



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. E016 OF 2021

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES LESIRONGO SITO.....ACCUSED

RULING

BAIL

[1] The accused herein is facing a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

[2] On 8th December 2021, the accused through his defence counsel **Miss Nkurunah** orally applied that the accused be released on bond on good terms. Counsel argued that the accused has fixed place of abode, is a bread winner and is not a flight risk.

[3] Mr. Karanja, counsel for the prosecution opposed the application for bond/ bail and stated that the investigation officer has put in an affidavit stating the compelling reasons.

[4] The prosecution filed two affidavits both sworn on 8th December 2021. One by **PC Kenneth Keter** and another by an **assistant chief Stephen Kuntai Esho** containing reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -

a) Flight risk- the accused person fled the scene in Wafoo village on 10th November 2021 the day of the incident to Mai Mahiu township where he was arrested five days later.

b) Safety and security of the accused- that the life of the accused might be in danger as the assistant chief cannot guarantee his security all the time short of assigning a security officer to follow him around.

ANALYSIS AND DETERMINATION

[5] Although the accused faces the grave charge of murder; he is still deemed innocent and is entitled under Article 49 (1) (h) of the Constitution to bail pending trial unless there are compelling circumstances. See ***Muraguri v Republic [1989] KLR 181, and R. V. Richard David Alden (2016) eKLR.***

[6] The overarching objective of bail is to ensure the accused gets his liberty, but also attends his trial. ***Muraguri v Republic [supra]***.

[7] Relevant matters to be considered by the court include: the nature of the charge; the likely sentence; previous criminal records, the views of the family of the victim, the possibility of interference with witnesses; the temptation to abscond; and, the safety of the accused.

Applying the test

[8] Has the prosecution proved compelling reasons not to release the accused on bond?

[9] From the affidavits by the respective parties it is apparent that the bond application has been opposed on two main grounds namely; flight risk and safety of the accused person.

Flight risk.

[10] In his affidavit, **PC Kenneth Keter** avers that the accused person was a flight risk; he has shown by his action in fleeing the scene and going into hiding for 5 days that he cannot be trusted to attend court if he is granted bond by court. This argument is neither here nor there, for no evidence has been tabled before this court which gives the argument the power and grace, say, that the accused went into hiding to avoid the hand of the law. Merely that he left the crime scene is not sufficient as a suspect would ordinarily not be expected to remain at the scene of crime until arrest. To lay the contrary as a legal proposition is dangerous. Real evidence is required to show that the accused went into hiding to avoid arrest and is likely to abscond trial. No such evidence upon which an inference may be drawn that he will abscond. For these reasons, the ground is not sustainable. I reject it.

Safety and security of Accused

[11] The investigating officer and the assistant chief in their affidavits have stated that the area is very hostile towards the accused person. The defence has not responded to this issue.

Taking law in own hands

[12] I have lamented before; this ground is disturbing as it depicts a society of the ruffians or Mahocks whose talent was to use all manner of cruel and torturous methods to inflict as much pain as possible and to kill anyone found in their way. Such was a society without law and order. The community herein is within the territorial jurisdiction of the Republic of Kenya- a nation governed by the rule of law and order under the Constitution of Kenya, 2010. I wonder where the said community derives its authority to harm or kill a suspect under trial. No one is above the law or should take the law in their hands. All are bound by the Constitution which reigns. See article 2 of the Constitution which declares the Supremacy of this Constitution thus: -

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

[13] At this age and time, it is disheartening and depressing that a community or group of people will haughtily express desire to harm or kill a person under trial- who is by law innocent until proven guilty. Is not such an epitome of a criminal mind? Can one notice any difference between such persons and avowed criminal? Any such act to harm or kill a suspect, should be liable to prosecution in criminal law. I have stated before, and I will state it again, that such actions are unlawful, barbaric and uncouth without any place in law and the 21st century. The community in question should let the law punish the accused. This should stop and my view is that, the ground that the security of the accused is threatened by the members of the public or victim family, should never be encouraged to be a ground for denial of bail; otherwise courts will inadvertently promote or condone violence, disorder and usurping of law by individuals or group of people.

[14] In any case, it is the duty of the state to ensure safety and security of its citizens including the accused person. The police should take appropriate measures to ensure security of the accused person. I therefore find the argument that the accused be detained for his own safety and security to be without any legal or factual basis and I reject it.

[15] After carefully analyzing the issues raised by the prosecution as compelling reasons I find no cogent material before court to demonstrate likelihood to abscond or danger to life of the accused if released. The stringent standard set by the Constitution has not been met as to justify limitation of fundamental freedom or liberty of the accused.

[16] In the final analysis, I find no compelling reason not to grant the accused bail. He shall be released on a personal bond of Kshs. 500,000/= with one surety of similar amount. He shall not leave the jurisdiction of the court without leave of the court. in light of the circumstances of this case, I will not give an option of cash bail.

[17] It is so ordered.

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application This 16th Day of February, 2022

F. GIKONYO M.

JUDGE

In the presence of:

1. Accused person
2. Torosi for Respondent
3. Kasaso – CA
4. Ms. Nkurunah for the accused - absent