are Kenyans whose rights are covered under the Constitution and are entitled to bond.

That the 1<sup>st</sup> accused is a young person who still has his future and in the event that he is found innocent his incarceration shall affect his future. Further that like all the other accused persons he undertakes to attend the trial and comply with all the terms. It was also submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons are family men and they have intimated to the Advocates that they shall always attend the trial.

In respect of the 5<sup>th</sup> Accused it was submitted that he too is a Kenyan who has a right to bail. That he has been an Assistant Chief and he would wish to have this case tried to its logical conclusion and he shall abide by the terms. The court was also informed that he has, like accused 2, 3 and 4 school fees to pay and as they respect this court they undertake not to disappoint it and shall provide securities and sureties.

In regard to the replying affidavit sworn by Chief Inspector Marco Pologis in regard to the notice of motion, Mr. Nyauke submitted that it has no substance that would warrant the court to withhold bond. That the court can only do so if accused persons are likely to interfere with witnesses and if there are high chances of them absconding.

That paragraph 11 of that affidavit only states that to release the accused persons would be a risk to them. The court was urged to find that there was no merit in the affidavit. Counsel pointed out that the state has a duty to protect the accused persons and is absconding its duty.

The State opposed the application and relying on the replying affidavit of Chief Inspector Marco Pologis sworn on 16.10.2012. Miss Valery for the State submitted that some of the accomplices are still at large. That the accused persons are likely to interfere with witnesses. She submitted that indeed one witness Ebrahim Okal Onjugi has already vide an OB NO. 8/2011 reported a threat.

Counsel further submitted that the community is hostile. That the accused and the witnesses come from different clans and there is a case in Kisii being HCCR. 98/2011 where members of the deceased clan murdered a person from the clan of the accused persons.

That it is therefore apparent that should accused persons be released they shall interfere with witnesses. Further that being fishermen in the deep waters of Lake Victoria they are likely to abscond. They could also be killed and fail to come for trial.

To those submissions the defence submitted that there is nothing to show that the Kisii CR 98/2011 exists hence the submissions regarding it should be ignored. Secondly that it is not exhibited anywhere that a fisherman cannot attend court and that in fact that is a further violation of their rights and the argument has no merit.

On the issue of interference with witnesses it was contended that the complainant used to convince this court is hearsay. That the said witness should have himself sworn an affidavit to depone to the threats. That the allegation was made by the Chief Inspector to frustrate the accused persons.

It was finally submitted that the State had not submitted anything of substance to warrant the denial of the accused' right. Counsel prayed that they be admitted to bail/bond upon such terms as would compel their attendance. He noted that they were willing to furnish sufficient sureties which is a gesture of goodwill and hence that benefit should go to them.

The court was urged to adopt these submissions in HCCR 19 of 2012 which I hereby do.

I have considered the application and the rival submissions very clearly.

Accused persons have a right to bond/bail on reasonable conditions under Article 49(1)(h) of the Constitution. However that right is not absolute as where there are compelling reasons not to release the accused persons that right may be denied. The onus to prove there are compelling reasons lies on the State. In the instant case the reasons cited are:-

- 1. That the accused persons are likely to interfere with witnesses and that indeed one of the witnesses has reported a threat.**
- 2. That the accused persons are likely to be met with a lot of hostility as even a member of their clan has been killed by the deceased clan. They could even be killed.**
- 3. That they are likely to abscond in view of their being fishermen in the deep waters of Lake Victoria.**

So are these reasons compelling" To begin with what is a compelling reason" This issue has been discussed in various cases among them in **REPUBLIC V. JOKTAN MAYENDE & 3 OTHERS [2012] eKLR** where my brother the Hon. Gikonyo J deriving from the meaning of the word compelling in Blacks Law Dictionary held that:-

“..... And accordingly the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond.....”

Applying that test to the reasons given in this case and being alive to the principle that each case must be considered on its own merits, it is my finding that the reasons cited are so forceful as to make this court to feel very strongly that it ought not to release the accused.

There is a deposition on oath that a witness has already reported a threat to the police. That cannot be wished away much as the best evidence of the allegation would have been the witness himself swearing an affidavit or even an extract of the report being annexed. At paragraph 8 of the affidavit Chief Inspector Marco Pologis has deponed that the accused persons and the witnesses reside in the same area. Their likelihood of them interfering with the witnesses is therefore real.

Secondly there is a deposition that there is bad blood between the accused persons and the family of the man they are alleged to have murdered and so should they be released they could be harmed. This is a deposition on oath not just a submission from the bar.

A case resulting from the said blood has been cited. Again even though the best evidence would have been the information or proceedings of such a case. This deposition cannot be taken light.

On the whole therefore though I do agree with counsel for the accused persons that the fact that they are fishermen is not a good ground to say they may never attend court. I do feel satisfied that there are compelling reasons not to release them. Accordingly their application for bond is denied.

Signed, dated and delivered in open court at Homa Bay this...3rd ..... day of .....May.....2013.

**E.N. MAINA**

**JUDGE.**

In presence of:-

Miss Valery for the state.

N/A for advocate for the accused.

Accused persons

Eudice Okombo Dholuo interpreter.



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