



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. E002 OF 2021**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN KININI WANG'ONDU**

**JAMES MAHINDA MWANGI**

**EDDY KARIUKI NGARI.....ACCUSED**

**RAPHAEL WACHIRA KARIUKI**

**GEOFFREY WARUTUMO WATURI**

**RULING**

1. The accused persons face a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Upon taking plea on 02/03/2021, the prosecution through Mr. Ondimu informed the court that he was preparing to file an affidavit of compelling reasons under Article 49 of the Constitution.
2. The affidavit of compelling reasons was duly filed on behalf of the respondent on 04/03/2021 sworn by one IP Joyce Maluki of Director of Criminal Investigation (DCI) Central Region Headquarters as well as the investigating officer in this case.
3. It is deposed that the accused persons are facing a very serious charge that attracts a maximum sentence of death for which reason they are likely to be tempted to abscond trial in the event that they are released on bond. Further that the evidence shows that the accused persons soon after the commission of the offence tried to interfere with investigations.
4. The deponent in several paragraphs of her affidavit has detailed evidence gathered in the course of investigations which she says will most likely secure a conviction in this case. It is further stated that the 1<sup>st</sup> accused who is believed to have provided funds to some of the accused persons to commit the crime is most likely to interfere with the witnesses in order to eliminate the evidence against him.
5. That the 2<sup>nd</sup> and 3<sup>rd</sup> accused are said to have escaped to Embu and Githurai Kimbo, Nairobi following the commission of the offence to evade arrest. The pair were arrested 20<sup>th</sup> and 22<sup>nd</sup> February 2021 respectively. Additionally, the 2<sup>nd</sup> accused changed his mobile number contacts as he moved to Embu. The 4<sup>th</sup> accused is said to have been arrested on 25/02/2021 hiding in his uncle's residence in Pipeline Estate Nairobi and 5<sup>th</sup> accused arrested in Embu town on 21/02/2021.
6. The prosecution said that 1<sup>st</sup> accused is still being investigated for possible offences arising from insurance fraud.
7. Relying on the foregoing facts the prosecution argues that the accused persons are a flight risk. The prosecution further argued that the brutal murder of the deceased raised public anger and that if the accused persons are released on bail, their security is at risk.
8. The 1<sup>st</sup> accused through his advocate Mr Mahugu Mbarire filed a formal application for bail on 9<sup>th</sup> March 2021 which was argued orally. In his affidavit the 1<sup>st</sup> applicant stated that he has a fixed abode and lives in his home at Mweiga with his family who are willing to take him on board pending the disposal of this case. Secondly, the 1<sup>st</sup> applicant was said to be an elderly man aged 74 years and in poor health with medical conditions that require regular medical attention. He stated that he had collapsed in the cells during the previous court session and became unconscious resulting into him being rushed to hospital for a scan and various other tests. Relying on the case of **Kigoro Macharia EKLR (2019)** asked the court to take into consideration the factor of advanced age.

