



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. E003 OF 2021**

REPUBLIC.....PROSECUTOR

VERSUS

KIRIMI GIKANG’U.....ACCUSED

**RULING**

1. The accused herein Kirimi Gikang’u was arraigned before court on 29<sup>th</sup> March 2021 facing the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 of the Laws of Kenya. After complying with the preliminary processes preceding plea taking, the charge was on 15<sup>th</sup> April 2021 read to the accused person who returned a plea of not guilty. Subsequently, counsel for the accused applied for the accused to be admitted to bail pending trial.
2. In opposition to the bail application, the State filed an Affidavit sworn on 12<sup>th</sup> April, 2012 by PC No. 95460 Patrick Macharia Mwangi in which the officer averred that accused is a flight risk considering that he is a police officer who is trained in evasion tactics.
3. At the hearing of the bail application, Mr. Abubakar, Counsel for the accused relied on **Article 49 of the Constitution** hence submitting that the said Article makes bail automatic as a matter of right unless there are compelling reasons not to. Counsel further submitted that the accused person being a Police Officer is a person of outstanding character and will not abscond court proceedings once he is granted bail.
4. In reference to the pre-bail report as filed in court on 15<sup>th</sup> April 2021, Counsel submitted that the report recommends that the accused person be released on bail hence the Court to consider the said recommendations in favour of the accused.
5. Learned Counsel contended that the conditions for consideration before one can be released on bail set out under **Section 123 A of the Criminal Procedure Code** have not been proved against the accused person. In particular, counsel submitted that accused has no record of absconding as he has never been charged before and that there is no proof tendered before Court showing that the accused is a flight risk or is likely to run away from the jurisdiction of this court.
6. In conclusion, Mr. Abubakar invited the court to uphold Article 50 of the Constitution thus stating that the accused has a right to be released on bail based on the presumption that he is innocent until proven guilty and that any further detention will be equivalent to being found guilty before trial. Basically, counsel urged that there was no compelling reason advanced by the prosecution to warrant accused’s

further detention in custody.

7. In response, Counsel for the DPP, Ms. Mwangeka adopted the content in the Affidavit sworn by the investigating officer and submitted that by the accused being denied bail is not equivalent to a conviction.

8. Learned counsel stated that the bail report as filed in court on the 15<sup>th</sup> April 2021 has shown sufficient compelling reasons as to why the accused should not be released on bail. It was stated that there is a high likelihood of witness intimidation by the accused and that the family of the deceased consider the accused a threat to their wellbeing.

9. Ms. Mwangeka further submitted that the accused person is a flight risk and she is afraid that once bail is granted, the accused person will flee the jurisdiction of this court in an effort to evade justice as he was on the run at the first time of arrest. She further stated that the accused person being a GSU officer serving under the Recce company and attached at Boni Forest, is skilled in matters of evasion and it will be hard to locate him.

10. In his rejoinder, Mr. Abubakar submitted that accused was arrested from his house in Meru a fact supporting his contention that he has no intention of absconding from this court's jurisdiction.

### **Analysis and determination**

11. I have considered the application herein, pre-bail report submitted thereof and oral submissions by both Counsel. The right to bail pending trial is a constitutional right provided under **Article 49 (1) (h) of the Constitution** which states: -

***An arrested 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. Bail pending trial is the cornerstone of a fair trial and can only be denied where there are compelling reasons not to grant bail. Section 123 A of the Criminal Procedure Code provides the criteria for the Court to consider when granting bail as: -

***(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 relevant circumstances and in particular -***

***(a) The nature or seriousness of the offence;***

***(b) The character, antecedents, associations and community ties to the accused;***

***(c) The defendant's record in respect of the fulfillment 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 protection.***

13. For an accused person to be denied bail the burden is on the Prosecution to prove that there are compelling reasons not to grant bail. The accused is therefore constitutionally entitled to bail as a matter of right. See the Court of Appeal case **Michael Juma Oyamo & another v Republic [2019] eKLR** where the court of Appeal stated that: -

***“...Article 49(1) (h) of the Constitution states that an arrested person has the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons”. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person...”***

14. The Court of Appeal in the case of **Michael Juma Oyamo & another v Republic (Supra)** referred to Criminal Bench Book, released in February 2018 that defines compelling reasons as likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused.

15. I have looked at the bail report as filed on 15th April 2021 which basically dwelt on the potential witnesses' fears that the release of the accused on bail will endanger their security. However, the report recommended release of the accused on bail but the same be granted on relevant/strict bail/bond conditions.

16. The Prosecution's main reasons for opposing bail is that they are apprehensive that the accused person will tamper with witnesses as some are known to him and that he is a potential flight risk being a GSU officer serving at the Recce company and therefore conversant with evasion technics.

17. It is trite that the evidentiary burden or onus on a prima facie basis lies with the prosecution in giving compelling reasons as to why they believe the accused person should not be granted bail. The objective of releasing an accused person on bail pending trial is premised on the presumption that an accused person is innocent until proven guilty.

18. Objectively, no one is to be detained in custody and therefore deprived of his liberty unless it is legally necessary. No accused person should be subjected to pre-trial detention except where there are justifiable grounds. See the case of **Republic v Danford Kabage Mwangi(2016)eKLR** where the court stated that;

***“The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to ensure that an accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive”***

19. While amplifying the constitutionality and significance of bail pending trial, the Court of Appeal in **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR** had this to say: -

***“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”***

20. The investigating officer's averments which the Prosecution is relying on does not show how the accused is likely to interfere with prosecution's witnesses. The mere fact that the accused is a GSU officer is not sufficient proof that he is a flight risk. The DPP has not brought before this court any cogent evidence to prove that the accused has the potential to intimidate witnesses. However, in some situations where possible, the relevant law on witness protection should apply.

21. It will amount to a gross misdirection of the law and indeed an act of discrimination if the accused

were to be denied bail on account of status or position in society simply because he is a police officer. Is a police officer not a member of society entitled to bail? Our Constitution does not classify people entitled to bail based on the position one holds in society.

22. I am not satisfied that the Prosecution has brought forth any compelling reasons that justify the denial of bail in this case. The issues as raised by the investigating officer in his affidavit are mere allegations which cannot be construed to qualify as being compelling. Indeed, if accused had the intention of running away from the jurisdiction of this court, he could not have retired to his house in Meru from where he was arrested without resistance after the commission of the offence. That is not a conduct consistent with a person intended at evading the course of justice.

23. Accordingly, I allow the bail application and order as follows: -

- (a) That accused be and is hereby admitted to bail pending trial**
- (b) That the accused be released on a bond of one Million with one surety of similar amount or in the alternative deposit a cash bail of Kshs 5000,000/=**
- (c) That the Deputy Registrar to examine and approve the necessary securities as may be presented by the potential sureties**
- (d) That the securities so approved be deposited in court pending finalization of the case herein or further orders from the court.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>th</sup> April 2021.**

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**J. N. ONYIEGO**

**JUDGE**