



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. E003 OF 2022

REPUBLIC.....PROSECUTION

VERSUS

DORIS WAMBUI IGUKU.....1ST ACCUSED

BENSON MUSILI KELO.....2ND ACCUSED

SIMON KARIUKI NGACHAL.....3RD ACCUSED

RULING

Brief Facts

1. This is a ruling on the affidavit of compelling reasons filed by the prosecution and on the applications dated 31st January 2022 and 1st February 2022 seeking for orders of release on bail pending the disposal of this case. The accused persons face a charge of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the 19th day of December 2021, at Kangemi Village, Mukaro Location within Nyeri County, the 3 accused persons jointly with others not before this court murdered Erasmus Iguku Kinyua. The accused persons pleaded not guilty.
2. The Affidavit of Compelling Reasons dated 4th February 2022 was sworn by Sgt Wilfred Kingara the investigating officer. He deposes that the accused persons are flight risks as the 1st and 2nd accused were found within Machakos County at Kivaa road block attempting to flee, when they were arrested. The 2nd accused, who is a Prison Warder at Nyeri Maximum Prison and at the time of his arrest was approximately 130 kilometres from his duty station. The 3rd accused was arrested on 24th December within Lusoi Village after fleeing from Nyeri Town where he operates as a boda boda rider.
3. The prosecution further state that all the prosecution witnesses are known to the accused persons and thus if they are released, they pose a real or conceived threat to the witnesses. Further, the 3rd accused is a girlfriend to the 2nd accused and they lived together before the offence was committed and therefore if the 3rd accused is released on bail, there is a likelihood of interference before she gives her testimony. Moreover, the prosecution states that the key prosecution witnesses have not met the threshold to be placed under witness protection and therefore the accused persons ought not to be released on bail at least until they have testified.
4. The 3rd accused person filed a Replying Affidavit in response to the Affidavit of Compelling Reasons whereby he states that he is a married man, whose fixed abode is at Lusoi within Nyeri County and that he used to operate a boda boda business in Nyeri Town near Nyeri Slaughter House. He states that at the time of arrest, he visited his family at home in Lusoi and as such, he was not trying to flee from Nyeri Town. He further states that his application for bail ought to be allowed because the prosecution has not shown that he has previously refused to attend court or that his life is endangered if he is released on bail. He relies on **Article 49(h) of the Constitution** and argues that the prosecution has not presented any compelling reasons to deny him bail or bond. Moreover, he states that he does not know all the prosecution witnesses as deposed in the prosecution's affidavit and has no intention of interfering with any witnesses if released on bond.
5. Parties filed written submissions in disposal of this matter.

1st Accused's written submissions

6. The 1st accused relies on Section 123 of the Criminal Procedure Code and the case of **Republic vs Stephen Kinini Wang'ondy & 4 Others [2021] eKLR** and submits that she shall abide by the measures that the Honourable Court will impose as a pre-requisite for grant of bail/bond. The 1st accused further submits that although she is facing a charge of murder, the Supreme Court in **Francis Karioko Muruatetu & Another vs R [2015] eKLR** held the right to bail for all offences including murder and as such, her case is no exception.

7. The 1st accused states that the prosecution has not passed the test set out in **R vs Nicholas Kipkemoi Kirui [2021] eKLR** in demonstrating that there are compelling reasons to warrant the denial of bail/bond. In suggesting that the accused persons shall interfere with witnesses, the 1st accused is guided by the dicta in **Antony Ngirita vs R [2016] eKLR** and submits that the prosecution has not provided any evidence to support such allegations. Further that she has not made any improper approaches or threats to any prosecution witnesses and neither does she have any intention to do so. She further states that she is not a flight risk and argues that it is prudent that evidence in form of affidavits ought to have been placed before the court explaining how and in what circumstances the arrest was carried out bringing out clearly the alleged escape. As such, the 1st accused submits that the allegations made by the investigating officer cannot form the basis of compelling reasons to warrant the refusal of bail/bond and the court ought to allow her application to be released on bail/bond.

2nd Accused's submissions

8. The 2nd accused submits that no evidence was presented to the court to demonstrate that on the day he was arrested he was meant to be on duty at the Nyeri Maximum Prison but in an attempt to flee he was found at Kivaa Market drawing the inference that indeed he was planning to flee.

9. The 2nd accused states that he is a prison Warden at Nyeri Maximum Security Prison and is currently on interdiction with strict guidelines on how he is to conduct himself till case concluded. He further states that the conditions imposed on him by his employer are stringent enough to safeguard his attendance to court since he shall be at his work station during the pendency of the trial.