9. I was further argued that the applicant was released on bail pending appeal in HCA NO. 64 of 2018 whereas he had faithfully attended court pending determination of the appeal.
10. According to Mr. Mahugu, the court should only be concerned with the issue of whether the applicant will attend court if released on bail. The counsel referred to other grounds presented by the prosecution as less important in this matter.
11. The counsels for the other accused persons did not file any formal bail applications or file any responses to the affidavit of compelling reasons but proceeded to argue in response to the prosecution's affidavit of compelling reasons.
12. Ms. Wambui Mwai for the 2<sup>nd</sup> accused attacked the affidavit of compelling reasons by the prosecution arguing that it does not pass the laid down test for opposing bail in that it dwells mainly on matters of evidence. The 2<sup>nd</sup> accused she submitted, is a family man with a wife and children, and who professes the Christian faith and has a fixed abode.
13. Relying on the case of **John Waraga Njuki Vs Republic H.C Kerugoya** Criminal Case No. 16 of 2020, Ms Mwai asked the court to dismiss the arguments by the prosecution on the public being hostile towards the applicants since their security is assured by the state.
14. In respect of the 3<sup>rd</sup> accused, Mr Gichuki adopted the arguments of his colleagues who had submitted before him in urging the court to grant bail to the accused persons. He added that the court ought to consider the Bail and Bond Policy which gives guidelines on the issue of bail and takes into consideration the rights of the accused persons as well as the duty of the prosecution to bring compelling reasons with a corresponding duty to satisfy the court as to those reasons. It was his submission that the prosecution had not established any compelling reasons.
15. Mr. Maru Macharia for the 4<sup>th</sup> accused relied on the provisions of Article 49(h) of the Constitution that the accused has a right to be released on bail unless the prosecution demonstrates compelling reasons. He submitted that the prosecution had not proved by evidence that the accused persons are a flight risk.
16. In regard to the 4<sup>th</sup> accused, it was argued that no evidence of likelihood to abscond was presented and that this problem by its very nature will be cushioned by the requirement of sureties standing for the accused persons in the event of release on bond. As for the security of the accused persons in the event of release, it was stated that in the absence of any affidavit evidence to that effect, the prosecution cannot convince the court on the said allegation.
17. Mr. Magua for the 5<sup>th</sup> accused associated himself with the oral submissions of the counsels for the 1<sup>st</sup>-4<sup>th</sup> accused persons. In addition, he said that the 5<sup>th</sup> accused has a fixed abode and is not a flight risk. He is ready to abide by any conditions imposed by the court.
18. Mr. Ondimu for the respondent urged the court to take into consideration the strength of the prosecution's case and the peace and security of the public that is likely to be threatened by the release of the applicant's on bail. For purpose of the public good, the rights of the public and the fundamental rights and freedoms of the applicants ought to be balanced. The prosecution counsel further argued that the burden of proof on compelling reasons is on the balance of probabilities and which has already been established. He relied on the case of **Republic Vs Ahmad Abolafathi Mohammad & Another**.
19. Mr. Ondimu was of the view that the nature of the charge or offence and the seriousness of the punishment is a factor that cannot be ignored in an application of this nature even though Article 49 does not mention it. He referred the court to the cases of **a)R.V Taika Kitende Muinya Vs R (2010) eKLR and that of R Vs Milton Kabulit & 6 others (2010) eKLR**
20. In addition, the respondent urged the court to also consider whether the accused persons are likely to evade trial or to undermine or jeopardise objectives or the proper functioning of the criminal justice system and to interfere with investigations, as well as interfering with witnesses. In conclusion, the prosecution urged the court to consider the security of the accused persons as an important tenet in determining this application.
21. Mr. Nderitu for the victims referred to the issue of protests that allegedly took place at the hometown of the 1<sup>st</sup> accused at Mweiga. He said there may be need for the court to consider protective custody for some of the applicants but for a definite period. It was the victims wish not to oppose bail as such but to leave it in the discretion of the court.
22. It was further submitted that although the offence facing the accused persons was not open to application of Alternative Dispute Resolution (ADR) or to Mediation, the victims were ready to offer reconciliation with the accused persons in other areas relating to this in accordance with the law. The interest of the victims however, is the determination of the court after conducting the trial to establish who was responsible for the crime and what the motives of the murder were.
23. The victims further stated that they do not want to interfere with the cause of justice or to seek revenge against any of the accused persons.
24. The right to bail is therefore, not absolute and where prosecution establish existence of compelling reasons not to release, the court may restrict the said right if need be. The issue is what constitutes a compelling reason. Mr. Nderitu said that the answer lies in the circumstances of each case and on the weight of the material presented before the court. The victims further argued that the court therefore has the discretion to grant or to refuse bail provided its decision is in the interest of justice.
25. This court proceeds to analyse the relevant provisions of the law as well case law in determining whether the prosecution have established compelling reasons.

26. Section 123 of the Criminal Procedure Code gives the things the court shall bear in mind in granting bail as: i) the nature and seriousness of the offence ii) the character, antecedents, associations and community ties of the accused person iii) the past record of the accused in his response to release on bail in previous cases iv) the strength of the evidence.

27. These tenets were elaborately captured in Kenya Judiciary's Bail and Bond Policy guidelines, March 2015 with the addition of a few others as follows:-

i) that the accused is likely to abscond. ii) that he is likely to commit or abet the commission of a serious offence iii) to endanger the safety of the victim/s, the public or witnesses iv) to endanger national security or to interfere with witnesses, vi) that it is in the public interest to detain the accused.

28. The prosecution will normally base their compelling reasons on the foregoing guidelines which must pass the test set out in various decisions of courts. It was observed in the case of **R v –Nicholas Kipkemoi Kirui**[2021]eKLR whereas the honourable Judge relied on the **RV Danson Mugunya & Another** case Mombasa Criminal Case No. 26 of 2008

***“I do hold that if the prosecutor objects to the release of the accused person pending trial, then at the first instance, the burden should be on the prosecution and not the accused to prove or at least to demonstrate the existence of the compelling reasons.”***

29. With the enactment of the Victim Protection Act the court is duty bound to take into consideration the interests and views of the victims of a crime in determining an application of this nature. This was emphasised in the case of **R V Martin Oluoch Okusako & Others** [2015] eKLR. In this case, the victims have made their representations through their counsel Mr. Nderitu which will be considered herein.

