



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Marwa (Criminal Case E025 of 2021)
[2022] KEHC 15214 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 15214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE E025 OF 2021
SN MUTUKU, J
JUNE 28, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH MAINA MARWA ACCUSED

RULING

The application

1. Joseph Maina Marwa, the accused, is charged with the murder of Boaz Amoro Nyakeri contrary to section 203 as read with section 204 of the *Penal Code*. This offence is said to have been committed on December 4, 2021 at Olekasasi area within Ongata Rongai in Kajiado North Sub-County, Kajiado County.
2. The plea was taken on February 2, 2022 where the accused pleaded not guilty. Mrs Mary Goretti Cheruto Chepseba (Mrs Chepseba or defence counsel) for the accused applied to have her client admitted to bail/bond pending the hearing and determination of this case in a notice of motion application dated February 4, 2022. The application is supported by the grounds found on the face of it and in the supporting affidavit sworn by defence counsel
3. The grounds in support are that the offence of murder is bailable; that the accused has an unqualified constitutional right to be presumed innocent until the contrary is proved; that the accused will avail himself in court until the trial is concluded; that the accused will abide by any conditions this honourable court will set; that the accused had never and cannot interfere with witnesses; that he is not a flight risk or a security threat; that the balance of probability on the rights of the accused person, the right of victims and interest of justice tilt in favour of this application for bond/bail; that there are no compelling reasons to deny this application.



4. The application is opposed through the affidavit sworn by No 83xxxx PC Richard Kioko, the investigating officer, dated February 14, 2022. In that affidavit, the officer has advanced reasons why he thinks the accused should not be admitted to bond/bail that: he is a flight risk since he has no fixed residence; he doesn't have any identification; his life is in danger due to bitterness of members of the public and friends of the deceased; due to the nature of the alleged offence and its impact, he believes the accused being in custody may be safe for him.
5. On March 24, 2022 the accused filed a supplementary affidavit in response to the affidavit by the investigating officer in which he avers that the prosecution did not give enough evidence to show that he is a flight risk; that being charged with a capital offence is not sufficient to deny him bail; that he denied being a member of a criminal gang; that bitterness and rivalry from his siblings should not affect the court's decision on this matter and that taking or failing to obtain a national ID card is voluntary and does not amount to guilt on the part of the suspect.

Submissions

6. Parties opted to canvass this application through written submissions. This court directed, on March 21, 2022, that the application be canvassed through written submissions and allocated time to the parties to file their respective submissions.
7. The accused filed his submissions dated March 30, 2021. He submitted that the right to bond for all accused persons is provided under article 49(1) (h) of the Constitution; that the court ought to consider that he is innocent until proven guilty and that the state must not use the 'compelling reason phrase' to limit an innocent citizen's release on bail.
8. On the issue of the accused being a flight risk, it was submitted that the same has not been proved and that the accused has always resided in Ongata Rongai where he has a family. He cited Republic vs- Dwight Sagaray & Others HCCR 61 of 2012 to support his arguments. In this case, a Venezuelan national was not found to be a flight risk.
9. On the issue of lack of national identity card, it was argued that it is not a legal reason at all to deny the accused bail either in law, precedents or appellate courts or Bail/Bond Policy Guidelines; that the probation officer's report has all the details of the accused on page 1 of the report; that this was a case of mistaken identity and it is on the prosecution to prove the allegations beyond reasonable doubt and that the police obtained the accused's finger prints and can trace his profile when necessary.
10. On the issue of the accused's security and allegation of public bitterness and deceased's close friends, it was submitted that the police cannot use this as a reason as by law they are entitled to protect all persons; that this reason has no basis in law; that everyone should respect the rule of law and that all citizens are equal before the law under article 27(1) and (2) of the Constitution.
11. On the nature of the offence and its impact, it was submitted that the same is now settled by the Constitution that capital offences are now bailable.
12. The victims filed their submissions dated May 16, 2022. It was submitted that the right to bail is not absolute and where there are compelling reasons the said right may be restricted; that it is the court's discretion on whether to grant bail and in exercising that discretion, the court must seek a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. They relied on the Nigerian Supreme Court in Albaji Mujabid Dukubo – Asari –vs- Federal Republic of Nigeria SC 20A/2006 on the criteria to consider in granting or refusing to issue bail pending trial and argued that the fact that this is a murder charge in itself is a compelling reason; that as a result the



accused person is likely to abscond and fail to attend trial. They further relied on *Watoto –vs- Republic (1991) KLR.*

13. It was their submissions that according to the probation officer’s report the accused has a questionable character as a result of his night business which entailed brokering second hand phones; that from the evidence as presented where the accused has no known place of residence indicates that he is a flight risk; that he is also undocumented as he has no national ID card; that should the accused be released he may interfere with the witnesses and they will be living in fear of being tracked. They urged that the court considers the above mentioned reasons and deny the accused bail/bond.
14. The Law Society of Kenya also filed their submissions dated May 19, 2022 and argued that a compelling reason is that the accused attendance in court cannot be secured; that the accused being 26 years of age has refused to take out an identification card contrary to section 6(1) of the *Registration of Persons Act*; that by that fact the accused does not exist as far as the government of Kenya registration of persons data is concerned; that the accused has no birth documentation or even school documentation and if released he may adopt an alias name and disappear.
15. It was argued further that the accused has no known fixed abode; that the accused has a wife and child whose abode is not disclosed; that under article 50(2) (e) of the *Constitution* the accused has a right to have his trial begin and conclude without unreasonable delay and this right will best be secured by not realizing him on bond/bail.

