



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT - NAIROBI

CRIMINAL DIVISION - MILIMANI COURT

CRIMINAL CASE NO. E 035 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

VICTOR ORICHO OCHWAL.....ACCUSED

RULING

1. Victor Oricho Ochwal, the Applicant, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He seeks to be released on bail pending trial pursuant to his right as espoused in Article 49(1) (h) of the Constitution.

2. The application is premised on grounds that: the Accused person is innocent until proven guilty; the right to bail is a constitutional right under Article 49 (1) of the Constitution, and unless the prosecution has compelling reasons that would lead the court think otherwise, the court should not have any reason of denying the accused person personal bail pending hearing of the case; there are no compelling reasons rendering the applicant incapable of being granted personal bail; it is fair and just that the application is heard and prayers sought granted and, that, the court has inherent power, jurisdiction and discretion to issue such orders as prayed in the circumstances.

3. The application is supported by an affidavit sworn by Dawood H. Farrah, counsel representing the Applicant, who deposes that following instructions from the Applicant, he is a 24 years old male adult, married with two(2) children who had been working for Kazi Mtaani for the past five (5) months preceding his arrest. Guided by Article 49(1)(h) of the constitution, he urged that the Applicant's ancestral home had been indicated as Asemo village, Bondo, hence he has a fixed place of abode and not a flight risk.

4. No. 64414 PC Frasto Onyambu Gesengi, an investigation officer in the matter, in a reply thereto deposed that the right granted under Article 49(1)(h) of the Constitution is not absolute and should be exercised judiciously. That after the applicant stabbed the deceased, he attempted to flee and was restrained by members of the public. That having tried to evade arrest demonstrated that since evidence is overwhelming, he would abscond from the jurisdiction of the court and that he would interfere with witnesses who are his neighbours.

5. The application was canvassed through written submissions. It was urged for the Applicant that the affidavit in opposition of the application was full of mere allegations as opposed to material /cogent evidence warranting denial of bail. That the right to release an accused person on bail could only be taken away if viable and justifiable compelling reasons are presented which would enable the court to exercise its discretion.

6. That what constitutes compelling reasons has been cemented in Kenyan criminal jurisprudence which can be traced in the Bail/Bond policy guidelines as well as the case of **Republic verses Mgunya & Another (2011)2 EA 36** which was cited in **Republic vs David Muchiri Mwangi(2018)eklr** thus:

(i) The nature of charge.

(ii) The strength of the evidence which supports the change.

(iii) The gravity of the punishment in the event of conviction.

(iv) The previous criminal record of the accused if any.

(v) The probability that the accused may not surrender himself for trial.

(vi) The likelihood of the accused interfering with witnesses or that he may suppress any evidence which is

incriminating him.

(vii) Likelihood of further charges being brought against the accused.

(viii) The probability of a finding of guilt.

(ix) Detention for the protection of the accused.

(x) The necessity to procure a medical or social report pending the disposal of the case.

(xi) Accused person's own safety, security and protection.

(xii) If the accused person is likely to pose public danger by being released on bail.

(xiii) If by releasing the accused on bail public confidence in the administration of justice will be dismissed.

(xiv) The character antecedents, associations and community ties of the accused person.

7. This court has been called upon to reach a finding that there are no compelling reasons to result into denying the Applicant bail and on reasonable terms.

8. The application is opposed by the State/Respondent. It is argued that compelling reasons have been comprehensively enumerated in the Bail and Bond Policy guidelines which provide for the need for the prosecution to satisfy the court on a balance of probabilities, the existence of compelling reasons that justify denial of bail. That one of the objective of the guidelines is to ensure that the rights of the accused persons are balanced with public interest.

9. It enumerated compelling reasons in this regard as follows: That the Applicant was a flight risk as he attempted to flee after commission of the offence but was restrained and disarmed by members of public who detained him until the police arrived and arrested him; his place of abode, other than the rental house in Shauri Moyo and occupation were unknown.

