REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. E010 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MUE MUASYA.....ACCUSED

RULING

1. The accused herein is charged with the offence of Murder Contrary to Section 203 as read with section 204 of the ***Penal Code*** the particulars being that on the 31st day of March, 2020 at Kyumbi Trading Centre in Athi River Sub-County within Machakos County jointly with others not before court murdered **MM**.

2. The Prosecution has opposed his being admitted to bail pending trial based on an affidavit sworn by **Cpl John Koech** a police officer attached to DCI Kyumbi, and one of the investigating officers in this case.

3. According to him, on the night of 31st March, 2020 at around 7:30 pm one **MM**, a Grade III pupil at early bird academy, aged 7 years was defiled and brutally murdered by the accused person and another who is at large and in the process, a DVD player make LG, a woofer make royal sound, the deceased child's mobile phone make Tecno T349 IMEI No. 356498093176622 & 356498093176630 and unknown amount of money were stolen from the house. In the course of the investigations, it was established that the accused person's Safaricom line 0716 *** *** paired with the deceased child's mobile phone make Tecno T349 IMEI No. 356498093176622 & 356498093176630 immediately after the incident and that the accused person immediately after committing the offence fled from the scene and went into hiding at Galana Kulalu irrigation scheme within Kilifi County.

4. According to the deponent, since 1st April 2020 the accused person's Safaricom line 0716 891 492 and the deceased child's mobile phone make Tecno T349 IMEI No. 356498093176622 & 356498093176630 were located to be in Galana Kulalu irrigation scheme within Kilifi County and being used by the accused person to communicate. On 22nd October 2020 at around 14:00 Hrs, the fellow investigators got information that the accused person had resurfaced back in Kyumbi area and through call data analysis on Friday the 23rd day of October, 2020 at around 14:30 Hrs, he was arrested within Kyumbi trading centre at his hide out and recovered from him the deceased child's mobile phone make Tecno T349 IMEI No. 356498093176622 & 356498093176630 paired with his safaricom MSISDN No. 0716 *** ***. He was immediately escorted to Kyumbi Police Station, interrogated and charged accordingly.

5. It was noted that the charge the accused person is facing is serious in nature and if released on bail or bond he may abscond court proceedings since he is a flight risk as his fixed place of abode and address has not yet to be established.

6. Based on the foregoing, it was urged that the court be persuaded to consider the reasons above as compelling and to order that the accused person be held in custody until conclusion of the case.

7. In response to the foregoing, the accused denied that he participated in the murder of the deceased, I insisted that he did not know anything about it. He also denied that he was using or ever accessed the deceased's phone as alleged. He also denied that he went into hiding and insisted that he was a law abiding citizen thus there is no iota of truth that he had disappeared.

8. According to the accused, the first time he heard about the incident in this case is when he was arrested by the police at Kyumvi.

9. Since in his view there are no compelling reasons to warrant denial of bail and he undertakes to abide by all conditions imposed by the court if granted bail, he ought to be released on bail on reasonable terms.

Determination

10. I have considered the material placed before me herein.

11. Article 49(1)(h) of the Constitution provides that:-

> ***An accused person has the right …***
>
> ***(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.***

12. The Constitution however has not identified what qualifies under the term "compelling reasons." The ordinary meaning according to ***Thesaurus English Dictionary*** of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

13. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release. In **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**, the Court held that:

> **"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system…the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question…the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;**
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> **"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."**
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> **In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."**

14. Gravity of the offence as a consideration was appreciated however by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

> **"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences,**

there may be no such incentive."

15. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

> **"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-**
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> **(i) The nature of the charges;**
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> **(ii) The strength of the evidence which supports the charge;**
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> **(iii) The gravity of the punishment in the event of conviction;**
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> **(iv) The previous criminal record of the accused if any;**
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> **(v) The probability that the accused may not surrender himself for trial;**
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> **(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
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> **(vii) The likelihood of further charges being brought against the accused;**
>
> **(viii) The probability of guilty;**
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> **(ix) Detention for the protection of the accused;**
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> **(x) The necessity to procure medical or social report pending final disposal of the case.**

16. Locally, the issue has been dealt with in the case of **Republic vs. Lucy Njeri Waweru & 3 Others Nairobi criminal Case No. 6 of 2013** which listed some of the factors that a court needs to consider in an application for bail as:-

> **a) Whether the accused persons were likely to turn up for trial should they be granted bail;**
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> **b) Whether the accused persons were likely to interfere with witnesses;**
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> **c) The nature of the charge;**
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> **d) The severity of the sentence;**
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> **e) The security of the accused if released on bond.**
>
> **f) Whether the accused person has a fixed abode within the jurisdiction of the court.**

17. This was the position adopted in **Dr. Ismail Kalule & 2 ors –vs- Uganda Crim. Case No. 115 of 2008 (2011) eKLR** where **Hon. Justice Owiny Dollo** stated that;

> **"There are well established guidelines Court should adhere to, in the exercise of its discretion, in considering the issue of bail.**
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> **These include nature or gravity of the offence the accused is charged with, the severity of the sentence that could result therefrom if conviction is secured."**

18. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> **"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."**

19. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

(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.

20. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."

21. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

22. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."

23. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in **Republic vs. William Mwangi Wa Mwangi [2014] Eklr** where **Muriithi, J** held that:

> **"It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail…It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail."**

24. In this case the opposition to the accused person's release on bond is based on the allegation that the accused's place of abode is unknown. In my view to base a decision denying bail to a person based purely on those grounds may well be termed discriminatory based on the status of the person. Whereas the fact that an accused's place of abode is unknown and has no permanent job and has no relatives are all factors that may, together with others, be taken into consideration, I do not understand the law to be that those who have no known source of income, place of abode or relatives are not entitled to bail pending trial. That kind of reasoning in my view would be clearly discriminatory yet the law presumes that all accused persons are innocent until proven otherwise. To my mind it is for that reason that the Court is given discretion to impose reasonable conditions for the grant of bail rather than to deny the accused bail.

25. It must however be appreciated that there is always a risk that an accused may abscond in any matter. In fact, it is not unknown that even in minor offences, the accused persons sometimes do abscond. Our Constitution has however taken a calculated risk of granting the right to be admitted bail to **all** accused persons save where there are compelling reasons shown to exist by the prosecution. It is therefore upon the prosecution to prove that the temptation for the accused to flee in a particular matter, based on convincing reasons, is so high that it amounts to compelling reason. Those circumstances cannot however be based on mere fear and speculation and each case must be considered on its own peculiar circumstances since each person whether accused or even a convicted criminal has the right to dignity of the person. Therefore, the decision whether or not to admit the accused to bail depends on the circumstances prevailing at the time when the application is made and may be subject to review depending on whether there are changes in those circumstances which warrant such review.

26. In this case however, it is deposed that the applicant, after the incident, disappeared for a very long time. That allegation cannot be swept under the carpet.

27. In the circumstances, I made the following orders:

(1) The accused person may be released on bond of Kshs 500,000.00 with a surety of similar amount.

(2) The court will be at liberty to cancel his bail and bond and to remand him in custody for the remaining part of his trial if any of the following conditions, which I hereby set as part of the terms upon which he is released, are breached:

(a) He shall present himself at this court without fail whenever required to do so.

(b) He shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that shall be supplied by the State to the defence.

28. Orders accordingly.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS 24TH DAY OF MARCH, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the State

Mr Muema for Mr Muumbi for the Accused

CA Geoffrey