30. In the affidavit of compelling reasons, the first issue raised is that the accused persons are facing the charge of murder which is a very serious offence and carries the sentence of death. The Judiciary Bond and Bail Policy 2015 lists the seriousness of the offence as a tenet for consideration. However, we must not lose sight of the fact that Article 49(i)(h) grants an accused the right to bail irrespective of the seriousness and the nature of the offence. This right however, may be restricted by the court based on the Bond and Bail guidelines as well as whether compelling reasons exist or not. Before section 123 of the Criminal case was amended, bail was not available for persons facing charges of robbery with violence under section 296 of the Penal Code, the offences of murder and treason. The amendment removed this restriction and opened the right to bail for all offences. Further, the mandatory nature of death sentence was declared unconstitutional in the Supreme Court petition of **Francis Karioko Muruatetu & Another** [2015]eKLR which factor must be considered in granting bail especially where the prosecution have presented compelling reasons. The decision gave courts the discretion to impose other sentences for the offence of murder, in addition to death sentence, of course depending on the circumstances and facts of each case. It was held in the case of **RV Mwangi**[2016]eKLR that:-

***Bail cannot be refused simply because the accused has been charged with a very serious offence but the seriousness of the offence can be taken into consideration as a factor in determining if one of the ground for refusing bail exists.***

31. The prosecution relied on the ground that some of the accused tried to interfere with investigations. It was deponed in the affidavit of objection that the evidence gathered so far supports the fact that the accused persons were in communication with each other before and after the commission of the offence and that this was fortified by the confession of the 3<sup>rd</sup> accused that money changed hands between them. From these facts, the prosecution state that there is a great likelihood that the accused persons will interfere with witnesses should they be released on bond.

32. It is trite that where it is proved that the accused will or is likely to interfere with witnesses, then bail ought to be refused. In the case of **Antony Ngirita V R** 2016 EKLR the honourable judge relied on the case of **Panju VS Republic** [1973] E.A 282 where the court held that evidence to such alleged interference must be availed. Article 49(i)(h) imposes an obligation to the prosecution to prove existence of compelling reasons.

33. In this regard, the prosecution relies on the evidence gathered that points at the guilt of the accused which may not be relevant at this stage except perhaps as a guidance but cannot be a compelling reason. It must be demonstrated that the accused persons have made an overt act or attempt to influence witnesses. No evidence has been tendered as to which witnesses have been interfered with or are likely to be interfered with. The question is whether the unnamed witnesses live in the same locality with the accused persons or whether there has been improper approaches or threats by any of the accused persons. If there were such approaches, then they would be said to amount to interference with witnesses. Has there been any threat or intimidation to the witnesses? The prosecution have not laid any material to support any such allegations.

34. In my considered view, the prosecution have not demonstrated the likelihood of interference with the evidence or likely intimidation or threat of any of its witnesses. I am also aware that the Witness Protection Act comes to the aid of any witness who is under threat of interference, intimidation or harm by the accused persons.

35. It was stated that the 1<sup>st</sup> accused is still being investigated for possible insurance fraud offences. In my view the said investigations, if any, are not relevant to this case and this court cannot spread its wings to provide a soft landing for the prosecution in matters that are not related to the case before it. Furthermore, time has lapsed since the 1<sup>st</sup> accused person was arrested and has been in prison custody where he could easily be accessed by the investigators. In my considered view, this is not a compelling reason not to release the 1<sup>st</sup> accused on bail.

36. The accused persons are said to be a flight risk in that some of them fled from their homes and were arrested in Nairobi. The 2<sup>nd</sup> accused was said to have changed his mobile phone and left his home at Mweiga town for Githurai Kimbo in Nairobi where he was arrested on 20<sup>th</sup> February, 2021 about one and a half months after the offence was committed. The 4<sup>th</sup> accused was allegedly found hiding in his uncle's house on 25<sup>th</sup> February, 2021 at Pipeline estate.

37. For the 2<sup>nd</sup> and 4<sup>th</sup> accused, and bearing in mind the burden of proof, it would have been appropriate for the arresting officers to put in affidavits explaining how and in what circumstances the said arrests were effected in order to bring out clearly the alleged escape and hiding but this was not done. The affidavit of the investigating officer is not by itself sufficient to prove that the 2<sup>nd</sup> and 4<sup>th</sup> accused are a flight risk. If the 2<sup>nd</sup> accused changed his mobile phone number it must be established what his mobile line he had at the time of arrest. These allegations remain unexplained.

