



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. E060 OF 2021

WILLIS OMONDI BARASA ALIAS BARASA.....ACCUSED

VERSUS

STATE.....REPUBLIC

RULING

1. The accused, **Willis Omondi Barasa alias Barasa**, has been charged with one count of **Murder contrary to Section 203 as read with Section 204** of the **Penal Code**. The particulars of the offence are that:

“ On the 11th August 2021 at around 0300AM in Mathare 4A, in Starehe Sub-county, within Nairobi County murdered Erick Otieno Oduor”.

2. On 2nd **September, 2021**, the accused pleaded ‘**NOT GUILTY**’ to the charge and on **16th November 2021**, through his counsel, the accused filed a **Notice of Motion** dated **16th November, 2021**, seeking to be admitted to bond/bail pending trial on reasonable and favorable terms.

3. The application is supported by the grounds that are stated on its face and the depositions made in the **Supporting Affidavit** sworn by the accused’s advocate on record, **Mr. Elvis BN Abenga** on **16th November, 2021**. He averred that the applicant has been diagnosed with peptic ulcers with severe stomach pains, nausea, feeling faint and intolerance to some greens and vegetables; that the Applicant is the sole bread winner of a family of four; that the applicant is a debtor and has an obligation to repay the loan he took out on a motorcycle; that the Applicant will comply with any conditions imposed by the court and will not interfere with prosecution’s case.

4. The State opposed the application through a **Replying Affidavit** sworn on **24th September, 2021** by **CPL George Maitha** of DCI Starehe in which he deposed that the accused person jointly with 2 others not before the court accosted the deceased with metal bars, pangas and door frames over an allegation that he was a thief; that the accused did not stop beating the deceased even after being informed by a witness who knew the deceased was mentally challenged and pleaded with the accused to have mercy on him since he was not a thief; that the accused and his accomplices were residents of Mathare 4A but each took flight to different places; that the accused was also on the verge of running away/escaping but was intercepted by members of the public; that if released, the accused and his two accomplices are likely to regroup and vanish; that releasing the accused is likely to jeopardize police efforts in tracing and apprehending his accomplices and that there is a real possibility of the accused disappearing without a trace; that the accused being a bodaboda rider he can easily change residence if released on bail and that the court should deny him bond until it is satisfied that he has a fixed place of

abode. Also she has submitted that the right to bail is not absolute.

5. After hearing both parties, the court decided to call for a pre-bail report to assist it in making a just determination in this application.

6. I have carefully considered the application and the rival submissions made by learned counsel in support and opposition to the application. I have also considered the pre-bail report dated **3rd February, 2021** and filed in court. I find the only issue for determination being whether or not the accused/ Applicant may be released on bond/bail.

7. It is trite that under **Article 49 (1) (h)** of the **Constitution**, “*an arrested or accused person is entitled to bond or bail on reasonable conditions pending a charge or trial subject only to existence of compelling reasons that would mitigate against his admission to bond*”. This is so irrespective of the nature or seriousness of the offence one is charged with. It therefore follows that the seriousness of an offence or the penalty prescribed for it upon conviction though relevant cannot by themselves constitute a ground for denial of bond pending trial.

8. In the case of **Simindei Naurori & Another –vs- Republic (2016)eKLR**, the court discussed the ramification of **Article 49(1) (h)** of the

Constitution thus:

“The Constitution under Article 49(1)(h) grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. The Constitution does not define what constitutes “compelling reasons”. However, courts have rendered decisions that articulate what constitutes compelling reasons and include the following: the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives. (See Alhaji Mujahid Dukubo-Asarin Vs. Federal Republic Of Nigeria S.C. 20A/2006).”

9. In determining an application for bail, the court ought to be guided by what was discussed by Justice Chesoni (as he then was) in the case of **Ng’ang’a –vs- Republic (1985) KLR 451** 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 the accused person unless it is shown by the prosecution that there are substantial grounds for believing that:

i. The accused will fail to turn up at his trial or to surrender to custody;

ii. The accused may commit further offences; or

iii. He or she will obstruct the course of justice.

iv. 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;

v. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;

vi. The strength of the prosecution case;

vii. The character and antecedents of the accused;

viii. The likelihood of the accused interfering with prosecution witnesses.”

10. The Investigating Officer by his affidavit, which was not controverted by an accused, stated that after the alleged offence was committed, the accused and his accomplices took flight to different places. However, the accused was intercepted by members of the public as he was in the verge of running away.

11. The pre-bail probation report also revealed the accused person’s family’s views, especially from his two cousins is not favorable for the accused being granted bail since it is alleged he is not a first time offender having been to court on many occasions. However, the mother is of the view that the accused should be granted reasonable bond terms and she is ready to stand surety for him. Further, the pre-bail report also shows that the accused is not well known in the community.

12. In consideration of the arguments by the Applicant and Respondent, alongside the recommendations by the Probation Officer in the pre-bail report upon a social inquiry, it is my view that there exist compelling reasons to deny the Applicant bail pending trial. He has been brought out as a flight

risk, a person with no fixed abode and a habitual offender.

13. I proceed to dismiss the application by the accused person for release on bon/bail. He may review his application at a future date depending on a change in circumstances. The prosecution is urged to ensure witnesses are availed to enable the trial proceed expeditiously.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Gikonyo counsel for the State

M/S Libanga counsel holding brief for Mr. Habenga counsel for accused

Court Assistant - Gitonga