



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**HIGH COURT CRIMINAL CASE NO.13 OF 2021 (MURDER)**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**NEHEMIA NYAMWARO ASIAGO.....ACCUSED**

**RULING**

1. On the 19<sup>th</sup> April 2021 **Nehemiah Nyamwaro Asiago** the accused person (the accused) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code vide an information dated the 19<sup>th</sup> April 2021.

2. The accused person pleaded not guilty to the said charge and his advocate Mr. Ochoki applied for bond/ bail for the accused. The prosecution opposed said application. An affidavit dated 19<sup>th</sup> April 2021 sworn by No. 63615 Detective PC Johnstone Sanga deposes after the alleged murder on the 2/6/2020 the accused person fled from the scene and switched off his phone and fled to Nakuru and then Nairobi. That on the 28<sup>th</sup> February 2021 homicide detectives from the DCI headquarters were directed to take over the investigations. On the 9<sup>th</sup> April 2021 the accused person was arrested by DCI detectives at Elmvale Travels Agency offices in Parklands Nairobi where he was being processed to travel to Qatar to escape arrest. That the prosecution witnesses are the accused's first family members that is his wife, sons, close relatives and neighbours who are well known to the accused. That there is a very high likelihood that if the accused is released on bond or bail he will influence, intimate or otherwise interfere with the witnesses and the state witnesses in this case will therefore not feel safe if the accused is released prior to them testifying in court. That the matter is in the public domain and has elicited a lot of community concern over his action and if released at this stage his personal security is also not guaranteed. That the evidence gathered against the accused is overwhelming and is an incentive abscond bond and that there is justifiable to subject the accused to pre-trial detention. That the accused is a flight risk. That though this court has a constitutional duty to protect the life that was lost under article 26 "Right to life" by providing an enabling environment to testify without fear any fear or interference by declining to allow the accused bail or bond. That the penalty for the offence of murder is the death penalty and there is high probability and incentive for the accused person to abscond if released on bail or bond pending the hearing of the and determination of the case. That given that compelling reasons are determined on a balance of probabilities and not beyond reasonable doubt the reasons they have raised are compelling enough to warrant the accused being denied bail or bond pending the hearing and determination of this case. That the court should order that the accused deposits his passport with the immigration department if released on bond for they are apprehensive that he could flee the country. That though the accused's right to be released on bond is his constitutional right under Article 49 (1) (h) of the Constitution, the right is not absolute but a matter of discretion on the part of the court.

3. In his replying affidavit dated the 20<sup>th</sup> April 2021 the accused deposed as follows; that he was arrested on the 9<sup>th</sup> April 2021 and he has been in custody since then. That he has a right to be presumed innocent until proven guilty. That he will attend all court sessions and he is equally ready to testify to his innocence. That he has a right to be admitted to bail and there are no compelling reasons not to be released on bail pending trial. That he is willing to be faithful to court if released on bond and he will abide by all conditions that this court may impose against me as a condition of his release. That he will abide by all pre-trial conditions and will not interfere with any witness that the prosecution intends to call. That he does not pose as a flight risk as has been intimated by the prosecution and that the investigating officer already has his passport. That he is desirous of having the matter concluded expeditiously the truth revealed and the perpetrators brought to book. That documents attached in the affidavit by the prosecution had been handed over to a travel agent long before the incident for which he was charged.

4. Mr. Otieno and Mr. Ochoki reiterated the affidavits referred to in paragraphs 2 and 3 of this Ruling. Mr. Ochoki in his response noted that there was no affidavit from any of the family members that the accused would interfere with them. Counsel relied on the authorities they submitted. Mr. Otieno asked the court to note that there are instances when an accused is released and mob justice takes place and there are instances bond is denied and that each cases has different facts and circumstances.

5. I have considered the application. Article 49 (1) (h) of the Constitution provides that an accused person has a right to be released on bond or bail on reasonable conditions pending the trial unless there are compelling reason not to be released. This right is further reiterated in Section 123 of the Criminal Procedure Code ("the CPC") which provides that a person may be admitted to bail once he has been brought to

court.

6. The prosecution whilst opposing the application for bond/bail has in an affidavit sworn by an officer investigation the case listed a number of reasons which they term as compelling reasons. I note that bail is a constitutional right which is not absolute. The compelling reasons depend on the circumstances of each case. In this case the reasons advanced are that the accused is a flight risk that he could interfere with the witnesses and that his own life is at risk within the community.

7. Section 123 A of the CPC provides circumstances to be considered by a court whilst considering to grant bond/ bail. It provides 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 fulfillment of obligations under previous grants of bail; and;*

*(d) the strength of the evidence of his having committed the offence;*

8. The accused faces a charge of murder which is a serious offence and the maximum sentence is the death sentence. There is an apprehension that the accused might not turn up for trial if released on bond. As a court I have to balance between protecting the rights of the accused who is presumed not guilty and the public interest. I do note that the accused was arrested about 9 months after the alleged offence took place. This is why the prosecution states that the accused is a flight risk. In his application the accused has not explained where he was his affidavit is silent on this crucial fact. Though the accused is not required to explain his actions at this stage, considering the circumstances of this case the fact that he was arrested 9 months later and arrested whilst processing papers to leave this country in my view these are compelling reasons to deny the accused bond or bail at this stage. The accused shall be remanded in Kisii GK prisons and is at liberty to renew his application for bond/ bail at a later stage during the trial.

**Dated, Signed and Delivered at KISII this 28<sup>th</sup> day of May 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Accused Present**

**Mr. Otieno Principal State Counsel ODDP**

**Mr. Ochoki For the Accused person**

**Ms. Rael Court Assistant**