10. On the allegation of fear of interference of witnesses, the 2nd accused states that in the event he does so, the court should cancel or withdraw his bail. Moreover, he states that no material has been presented to this court to show that the 2nd accused will interfere with the witnesses. He relied on the case of **Panju vs Republic [1973] E.A. 284** and submits that the prosecution ought to have presented evidence to show on what these fears were founded upon. As such, the 2nd accused urges the court to release him on reasonable bail/bond terms.

Issues for determination

11. On perusal of the affidavits and submissions by the accused persons and the prosecution counsel the main issue for determination is as follows:-

- a) Whether the prosecution have established compelling reasons under Article 49(1)(h) of the Constitution.

The Law

12. **Article 49(1)(h)** of the Constitution provides that:-

An accused person has the right...

(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.

13. It follows that the right to bail is not absolute and where there are compelling reasons, that right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exists compelling reasons to deny an accused person bail.

14. The considerations in determining whether or not to grant bail are set out in **Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25** which sets out judicial policy on bail thus:-

“the following procedures should apply to the bail hearing:

a) The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:-

b) That the accused person is likely to fail to attend court proceedings; or

c) That the accused person is likely to commit, or abet the commission of, serious offence; or

d) That the exception to the right to bail stipulated under Section 123A of the criminal Procedure Code is applicable in the circumstances; or

e) That the accused person is likely to endanger the safety of victims, individuals or the public; or

f) That the accused person is likely to interfere with witnesses or evidence; or

g) That the accused person is likely to endanger national security; or

h) That it is in the public interest to detain the accused person in custody.”

15. In **Republic vs Fredrick Ole Leliman & 4 Others [2016]eKLR** the court held that:-

“The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of Ng’ang’a vs Republic 1985 KLR 451 where Chesoni J, as he then was thus:-

“The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (Cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-

- a) The accused will fail to turn up at his trial or to surrender to custody;**
- b) The accused may commit further offences; or**
- c) He or she will obstruct the course of justice**

The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- b) The strength of the prosecution case;**
- c) The character and antecedents of the accused;**
- d) The likelihood of the accused interfering with prosecution witnesses.”**

16. One major reason by the prosecution is that the accused persons are a flight risk. It is the prosecution’s case that the 1st & 2nd accused were arrested in Machakos County at Kivaa Market trying to flee whereas the 3rd accused was arrested at Lusoi in Nyeri County. The 2nd accused person has attached an interdiction letter which stipulates that in the event he is granted bond by the court he cannot leave the prison compound for more than six (6) hours without the authority of the Officer in Charge. This indicates that already his liberty will be curtailed by his employer once the court grants bail making it difficult for him to abscond without his employer catching up with him. Furthermore, the prosecution ought to have provided evidence to show that the accused person ought to have on duty on the day he was found at Kivaa market. The investigating officer only stated that the 2nd accused was arrested about 130 km away from his station. As regards the 3rd accused, the prosecution states that he was arrested at Lusoi attempting to flee because he abandoned his boda boda business in Nyeri town. No evidence of abandoning business with the intention to flee was tendered by the prosecution against the 3rd accused. He further swore an affidavit stating that his fixed abode is at Lusoi and that he was home for Christmas when he was arrested. Notably, the distance between Lusoi and Nyeri town is not more than 50 kilometres to raise an alarm of the accused attempting to flee the accused persons on bond.

17. On the issue of interference of witnesses, the investigating officer averred that the accused persons know the prosecution witnesses and he has a fear that if they are released, they shall interfere with the witnesses. Notably, the investigating officer did not give any account of actual interference of the witnesses by the accused persons nor did he give any facts upon which his fear of interference was based. The allegations were merely speculative. As such, I am not persuaded that the prosecution has adduced sufficient evidence to demonstrate likely interference with witnesses by any of the accused persons.

Conclusion

18. It is my finding that the accused persons herein ought to be accorded their right as granted by Article 49(1) of the Constitution.

19. Consequently the following orders are made:-

- a) That the accused persons be and are hereby released on bond of Kshs.1,000,000/= with one surety of a like amount.
- b) That the accused persons shall not leave the jurisdiction of this court without permission of the court.
- c) That upon release, the accused persons shall attend bi-monthly mentions before the Deputy Registrar pending disposal of this case.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 24TH DAY OF FEBRUARY, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 24TH DAY OF FEBRUARY, 2022