



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE N. E092 OF 2021

DICKSON NJANJA MARARO.....ACCUSED/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

The case for the applicant

This ruling is pursuant to an application by the accused/applicant dated 10th January, 2022. The applicant has applied for the following orders.

- 1) Spent
- 2) An order that the accused/applicant be admitted to bail/bond on reasonable conditions pending the conclusion of his trial.
- 3) Any further orders as may be expedient to preserve the ends of justice.

The application is supported by the affidavit of the applicant dated 10th January, 2022. He depones that he was charged with the offence of murder to which he pleaded not guilty. He has deposed that the offence of murder is a bailable. He has further deposed that the identity of the prosecution witnesses has not been disclosed to him and therefore the argument that he will interfere with the witnesses does not hold water. He has also deposed that he has a fixed place of abode and family attachment. Additionally, he has deposed that he has businesses within Nairobi county and as such he is not a flight risk. He has further deposed that he is not a flight risk and undertakes to attend court whenever he will be required to do so. Furthermore, the applicant has deposed that he is the bread winner of his ageing parents and siblings. He has therefore requested the court to release him on bail/bond pending the conclusion of his trial.

The case for the respondent

The prosecution has opposed the bail application through the supporting affidavit of the investigating officer (No. 233815 CI Geoffrey Ndatho), who has averred to the following major matters. He has averred that the accused shot and wounded the deceased on the night of 2nd July 2021 at Quiver Lounge Club along Thika Road in Kasarani Sub-County. Subsequently, the deceased was hospitalized in various hospitals for a period of 4 months until his demise on 23rd November 2021. Alongside the deceased, two other victims who were injured in the incident were hospitalized. He also deposed that the accused/applicant is also facing two other counts of attempted murder in Milimani Chief Magistrates Court Criminal Case Number E790 of 2021. Furthermore, he has deposed that the two surviving victims who are a police officer and a civilian are in fear of their lives as the accused/applicant is a licensed private firearm holder; whose license has not been revoked and may cause harm.

He has further deposed that the accused has already interfered with exhibits which the prosecution intends to rely on being a motor vehicle KCC 110D Toyota S. Wagon; which the accused transferred to his mother. He avers has further averred that the accused is a flight risk given that he has a valid international passport number CK01937; which has not been surrendered to court or the investigating officer. The he has also deposed that the right to bail is not absolute and depends on the circumstances of each case.

He has therefore urged the court to find that the prosecution has adduced compelling evidence to deny the accused bail/bond.

The applicant's submissions

Messrs Ong'anya Ombo Advocates have filed written submissions on behalf of the accused/applicant. It is submitted that if the prosecution objects to the release of the accused person, then the burden is on them to demonstrate the existence of compelling reasons. Counsel relied on the case of **Republic v Joktan Mayende & 3 others [2012] e-KLR** which the court defined compelling reasons as those that are forceful or

convincing as to make the court feel very strongly that the accused should not be released on bail/bond. It is their submissions that the prosecution's affidavit citing reasons why the accused should not be granted bail lacks cogent evidence to support their allegations.

It is their argument that the accused has already been granted bail in the attempted murder charges in the lower court and has complied with the conditions of bail which were set by the lower court. She has submitted that the accused has not interfered with witnesses and therefore urges the court to dismiss the argument of the prosecution. Counsel cited the case of **Republic vs Dwight Sagaray & others High Court Criminal Case No. 61 of 2012** in which the court held that for the prosecution to succeed in persuading the court on the ground of interference with witnesses, it must place material before the court to demonstrate actual or perceived interference. The prosecution must also demonstrate to the court, for example, the existence of a threat or threats to the witnesses.

The second ground raised is that the accused has already interfered with investigations. Counsel submitted the motor vehicle in issue which he has allegedly interfered with, is in the custody of the DCI and that cannot be a ground to deny the accused bail. Counsel has therefore urged the court to reject this argument. Counsel has also cited the case of **Republic vs Kokonya Muhssin [2013] e-KLR** in which the court held that a general averment that the accused is interfering or has interfered with investigations will not suffice as a compelling reason within the meaning of article 49(1) (h) of the Constitution of Kenya.

