REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. E011 OF 2021

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

VERSUS

GIBSON KIPLANGAT BETT.....ACCUSSED

RULING

Bond /bail application

[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 21st September, 2021, the accused through his defence counsel **Mr. Korir** orally applied that the accused be released on bond on reasonable bail terms.

[3] On 13th October 2021, the prosecution filed an undated affidavit sworn by **PC Kenneth Kemei** containing reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -

a) **Witness interference**- the brutal murder of the deceased was committed in the presence of a minor and release of the accused will increase chances of witness intimidation and interference. The key witnesses; the minor and his mother to testify so as to reduce the risk of interference and intimidation. Two crucial witnesses are the immediate neighbours of the accused as they reside 50 meters away from the accused person's home.

b) **Safety and security of the accused-** that the brutal murder has caused much public anger and apprehension and he was apprehended by his fellow villagers after he fled the scene. When the villagers from Migwara learnt that the accused had been apprehended they sought to attack him and kill him but one Richard Kipkesh, a village elder, pleaded for his life and escorted him to the police station. The accused was booked and subsequently taken to hospital vide OB NO. 7/09/08/2021. Therefore, the security of the accused cannot be guaranteed.

c) **Flight risk-** the accused person fled the scene in Migwara village to evade arrest.

[4] The applicant filed a replying affidavit sworn on 20th December 2021. He argues that while he faces the serious charge, the same does not translate to likelihood to abscond trial. The same is a mere assumption without basis.

[5] The applicant averred that he was on his way to Melelo police station after he received a call from a neighbour to report when he caught up with the village elder, Richard who walked him to the police station.

[6] The applicant averred that the perceptions of public anger are unsupported allegations. He contends that the investigating officer did not produce the treatment notes from the said Ololulunga Sub County Hospital where he allegedly received treatment. Production of an OB extract is not conclusive.

[7] In conclusion, the applicant argued that there are no compelling reasons to keep him in custody pending hearing of his case.

ANALYSIS AND DETERMINATION

[8] 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***

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

[10] The prosecution cited three grounds on which they opposed bail; i) possibility of interference with witnesses; ii) likelihood to abscond; and; and iii) the safety of the accused.

Applying the test

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

Safety and security of Accused

[12] I will deliberately start with this ground. The investigating officer in his affidavit has stated that the public anger against the accused person is high, and they may injure or kill him. The defence has brushed off the allegations as mere perceptions.

Taking law in own hands

[13] 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. But, 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.

[14] 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.

[15] 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.

Flight risk.

[16] In his affidavit, **PC Kenneth Kemei** avers that the accused person was a flight risk; he has shown by his action in fleeing the scene 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 and was arrested after much search or manhunt. 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. It would be a dangerous proposition to pronounce mere leaving the scene as a compelling except with cogent evidence. No evidence as I have outlined or something close to that from which an inference may be drawn that he will abscond. For these reasons, the ground is not sustainable. I reject it.

Interference with witnesses

[17] The prosecution alleges likelihood of interference with prosecution witnesses. On this ground the court in **R. V. Jaktan Mayende & 3 others**, stated that:

> **"- In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010……Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice…if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused."**

[18] See also **R. V. Patius Gichobi** that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of the Constitution. Accordingly, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground. More jurisprudence on the point is found in ***R. V. Dwight Sagaray & 4 others, 2013 eKLR***, where the court stated that: -

"For the prosecution to succeed in persuading the court on these criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others."

[19] The arguments presented on interference with witnesses remind of two pertinent matters. One, protection of witnesses and victims of crime. And, protection of the integrity of the trial and criminal justice process.

Protection of victims

[20] Under the law, the court has a duty to give effect to the rights of victims expressed in Section 10 of the Victim Protection Act No. 17 of 2014, as follows: -

10 (1) a victim has a right to: -

(a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

(b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

(c) Have their property protected.

Protection of trial

[21] Interference with witnesses undermines the criminal justice system and dents the integrity of the criminal process; in turn interference with the administration of justice, and prejudice to the trial. Thus, it is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in ***R. V. Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR*** where she succinctly stated that: -

"Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."

[22] In the present case the prosecution stated in the affidavit in objection of bond the accused is likely to interfere with vulnerable witnesses; the minor who witnessed the brutal murder and his mother. Also, there are two crucial witnesses who are his neighbours. It is more likely that the vulnerable witnesses may be scared stiffly by the presence of the accused amongst them.

[23] See **Republic v Fredrick Ole Leliman & 4 others [2016] eKLR**, where the Court expressed basis of fear upon witnesses, that: -

"In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety."

[24] The court must therefore, strike a perfect balance which ensures that the trial is not impeded by acts of interference with witnesses, but at the same time, upholding the rights of the accused to fair trial (**K K K v Republic [2017] eKLR**)

[25] The circumstances of this case are; that one of the witnesses is a minor and his mother, and two others are neighbours who live close to the home of the accused. It is stated that the heinous act of murder happened in the presence, inter alia of the minor and the mother. In these circumstances, likelihood of interference of witnesses, directly or indirectly, is not far-fetched. The minor, who is a witness in this case would be intimidated by the presence of the Accused.

CONCLUSION AND ORDERS

[26] In conclusion, the court finds that a compelling reason has been established; likely interference and intimidation of witnesses especially the minor and his mother and the neighbours owing to the manner in which the murder was carried out. There is compelling reason to keep the accused person in custody at least until the said witnesses have testified. Accordingly, the accused is denied bail. In case of a future

application for bail, it will be considered on its merit and the circumstances of the case obtaining at the time.

[27] The Court directs that the hearing of this case be on the basis of priority. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION

THIS 25TH. DAY OF APRIL, 2022.

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F.M. GIKONYO

JUDGE