



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER E043 OF 2020

REPUBLIC.....PROSECUTOR

- VERSUS-

SHADRACK OTIENO ONYANGO also known as SHIDA...ACCUSED

RULING ON BAIL

1. The accused person is charged with **Murder Contrary to Section 203 as read with 204** of the **Penal Code Cap 63 Laws of Kenya**.
2. It is alleged that on the night of 19th to 20th June 2020 and Flamingo area in Bondeni Ward within Nakuru East Sub County he murdered Alphan Ogaye Ougo.
3. **Article 49(1) (h)** guarantees the accused person's right to bail pending trial unless there are compelling reasons to deny the same.
4. The prosecution opposed the accused's application for bail through an affidavit sworn by number 83982 CPL Samson Osamba on 23rd December 2020. He depones that he is the investigating officer. He depones that there is a gang by the name *Confirm Group* that exists in Nakuru and that on the material night rival gangs of the same group were engaged in conflict as a result of which one Alphan Ogaye Ougo died and another Janis Oburamba sustained injuries for which he was treated at Nakuru Level 5 hospital.

That three days later property of unknown value including dwelling houses were set ablaze by the rival gangs.
5. That the accused person was arrested on 10th December 2020 following investigations which placed him "within the scene" of the incident – and there is 'reasonable belief' that he is a leader of the illegal **Confirm** group –which is a threat to peace and security in Nakuru Town.
6. That the accused has no known fixed abode, he is a threat to society, he is likely to abscond if granted bond and also to interfere with witnesses.
7. That he is a known gang leader of the illegal group from Rhonda nicknamed "Wa TZ" with connection all over the country and if released "can launch a retaliatory attack on their rival gang."
8. In response Ms. Moenga for the accused urged the court to take into account the accused's right to be presumed innocent until proved guilty. That apart from the assertions made by the investigating officer about the accused being a member of the alleged illegal group, of being a gang leader, of being a threat to society, of having no fixed above, the Investigating officer had not tendered any evidence to support those averments. That the state had not demonstrated how the accused was a flight risk, and that the accused has no previous record. That the statements supplied to the defence indicated that the accused person was arrested at his residence in Flamingo Estate - and according to the defence, the affidavit was only intended to frustrate the accused's constitutional rights.

That the accused is a Kenyan, whose parents reside in Nakuru, who is willing to abide by any conditions to the bond terms granted by court.
9. In her response, Ms. Murunga for the state reiterated the fears of the state; that the accused would interfere with their witnesses, that where he was living was rented premises and hence no fixed abode.
10. I had also sought a Pre-bail report. This was filed by the Department of Probation and Aftercare Services Nakuru County. I noted that the officer who did the report concluded;

"We however are reluctant to recommend bond due to in part to his history of repeat offending and arrests combined with

the fact that he is highly mobile in nature due to the fact that they reside in rental premises and can easily move houses makes him a high flight risk and also the fact no one substantive has presented himself as a surety makes us not recommend him for bond. Bond is therefore not recommended.”

11. I have carefully considered all the foregoing – and the only issue for determination is whether the prosecution has established compelling reasons to warrant the denial of bond.

In **Republic vs Joktan Mayende & 3 Others [2012] eKLR** the learned Judge observed [2] *The right of the accused or person arrested to be released on bond as granted by the Constitution is not absolute. It has been limited by the Constitution itself in two respects. One, release on bond or bail will be on conditions, although those conditions should be reasonable. Second, to the extent that there are compelling reasons, the accused will not be released on bond. The onus is however on the court to determine; the conditions of bond or bail; and in case the prosecution objects to grant of bond or bail, whether the reasons adduced are compelling reasons in the sense of Article 49(1) (h) of the Constitution.*

Noting that the term compelling reasons is not defined by the Constitution the learned Judge went on to agree, as I do with him, with definitions by other judges and stated as follows:

I too take the same approach and adopt the finding by the Honourable Judges on the meaning of the word compelling in the context of the Constitution. But more light is shed by the Black's Law Dictionary 7th Edition. And accordingly, the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.

Are the reasons given by the prosecution forceful and convincing?

12. Let me begin by the Pre-bail Report. The purpose of bail reports is set out in the **Bail and Bond Policy Guidelines** and at **Paragraph 4:27** – it states;

“The bail report shall only contain information that will assist the court to make a fair decision on whether or not to release an accused person on bail.”