In respect of the argument that the accused is a flight risk, counsel submitted that the mere possession of a passport by the accused does not mean that he will jump bail. Counsel further submitted that the court has the option of ordering the accused to deposit his passport in court. Finally, counsel has submitted that the accused is willing to abide with the conditions set by the court in respect of the grant of bail/bond.

The submissions of the prosecution

Counsel for the prosecution (Ms Peris Maina) has filed written submissions in opposition to the application. She has submitted that there are compelling reasons that warrant denial of bail to the accused. Counsel has submitted that there is real apprehension that the accused is likely to interfere with the prosecution witnesses. In support of this proposition, counsel has cited **Republic v Frederick Ole Leliman & 4 others [2019] e-KLR**, in which the court observed in respect of the public interest and the compromise of the criminal justice system, that interference with the case may take many forms among them, influencing or compromising or inducing or tarrying a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. That court also pointed out that such interference may take place at any stage of the proceedings including immediately on commission of the offence, during investigations and during trial and can be committed by any person including the accused, witnesses or other persons.

Counsel further submitted that the case is for hearing on 21st and 22nd March 2022 when the key witnesses are expected to testify. She therefore submitted that it is in the interests of justice that bail/bond be denied and that the application be renewed after the evidence of the witnesses has been taken.

Issues for determination

I have considered the affidavits of the parties, their submissions and the applicable law. As a result, I find the following to be the issues for determination.

1. Whether the accused is likely to interfere with the prosecution witnesses.
2. Whether the accused has interfered with the investigations
3. Whether the accused is a flight risk.

Issue 1

The investigating officer (No. 233815 CI Geoffrey Ndatho) has not placed any evidence before the court of any prosecution witness who was allegedly interfered with by the accused or his proxies. The argument that he is a licensed private firearm holder is not evidence in support of the allegation that the accused will interfere with the witnesses. In the absence of such evidence, the averment that there is a likelihood that the accused is likely to interfere with the witnesses is speculative in nature and is inadmissible.

I therefore reject his averment for that very reason.

Issue 2

The investigating officer alluded that the accused/applicant had transferred an exhibit namely motor vehicle KCC 110D Toyota S. Wagon to his mother. It was contended that this is an exhibit which the prosecution intends to rely on. In this regard, the accused/applicant has submitted that the said motor vehicle is in the custody of the DCI and as such of no consequence. From the copy of records dated 31st August 2021 that was submitted by the investigating officer, the motor vehicle KCC 110D is registered in the name of Jane Wanjiru Nganga. The prosecution of this matter commenced on 6th December 2021. It is however unclear when the said transfer of motor vehicle took place. There is therefore no evidence of any interference with the investigations.

I therefore find that the prosecution has not discharged the burden of proof that is placed upon it to prove on a balance of probabilities that the accused will interfere with the investigations.

Issue 3

The prosecution has submitted that the accused is a flight risk; since he owns a passport and the same has not been deposited in court. The possession per se of a passport does not constitute evidence that the accused is a flight risk. The contention by the prosecution that he is a flight risk lacks evidentiary basis and I hereby dismiss it for lacking in merit.

After taking all the foregoing matters into account, I find on the evidence and the applicable law that there are no compelling reasons to deny bail/bond to the accused. In the premises, the application of the accused succeeds and is hereby granted bail/bond in the sum of Kshs 500,000/- with a surety of a similar amount to be approved by the Deputy Registrar of this court.

He will also deposit his passport in court pending the hearing and determination of his trial.

Additionally, the applicant is hereby ordered to surrender his firearm to the armourer pending the hearing and determination of his trial.

In the interim period the accused will be remanded in custody until he complies with the terms of his release on bail/bond.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF MARCH 2022.

J M BWONWONG'A

JUDGE

IN THE PRESENCE OF-

MR. KINYUA: COURT ASSISTANT

MR. ONG'ANYA FOR ACCUSED/APPLICANT

MS MAINA FOR THE REPUBLIC/RESPONDENT

MR. MAROA HOLDING BRIEF FOR MR. MAANZO FOR THE VICTIMS