



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE E031 OF 2021

PROSECUTOR.....REPUBLIC

VERSUS

DESIRE IRAMBONA.....ACCUSED

RULING

The accused **DESIRE IRAMBONA**, has moved this court seeking that he be released on bail. In arguing this application, Mr. Odhoch for the accused, submitted that under Article 49(1)(h), accused persons are entitled to the right of bail unless the prosecution proves the existence of compelling reasons. Also that he is presumed innocent till it is proved otherwise. It was also submitted that the accused is not a flight risk. lastly, that there are no compelling reasons that would justify a denial of bail.

Counsel relied on a filed list of authorities of the following decided cases:

- i) *Republic Versus Muneer Harron Ismail & 4 others (2010)eKLR,*
- ii) *Republic Versus Richard David Alden (2016)eKLR.*
- iii) *Republic Versus Dwight Sagaray & 4 others (2013)eKLR*
- iv) *Republic Versus Gladys Wambui Mwangi & 3 Others (2018)eKLR.*

Ms. Kimani for the prosecution opposed this application on grounds that the right to bail is not an absolute right and the same may be denied where there are compelling reasons. Counsel cited 3 cases. First, that the accused is a flight risk. That, he is a foreigner of Burundian origin and that he has no passport, nor refugee identification nor work permit. That he is illegally present in Kenya with no fixed abode or place of employment. That if released, it would be impossible to trace him.

Secondly, it was submitted that the prosecution has a strong case with many eye witnesses, which would be an incentive for the accused to abscond.

It was further submitted that the accused faces a serious charge which on conviction could attract death sentence. That due to the strong prosecution's case, accused is likely to abscond to avoid the consequences of a conviction.

Counsel distinguished the authorities relied on by the applicant. Since the persons therein were citizens of Kenya or had identification documents. She prayed that this application for bail be dismissed.

Counsel for the applicant made a further response that the accused has lived in Kenya since 2017 when he came as a refugee. That he has a sister who stays in Zimmerman and a Kenyan wife. That he is ready and willing to abide by any conditions the court may set. Finally, that the constitution does not discriminate foreigners on the issue of bail.

I have considered the submissions of both sides on this issue of bail. Article 49(1)(h) of the constitution of Kenya stipulate;

“An arrested person has the right:

- ***To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.***

The constitution therefore affords the right to bail to all accused persons irrespective of the nature of the charges that they face. The rider to this is, however, that the right may be denied where it can be proved the existence of any compelling reasons i.e reasons that are good enough as to justify the denial of the right.

The Bail and Bonds policy guidelines and indeed the courts have confirmed some of the factors that could constitute compelling reasons as:-

- *Nature of the charges or offence and the seriousness of the punishment to be meted out in case of conviction.*
- *The strength of the prosecution's case.*
- *Character and antecedents of the accused.*
- *Failure to observe terms of bail in previous cases.*
- *Likelihood of interference with prosecution witnesses.*
- *Weed to protect victims*
- *Whether the accused is a flight risk.*
- *Whether the accused has a place of abode or is gainfully employed.*
- *Public order, peace and security.*
- *Protection of the accused.*

Of course, the above list is not conclusive. Depending on each case, many other factors could constitute compelling reasons good enough to justify a denial of the right.

The prosecution has submitted that the accused faces a serious offence of murder which could attract up-to death sentence. With respect, there is no doubt as to the seriousness of the offence accused faces. But under Article 49(1)(h), all accused, irrespective of the nature of the charges the face, maybe granted bail. This ground therefore, cannot on its own, be a compelling reasons. I hold the same view on the round that the prosecution has a strong case against the accused. In any case, accused enjoys the constitutional right of presumption of innocence since his case is yet to be heard.

On the ground raised that the accused is a flight risk, it must be stated that the primary objective of bond or bail is to secure the attendance of the accused to court for his trial. It is not a licence for the accused to abscond never to appear in court to face his accusers. (see Republic Versus Godfrey Madegwa & 6 others (2016)eKLR). So that is case the prosecution can show grounds pointing at the possibility of the accused absconding if released on bail, then denial of the right would be justified. In our present case, a number of issues of fact came out relevant to whether the accused is likely to abscond if released on bond.

It is conceded that the accused is of Burundian nationality, and not a Kenya. His place of abode remains unknown. It is equally unknown if he is gainfully employed or if he has any attachment in any form in Kenya. He has not exhibited his passport or resident permit. His refugee status, if at all, also remains unknown.

The question therefore, that comes to mind, is whether in the circumstances, there is a guarantee that if released, the accused will turn up for his trial. Our whether in the circumstances, it would be possible to track and trace the accused if he absconds upon being placed on bail, with a possibility of the accused leaving the jurisdiction of this court. This court is convinced that these circumstances put together point to a possibility of accused absconding if released on bond never to turn up for his trial.

As to the authorities cited above by the accused, there are clear distinctions with our present case. Whereas authorities number 1, 2 and 4 relate to Kenya nationals, authority No. 3, related to a foreign national, but whose employment, place of abode and personal details were discernible.

I am therefore convinced that the prosecution have proved the existence of at least 1 compelling reasons that justifies the denial of the accused the right to bail. I accordingly dismiss the application for bail by the accused and order that accused shall remain remanded in custody pending the hearing and determination of his case. Orders accordingly.

D. O. OGEMBO

JUDGE

30.3.2022.

Court:

Ruling read out in open court in the presence of the accused, Mr. Odhoch for the accused and Ms. Kimani for state.

D. O. OGEMBO

JUDGE

30.3.2022