Determination

16. I have considered the issues raised by all the parties and canvased in this application. The law under article 49 (1) (h) of the *Constitution* provides that:
 - (1) 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.
17. The right to bail is not absolute. It can be denied where compelling reasons exist. It is upon the court, in the exercise of its discretion, to grant or to decline admitting an accused person to bail/bond. This is a judicial discretion that must not be abused but must be exercised basing on the evidence presented to court.
18. Has the state, presented compelling reasons in this case? I have considered the grounds advanced by the state through the affidavit of the investigating officer. Other than making general statements, the officer has not tendered evidence to support those statements. The Law Society of Kenya and the victims have argued that the accused should be denied bail/bond and advanced what they consider as compelling reasons. It is therefore upon this court to decide whether these reasons are compelling this court to decline this application.
19. Article 50(2) of the *Constitution*, every accused person is entitled to the presumption of innocence. In line with that provision, the Bail and Bond Policy Guidelines, recommended that:

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.
20. Section 123A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, stipulates that:



- (1) Subject to article 49(1)(h) of the *Constitution* and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular—
 - (a) the nature or seriousness of the offence;
 - (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
 - (d) the strength of the evidence of his having committed the offence;
 - (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
 - (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection.
21. The paramount consideration in granting bail/bond is whether the accused will present himself to court to stand trial until the trial is concluded.
22. Courts in this country have considered various factors in granting or declining to grant bail, including:
- i. Probability of the accused person turning up for trial
 - ii. The nature of the charges
 - iii. The strength of the evidence supporting the charge
 - iv. The gravity of punishment in the event of conviction
 - v. Any previous criminal records of the accused
 - vi. Presumption of innocence
 - vii. Protection of the accused
 - viii. The likelihood that the accused will interfere with the witnesses
23. As to the nature of the offence and the seriousness of the punishment likely to be meted if the accused persons is ultimately found guilty, the offence of murder is one of the most serious offences whose penalty is ultimately death in deserving cases. The approach previously taken, before the mandatory aspect of the death penalty was done away with by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Others vs Republic [2017] eKLR*, was that, given the seriousness of the charge and the possible outcome of a conviction, the temptation to jump bail if released on bond was a key consideration. Thus, in *Watoro vs Republic [1991] KLR 220*, it was held thus:

' The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody, the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to



whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases...the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction'

24. In our instant case the respondent submitted that the accused is likely to abscond due to the nature of the offence. Counsel for the accused however argued that seriousness of the offence cannot be argued as a motivation to abscond. He urged court to look at article 49 (1)(h) of the Constitution and Bail and Bond Policy Guidelines and that on a balance of probabilities no compelling reasons have been advanced.
25. It has also been argued by counsel for the victims and LSK that the accused has no identification documents thereby making him a flight risk. The report by the probation officer also indicates the character and nature of the accused that even his family members have left him to carry his own cross. It was also argued that the fact that the accused has no known residence is equally a compelling factor to not consider granting bail. That he is a member of a criminal gang and that if released he may interfere with the witnesses.
26. This court called for a pre-bail report which was filed on March 7, 2022. I have read the Report. The family of the accused, one brother, stated that since the accused has failed to register for an ID, they fear he is a flight risk. The report is not favourable to the accuse as it recommends that he should not be granted bail/bond at this time until the matter is heard and determined.
27. I have considered this matter. While accused persons charged with murder and other capital offences have been admitted to bail and that the seriousness of the offences they face and the stiff penalty in case of conviction have been advanced as compelling reasons to support denial of bail/bond, it is my considered view that each case should be considered on its own peculiar circumstances as no two case are similar.
28. My concern in this matter is the fact that the accused at his age, has failed to register for national identity card. He is not under 18 years and yet he does not see the need to register for this crucial identification document. In this country, almost everything citizens do on a daily basis require identification and the one document that dictates the services one gets is the national identity card. How has the accused managed to live in this country, when he is over 18 years, the age of majority, without this important document?
29. This reluctance on his part to acquire this crucial document is making me uneasy. The accused does not exist in the government data base as a citizen of this country. He could disappear and no one will be the wiser. The authorities would not know where to start to locate him.
30. Having taken into account this factor alone, I am persuaded that it may not be in the best interest of justice to release the accused on bond. In my view, it may be safer to keep him in custody until this matter is fully heard and determined.
31. It is now for this court and the prosecution to obey the command of the law under article 50 (2) and accord the accused an expediate trial.
32. For the above reasons, I hereby decline to grant the notice of motion dated February 4, 2022. The accused shall remain in custody pending hearing and determination of this case. The prosecutor is urged to prepare for the pre-trial conference to pave the way for fixing this matter for hearing.
33. Orders shall issue accordingly.



Dated, signed and delivered this 28th June, 2022.

S. N. MUTUKU

JUDGE

