



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. E089 OF 2021**

**FELIX ONYANGO OJEYA ALIAS FELLO ..... 1<sup>ST</sup> ACCUSED**

**WILLIAM OTIENO ONDORO..... 2<sup>ND</sup> ACCUSED**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The 1<sup>st</sup> accused, *Felix Onyango Ojeya alias Fello*, and the 2<sup>nd</sup> accused, *William Otieno Ondoro*, have jointly been charged with the offence of murder contrary to *section 203* as read with *section 204* of the *Penal Code*.
2. The particulars of the offence allege that on 7<sup>th</sup> November 2021 at Njiru Ageria area in Njiru Sub-County within Nairobi County, the accused persons jointly with others not before the court murdered *Landama Kararam*.
3. The court record shows that the accused persons were arraigned in court on 30<sup>th</sup> November 2021. They both pleaded not guilty to the charges.
4. On 18<sup>th</sup> January 2022, the firm of *Wanyanga & Company Advocates* filed two separate applications seeking that each of the accused persons be admitted to bond or bail pending trial. The applications are supported by affidavits sworn by the accused persons. The two applications sought similar prayers and were premised on the same grounds. On the hearing date, they were consolidated and heard together.
5. In the applications and in their respective affidavits in support thereof, the accused persons contended that they had a constitutional right to be admitted to bond pending trial and a right to be presumed innocent until proved guilty. They averred that they were Kenyan citizens residing in Njiru with known fixed abodes and were thus not a flight risk; that they were ready to comply with any condition this court may set as a pre-requisite to grant of bail or bond including reporting to Kayole Police Station every fortnight for the court to be informed of their whereabouts. They also pledged not to interfere with witnesses if their application was allowed.
6. The respondent opposed the applications through a replying affidavit sworn by the investigating officer *Cpl. Choyo* on 18<sup>th</sup> February 2022. *Cpl. Choyo* deposed that the accused persons have no known fixed place of abode or place of work and if released, they are likely to abscond and tracing them again would be an uphill task considering the vastness of Kayole area and its environs. He averred that the accused person's constitutional right to bail was not absolute and was subject to the court's discretion.
7. The application was argued orally before me on 16<sup>th</sup> March 2022 by learned counsel *Mr. Wanyanga* who represented the accused persons and learned prosecuting counsel *Ms Ogwen* who appeared for the respondent.
8. In his submissions, *Mr Wanyanga* denied the respondent's claim that the accused persons were a flight risk. He submitted from the bar that the accused persons live in Njiru and Mwiki respectively. He further submitted that the respondent, though opposed to the applications had failed to demonstrate the existence of compelling reasons to justify denial of bail or bond to each of the accused persons. Counsel asserted that the replying affidavit sworn on behalf of the respondent contains mere allegations and not compelling reasons as envisaged by *Article 49(1) (h)* of the *Constitution*.
9. On her part, *Ms Ogwen* submitted that the accused persons have only mentioned in passing where they lived but their fixed place of abode is still unknown; that there was a real danger that if they were released, they will regroup with suspects still at large and tracing them again will be difficult.

She urged the court to find that the respondent had disclosed compelling reasons sufficient to justify denial of bond or bail.

10. Under *Article 49 (1) (h)* of the *Constitution*, all accused persons irrespective of the seriousness of the offence charged have a constitutional right to bond or bail pending trial subject to existence of compelling reasons. It is now settled law that the duty to demonstrate existence of compelling reasons rests on the prosecution: See- *Republic V Danson Mgunya & Kassim Sheebwana Mohamed, [2010] eKLR; Patius Gichobi Njagi & 2 Others V Republic, [2013] eKLR.*

11. In *Patius Gichobi Njagi & 2 Others V Republic [Supra]*, the court in expounding on the Prosecution's duty to disclose compelling reasons if opposed to bond pending trial stated as follows:

*“... where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the state must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case of Jaffer V Republic, 1973 E.A. 39, the court cannot be called upon to speculate.”*

12. In this case, the prosecutions objection to grant of bond or bail to each accused is based on grounds that the accused persons have no known fixed abode and they were therefore flight risks. The accused persons did not counter this allegation by filing a further affidavit to disclose their specific places of abode, if any existed. *Mr. Wanyanga's* submission from the bar that the accused persons lived in Njiru and Mwiki cannot suffice.

13. The primary consideration a court bears in mind when exercising its discretion in deciding whether or not to grant bond or bail pending trial is whether there is a risk that if released, an accused person will not turn up for his trial.

14. In this case, the accused persons have not dislodged the prosecutions claim that they do not have a known fixed place of abode and that for this reason, if released they are likely to abscond.

15. The pre- bail reports filed in respect of each accused person in compliance with the court order of 21<sup>st</sup> February 2022 did not help as the report for 1<sup>st</sup> accused disclosed that his family has relocated from the rental house they used to reside in prior to his arrest but that he had siblings who are willing to stand surety for him. In respect of the 2<sup>nd</sup> accused, the pre-bail report indicates that if released, he will go back to live in Njiru where he was residing prior to his arrest. The details regarding his specific place of abode in Njiru were not disclosed.

16. In determining applications for bond or bail pending trial, the court strives to balance an accused person's right to liberty in view of the constitutional guarantee on the presumption of innocence until proved guilty and the public interest as well as the victims right of having suspected perpetrators of crime punished after undergoing due process. These rights can only be balanced if the court was satisfied that if released, the accused person will not abscond.

17. The fact that in this case it is not clear where the accused persons reside or will reside if granted bail is a pointer to a possibility that if released, the accused persons are likely to abscond. This to me is a compelling reason to justify denial of the accused persons right to bond or bail pending trial.

18. In view of the foregoing, I decline to admit the accused persons to bond pending trial for now but the accused persons are at liberty to revisit their applications if and when they are ready with solid evidence specifying their place of abode or where they will reside if their application was favourably considered by the court.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of March 2022.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Both applicants present

Mr. Wanyanga for the applicants

Ms Ogwen for the state

Ms Karwitha: Court Assistant