38. As for the 3<sup>rd</sup> accused, it was only stated that he was arrested in Embu on 21<sup>st</sup> February, 2021 while the 5<sup>th</sup> accused was also arrested the same town on the same day. The issue here is whether these two accused persons lived and worked in Embu where they were arrested or whether they had also escaped from Mweiga where the crime was committed? The 1<sup>st</sup> accused was not mentioned in this context of escaping and hiding. He deposed in the affidavit in support of his application for bail sworn on 8<sup>th</sup> March 2021, that he was arrested on 20/02/2021 from his residence at Mweiga Nyeri county. This information was not disputed by the prosecution.

39. It is notable that the prosecution have not alleged that any of the five accused persons have no fixed abode. The 1<sup>st</sup> accused has explained in his affidavit that he has a family and a home where he lives with his family. He further stated that he honoured summons to the police at all times the investigations were ongoing and before his arrest. He further stated that he has previously been charged with other offences and that he attended court faithfully up to the determination of the appeal in which he was acquitted.

40. For the prosecution to persuade court in denying bail, it must place material to demonstrate the allegations. In my considered view, it has not been shown that the accused persons are a flight risk.

41. The issue of the security of the accused persons was pegged on demonstrations that had taken place at the home town of the 1<sup>st</sup> accused at Mweiga following the commission of the offence. The case of **R v. Lucy njeri Waweru & 3 others 2013 eKLR** was cited by the defence where the court observed that tempers and emotions cool with time. The prosecution also relied on the same case to state that the public may out of sympathy seek to revenge on behalf of the victims. In this regard, I am of the considered view that the state has the required legal machinery to protect its citizens. Any person taking the law into their hands must face the full force of the law. The rights of the accused persons to be released on bail will not be restricted for fear of hostility or revenge by the public.

42. In regard to public interest, the court has to balance the rights of the public and those of the accused persons. In this particular case the prosecution have not demonstrated any threat to public interest that is likely to compromise the criminal justice system.

43. The other category of rights which this court must consider in this matter are those of the victims. It has been clearly said through their counsel that the victims are not opposed to the accused persons being released on bail.

44. The accused persons have a right to be presumed innocent until proven guilty. This right must be guarded throughout the trial until one is convicted of the offence charged. However, I wish to state that the act of denying bail does not in any way mean that this right has been denied. The objective of keeping an accused in custody serves the purpose of ensuring he attends the trial and this will happen in cases where it has been established that the accused is a flight risk or is likely to interfere with witnesses.

45. A fact that was not disputed is that the 1<sup>st</sup> accused is the father of the deceased and that he has seven(7) other children. The deceased was his last born son who died at the age of 33 years. The 1<sup>st</sup> accused says he is aged 74 years and sickly. He produced a report from Outspan Hospital which states that he is both hypertensive and diabetic since 2008. The doctor recommends that his conditions require constant medication and good diet and he is in the high risk group due to his age in regard to the current Covid – 19 pandemic. For all these reasons, the 1<sup>st</sup> accused urged the court to release him on bail.

46. This court cannot lose sight of the fact that accused persons are accorded medical treatment in prison including referrals to credible and well equipped hospitals in this country that include Kenyatta National Hospital. However, I take judicial notice that people aged over 65 years of age are regarded as old people. Such older people with underlying conditions are in the high risk category of such conditions deteriorating while in prison. As for the Covid -19 pandemic infection risk, I would say that the 1<sup>st</sup> accused may be safer in prison than out there during these times of increased positivity rate in the country. However, the court will consider the representation of the 1<sup>st</sup> accused alongside other factors that have been articulated herein and which affect all the accused persons.

47. In conclusion, this court considers the right of the accused persons to bail as well as the severity of the offence and it is on this basis that the court will impose conditions which are reasonable to both the accused persons and the victims.

48. The accused persons are hereby admitted to bail on the following terms:-

- a) To be released on bond of Kshs.1,000,000 with one suitable surety of alike amount.
- b) That the accused persons do deposit in court any passports they hold pending the disposal of the case and will not leave the jurisdiction of this court without its permission
- c) That this case will be mentioned before the Deputy Registrar of this court every 30 days until final disposal
- d) That the accused persons will not either directly or indirectly communicate with, interfere or intimidate any witness in this case during the pendency of the trial.

49. It follows that breach of any of the conditions for bail will lead to cancellation of the bond.

50. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 28<sup>TH</sup> DAY OF APRIL, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered in open court this 28<sup>th</sup> day of April 2021.**