10. That witnesses herein are friends and neighbours of the Applicant at Shauri Moyo hence, there is real likelihood of him interfering with them as they will be reluctant to testify because of fear and anxiety. In that regard the case of ***Republic vs Fredrick Ole Leliman & Others (2016) ekr*** was cited where the court stated that

“...Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever....”

11. That having been supplied with a soft copy of the committal bundle, evidence that the State will rely on, the Applicant is fully aware of the weight and strength of the case which is an incentive for him to abscond. In this respect the Respondent cited the case of ***Republic vs Margaret Nyaguthi Kimeu (2013) ekr*** where the court stated that:

“I have considered the application, the nature of the offence and the strength of the evidence on record and the severity of the sentence to be meted out if the Applicant is found guilty. All the prosecution witnesses have testified and the prosecution case closed. The evidence on record cannot be termed as frivolous.”

12. Bail is provided for in **Article 49(1)(h) of the Constitution** that provides thus:

(1) 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.

13. Although bail is an accused person's constitutional right, it is not an absolute right, such that some factors must be considered prior to the order being granted. Compelling reasons that would call upon the court to ensure the accused person is incarcerated during trial are not provided for in the constitution, but as submitted, they have been considered in caselaw and the Bail and Bond Policy Guidelines. I must however point out that these reasons vary according to circumstances of each case. In ***Republic v Francis Kimathi [2017] Ekr***, it was held: -

“... There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Except, however, compelling reason should be a reason or reasons which is rousing, strong, interests, attention, and brings conviction upon the court that the accused person should be denied bail. Flimsy reasons will not therefore do. Therefore, the standard is high for it draws from the constitutional philosophy that any restriction of rights and freedoms of persons must be sufficiently justified given the robust Bill of rights enshrined in the Constitution ...”

14. It is a legal principle that an accused person is not guilty unless proven guilty. *In R vs Oakes [1986] 1 R.CS it was held that:*

“The presumption of innocence lies at the very heart of the criminal law and is protected ...this presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major International human rights documents...”

15. Therefore, prior to the case being proved, an accused person’s liberty should not be deprived on flimsy reasons, it must be on cogent evidence. On the other hand, the State that apprehends the suspect must strenuously advance the interests of the victim. For that reason, a balance must be struck between the cause of the Applicant and the interests of the victim(s) of the offence.

16. In the case of *Ng’ang’a Vs Republic 1985 KLR 451 Chesoni J*, (as he then was) stated thus:

“The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should grant bail to the accused person unless it is shown by the prosecution that there are substantial grounds for believing that:

- i. The accused will fail to turn up at his trial or to surrender to custody;***
- ii. The accused may commit further offences; or***
- iii. He or she will obstruct the course of justice.***
- iv. The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;***
- v. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;***
- vi. The strength of the prosecution case;***
- vii. The character and antecedents of the accused;***
- viii. The likelihood of the accused interfering with prosecution witnesses.”***

17. The paramount consideration which the court should peg on its consideration as to whether or not an accused person should be released on bail is, therefore, whether he will turn up for trial. It is alleged that he is a flight risk, having attempted to flee after the incident, but, having been pursued and arrested by members of public, prior to being handed over to the police. Having not sworn an affidavit, the alleged conduct of fleeing remains unexplained. However, the question that lingers is if he will turn up for trial if released?

18. It is also urged that that there is a possibility of the Applicant interfering with witnesses who are his neighbours an allegation that was dismissed by the Applicant as baseless. The integrity of witness evidence must be preserved therefore it would not be right for any witness to be interfered with. But, it is not enough to allege that there will be interference, this should be demonstrated. If released on bail, conditions must be set to be adhered to by the accused person.

19. The case herein being murder, is a serious one. And as rightly submitted, witness statements having been supplied, the Applicant is aware of evidence against him. But, this must be weighed against other factors. The Accused is a young adult stated to be 24years old, and a father of two (2) children, who is presumed to be innocent until proven otherwise.

20. The upshot of the above is that, I grant the Applicant bond of Ksh. 500,000/- with a surety of a similar sum. During pendency of the case, upon being released from custody, he is barred from interacting with witnesses who have recorded statements.

21. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF MAY, 2021

L. N . MUTENDE

JUDGE