



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL CASE NO. 4 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**VICTOR KIPROTICH CHERUIYOT.....ACCUSED**

**RULING**

1. Victor Kiprotich Cheruiyot (Accused) is facing trial for the alleged murder of his mother Winnie Chepkoech. The particulars in the information are that he committed the offence on 1<sup>st</sup> March 2020 at Kababai village in Embomos location Konoin Sub-County within Bomet County.

2. The Accused was arraigned in court on 16<sup>th</sup> June 2020. He could not however take plea as the mental assessment report stated that he was not fit to stand trial. A subsequent psychiatric assessment done on 16<sup>th</sup> December 2020 by Dr. Karanja consultant psychiatrist at the Gilgil Sub-County hospital found the Accused fit to plead.

3. The Accused took plea on 11<sup>th</sup> February 2021 and pleaded not guilty. Subsequently his defence counsel Ms. Chepkemoi filed a formal application for his release on bail pending trial. The application dated 17<sup>th</sup> February 2021 seeks that the Accused be released on bond or bail on such terms and conditions that the court may deem fit and just.

4. The application is brought on the grounds that murder was a bailable offence under Article 49 (i) (h) of the Constitution; that the applicant was a person of reasonable conduct and disposition who will not pose any threat to the society or witnesses if released on bond; that the applicant shall abide by any conditions set by the court and shall not interfere with the witnesses; that the applicant was innocent until proven guilty; that there were no compelling reasons to justify denial of bond, and; that such denial would be a total violation of the applicant's rights enshrined in the Constitution.

5. The application is supported by an affidavit stated to be made by one Robert Kipyegon Rono who makes various averments. The same affidavit is however stated to be sworn by the Accused Victor Kiprotich Cheruiyot, whose signature is appended thereto and commissioned by Geoffrey Kipngetch Korir advocate. Such an affidavit is *prima facie* fatally defective and must be struck out which I hereby do. I shall however proceed to consider the application on the basis of Article 49 (i) h of the Constitution which does not make it mandatory for an Accused person seeking to be released on bond to file a formal application supported by a sworn affidavit.

6. The application was strongly opposed by the State. The Prosecution filed a Replying affidavit in opposition sworn by No. 82137 P.C Tirus Gitonga of DCI Konoin Sub-County. P.C Gitonga deponed that the Accused was the son of the deceased and most of the prosecution witnesses were related to the Accused and therefore his release will jeopardise the prosecution case. That there was tension in the community and releasing the Accused on bail might escalate such tension; that the Accused was mentally unstable with drug induced psychosis which makes him exhibit violent behavior; that the family was not willing to stand surety for the Accused and; that it was in the interests of justice for the Accused to be held in custody until the case is heard and determined.

7. A pre-bail report was filed by the probation officer on 11<sup>th</sup> March 2021. The report states that the Accused was the last born child of one Richard Baliach and the deceased. It states that the family was still in shock and pain on the loss of the family matriarch. That they were apprehensive of their safety due to the Accused's violent behavior. Further, the report described the Accused as someone who was given to violence and abused drugs. The report quotes the Accused's father as having said that the Accused had been expelled from several schools due to his antisocial behavior and had also previously attacked a neighbor using a knife.

8. The application was urged before me on 18<sup>th</sup> March 2021. In urging the application, Ms. Chepkemoi who held Ms. Brandy Koskey's brief submitted that the Accused was entitled to bail under Article 49 (i) (h) of the Constitution. She submitted that the probation officer's report contained mere allegations. She stated that the allegation that the Accused had been expelled from several schools, or that he had

disappeared from home or been violent at home had not been proved or substantiated. Counsel further submitted that the averment that the Accused would interfere with witnesses was not proved. She urged the court to find that there were no compelling reasons to deny the Accused bond. She relied on Kisumu Criminal Case No. 14 of 2014 the case of **R –Vs- Isaac Rono & Others (2019) eKLR**.

9. Mr. Muriithi learned Principal Prosecution Counsel opposed the application. He relied on the Replying affidavit sworn by the Investigating Officer No. 82137 P.C Tirus Gitonga of DCI Konoin Sub-County.

10. P.C Tirus Gitonga averred at paragraph 3 that the Accused was the son of the deceased and that the release of the Accused before the witnesses testify would greatly prejudice the prosecution's case due to a high likelihood of witness interference. He averred at paragraph 4 that there was tension on the ground which may escalate if the Accused is granted bail. He further averred at paragraph 6 that the family of the Accused were unwilling to stand surety for him and receive him back home hence he will have no permanent abode which would raise the likelihood to abscond trial.

11. The starting point in an application of this nature is Article 49 (i) (h) of the Constitution which states that **“an arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released.”** This Article has been interpreted to mean that an accused person is in the first instance entitled to bond or bail, the only limitation being the existence of compelling reasons.

12. The Judiciary Bail and Bond Policy Guidelines (2015) has stated with respect to compelling reasons that:-

**“.....According to the decision of the courts, the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial.....”**

The Policy goes on to list the criteria often used by the courts including:-

**(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.**

13. In the present case, the two grounds which stand out in the State's objection to the release of the Accused on bail are that he was likely to interfere with witnesses and was also likely to endanger their lives.

14. Interference with witnesses is no doubt a compelling reason for denial of bail. In **R .V. Jackton Mayende & 3 Others Bungoma HCCRC No. 55 of 2009 (2012) eKLR** Gikonyo J. stated:-

**“.....(22) All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with the witnesses are varied and numerous but it is the court which decides in the circumstances of each case 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.”**

15. I agree with Gikonyo J's in depth analysis as quoted above. Interference with witnesses must therefore attract sanction, including denial of bail, because it has the potential of undermining the criminal justice system.

16. There is a clear nexus between interference with witnesses and the integrity of the criminal process. This nexus was clearly demonstrated by Lesiit J in **R. V. Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR**, in the following terms:-

**“Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.”**

17. Further in **R. V. Dwight Sagaray & 4 Others, Nairobi Criminal Case No. 61 of 2012 (2013) eKLR**, this court held:-

**“As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrate actual perceived interference. It must show the court for example the existence of a threat or threats to witness;**

*direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others.”*

18. It has been demonstrated by the Prosecution in this case that the deceased was the mother of the Accused. The primary witnesses are family members. The Probation Officer has stated in his report that the family of the Accused were terrified by the prospect of his release. They fear that the Accused might harm them. Owing to the antecedents of the Accused such fear cannot be farfetched and must be taken by the court as real and not speculative.

19. A related concern would be the real possibility that the Accused once back in the same home with the witnesses, would have the capacity to intimidate them and thereby prejudice the prosecution case. As stated in **R. V. Dwight Sagaray (Supra)** “**Such interference goes to the root of the trial and is an affront to the administration of justice.**”

20. In the final analysis, I have come to the firm conclusion that the Accused if released, was likely to interfere with the administration of justice through interference with witnesses. I am also persuaded that the safety of his immediate family members would be in jeopardy. The Accused’s application to be granted bail is thus rejected. He shall remain in custody pending trial.

21. Orders accordingly.

**Ruling delivered, dated and signed this 27<sup>th</sup> day of April, 2021.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of the Accused, Defence Counsel Ms. Chepkemoi holding brief for Ms. Brandy Koskey, Mr. Murithi for the DPP, and Kiprotich (Court Assistant).**