This is because a bail report may be called for where a court considers it does not have sufficient **information** to make **a fair and appropriate bail decision**. This is very valuable information as the officer has the advantage going to the ground, speaking directly to other people and is expected to provide factual findings of his or her social inquiry. The information gathered includes and is not limited to the accused's social background, home details, community and family views and ties, the views of the victim, the accused person's social capital. In most cases this information is not available through the usual process of hearing a bail application.

14. Having said so, I doubt that it is in the place of Probation Officer to recommend or dis-recommend bail/bond. The officer's role is to give information to the court for the purpose of making a fair, appropriate decision.

15. Back to the prosecution's position. It is that the accused will interfere with witnesses. I have noted from the Pre bail report that the family of the victim is reported to have no problem with the accused person. This is however explained by the officer to be based on fear sensed fear on that part of the victim's grandmother. Apart from just making that statement the officer does not substantiate the same, and no evidence to support this was forthcoming from the Police Officer's affidavit.

The offence is alleged to have been committed in June 2020, and arrest was in December 2020, surely if there was any interference with witnesses it is likely to have happened already taking into consideration the allegation that the deceased was also a member of this alleged group and his family as aware of the same.

In any event there is no evidence that any of the witnesses reported to the police that they feared for their lives/were facing threats or intimidation.

16. There is also the main reason put forward by both the Police and Pre Bail Report that **the accused is a leader for a notorious criminal gang Confirm Group who has been arrested, and charged with various related offences.**

The prosecution is saying that the accused is not only a member of an illegal gang but is facing other charges and is not a first offender. The affidavit by the police officer gives no such information. Except for this offence, there is no evidence of any other charge pending in court or of previous arrests or records. No OB number of any reports made against the accused is cited, no criminal case numbers of pending cases are quoted, or anything to show that the accused had been charged with criminal cases, granted bond and absconded. Hence the PACS officer had no factual basis for his recommendation.

17. Regarding the gang membership: the Pre-Bail Report indicates that the local administration that is, the Chief of Kaptembwa does not know the accused and has never heard of him. The question that begs is how that is possible if the accused is a wanted notorious criminal? The chief would know about him. He would have heard about him. He would be one saying that the accused needs to be kept out of the community because of the threat he poses, but the Pre-Bail Report indicates that he is unknown to the local administration.

That does not speak to the notoriety he is accused of.

18. As to equating living in rental premises to having no fixed abode, surely that cannot found a reason for denial of bond. Most urban area

dwellers do not live in their own houses. Such a ground would mean that anyone living in a rental house would be found to have no fixed place of abode. There must be more than just living in a rental house. No evidence has been placed before the court to show that the accused changes residences so frequently that he can be assigned such a label. There is evidence that his family has lived in Kaptembwa, since he was young. His brothers still live there he lived there with his wife a child. No evidence of the alleged high mobility was presented.

19. The allegations contained in the affidavit by the investigating do not present tangible evidence to support the allegation.

Many of them are disputed facts – as to whether the accused is a member of a gang/leader of gang these are all disputed facts, that the prosecution would be required to prove at the hearing of the case and the accused right to be presumed innocent until proven guilty would be violated if this court was to move the basis of alleged, unproven facts to deny him bail.

20. In arriving at my conclusion I find guidance in the case of **Aboud Rogo Mohamed and Another –vs- Republic [2011] e KLR** where the accused were charged under the **Prevention of Organised Crimes Act - 2010**. The court upheld the accused persons' right to the presumption for innocence.

It is my considered view that an accused person can never be more powerful than the state, which holds that the instruments of control, to protect its citizens from the harm of crime and to keep suspected criminals within the long arms of its law.

Hence I do find that the prosecutor has failed to establish that there are compelling reasons to deny the accused person bond.

21. I therefore make the following orders:

1. The accused person is admitted to bail.
2. The accused may be released on bond of Kshs. 300,000 with a surety of similar amount.
3. The surety to be assessed by the Deputy Registrar.
4. The surety to commit to ensure that the accused attends court as and when required to.
5. The accused to attend court at all times when required to in default the order for bond will be vacated and a warrant of arrest will issue.

DATED AND DELIVERED VIA ZOOM THIS 27TH DAY OF APRIL, 2021

MUMBUA T. MATHEKA

JUDGE

In the presence of:

Edna Court Assistant

For state

Accused: present via ZOOM at Nakuru Main GK Prison

MUMBUA T. MATHEKA

JUDGE

Ms. Moenga N/A

Mention on 11th May 2021 to fix hearing dates

Mention Notice to issue to counsel