



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 3 OF 2020

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

VERSUS

BENSON WAWERU.....ACCUSED

RULING

Bail

1. **Benson waweru (“the applicant”)**, has been charged with the offence of murder contrary to *section 203 a read with section 204 of the Penal Code*.
2. After taking plea, the defence counsel, **Mr. Langat** applied for the accused to be released on bond. He requested a pre- bail report to be prepared for court’s consideration.
3. The application was opposed by the prosecution. They submitted that there were compelling reasons not to release the accused on bond. That despite the report by the probation officer, the accused person is still a danger to witnesses. He threatened the victims’ mother. His security is also at risk.
4. The defence counsel submitted that the prosecution has not proved compelling reasons to deny the accused bail. Further, it was submitted, that the prosecution did not substantiate the alleged threat to witnesses. No OB extract on the allegation was produced. The accused runs businesses at Mulot and he is not a flight risk. According to the defence counsel, mere speculation is not a compelling reason. The defence counsel urged that the mother of the accused lives in Kiambu- the accused can operate from there. He urged the court to grant him reasonable terms.

ANALYSIS AND DETERMINATION

5. Bail is a constitutional right under **Article 49 (I)** of the **Constitution**. The right is, however, not absolute as liberty may be denied where there are compelling reasons. Compelling reason must be of a nature that is reasonable and justifies limitation of right in an open and democratic society under **Article 24** of the Constitution which provides thus:

1. A right or fundamental freedom in Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

a) The nature of the right or fundamental freedom,

b) The importance of the purpose of the limitation,

c) The nature and extent of the limitation,

d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

6. In ***Republic Vs. Danson Mgunya & Another Ibrahim J*** (as he then was) stated the principle that the liberty of accused should only be limited where there are compelling reasons not to be released and it is the duty of the state to demonstrate the same, and even then each case must be decided on its own circumstances touch and context. I couldn't agree more. In ***R. V. Richard David Alden (2016) eKLR***, Lesiit J succinctly summarized the Bail and Bond Police Guidelines as follows:-

“The Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set out under Section 123A of the Criminal Procedure Code. These general considerations are: the nature of the offence; strength of prosecution case; character of the accused and antecedents; failure by the accused to observe previous bail and bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is child offender; whether the accused is flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person.”

7. On the rights of the accused, Lesiit, J in the case above cited, further stated: -

“Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.”

Applying the test

8. **Applying the test, has the prosecution established compelling reasons not to release the accused on bond?** From the pre-bail report on record and submissions of the respective parties it is apparent that the bond application has been opposed on two main grounds namely; interference with witnesses, and the security of the accused. I will consider these issues beginning with accused's own safety and security.

9. Learned prosecution counsel Ms. Koina submitted at the hearing that the security of the accused is at risk. The defence hears none of this and submitted that the accused will operate from Kiambu where his mother resides.

10. The pre-bail report expresses apprehension that the victim's family and residents might be hostile to the accused. The report indicated that the family members of the accused had settled in Kojongaa in Narok but they left their land which had no title after post- elections in 1992. The family of the victim are opposed to the accused being granted bond. They said the victim's mother had been threatened by the accused and have fear of what might happen if he is released on bond. They warned of dire consequences if the accused is released on bond. The area administration is not opposed to the accused being released on bond but warned against the accused going back to the same area for the sake of his life. It was further indicated that the relatives of the victim's mother had gone to the accused's hotel and destroyed everything inside.

Taking law in own hands

11. One element of the above report takes me aback; that the family of the victim takes the law in their own hands to destroy the property of the accused and threaten his life. They should understand that no one is above the law and such acts as they have committed here are subject of prosecution. They should understand that the law follows its own course and they should never take the law into their own hands lest they should be prosecuted. I have stated before, and I will state it gain, that such actions are unlawful, barbaric and uncouth without any place in law and the 21st century. They 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.

12. 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 in the circumstances of this case. 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.

Interference with witnesses

13. 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.”

14. See also ***R. V. Patius Gichobi*** where the court held 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 as to persuade the court to deny the accused bond. 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 this 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.”

15. In the present case the probation officer stated in his report that the victim’s mother had been threatened. The allegations were left at very high level of generalization and devoid of such succinct details which would paint a vivid picturesque of the threat made to and therefore, likelihood of interference with witnesses. Accordingly, the prosecution has not proved threats to or possibility of interference with witnesses. It bears repeating that, the court must be satisfied that threats were made and were of a nature that would *inter alia*, put the witness in a vulnerable position vis-à-vis the accused or put the accused in a position of influence over the witness or would instill fear in or prevent the witnesses from testifying.

16. After carefully analyzing the opposing views on the issue of possible interference with witnesses, I find no cogent material before court to demonstrate actual or perceived interference with witnesses by the accused if released. The stringent standard set by the Constitution has not been met as to justify limitation of fundamental freedom or liberty of the accused.

17. In the final analysis, I have found no compelling reason not to grant the accused bail. He is released on a personal bond of Kshs. 500,000/= with one surety of similar amount. He shall not leave the jurisdiction of the court without leave of the court.

It is so ordered.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 24th day of March, 2021

F. GIKONYO

JUDGE

In the presence of:

1. Mr. Kasaso – Court Assistant
2. Mr. Langat for the accused
3. Ms. Torosi for the Respondent

F. GIKONYO

JUDGE