



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL CASE NO. E001 OF 2020**

***(CORAM: F.M. GIKONYO J.)***

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BONFACE METIAN RISANJO.....ACCUSED**

**RULING**

**Bail Application**

1. The accused herein is facing a charge of murder contrary to **Section 203** as read with **Section 204** of *the Penal Code*. On 23<sup>rd</sup> February 2021, the accused through his defence counsel Ms. Kudate orally applied for the accused to be released on bail pending the trial.
2. The bail application has been opposed by both the prosecution and the family of the victim. The prosecution filed two affidavits to oppose bond by **CPL Eric Munene** and **Ita Ole Nao** both dated 22<sup>nd</sup> march 2021. Defence counsel opted to file written submissions in response to these affidavits.
3. The prosecution has advanced two (2) grounds why the accused should not be admitted to bond. One; that the accused is a flight-risk. They provided particulars; that the accused was arrested after five days at Olposimoru border as he was fleeing to the neighbouring country Tanzania where he has relatives. Two; that there a likelihood of interference with witnesses by the accused. According to the prosecution and the victim family, some of the witnesses have expressed fear that they will not be able to freely testify if the accused person is released on bail or bond.
4. Ms. Kudate for the accused urged the court to release the accused. She argued in her written submissions that **Article 49(1) (h)** of the **Constitution** provides for bail as a right which could only be curtailed on compelling reasons being shown by the prosecution. She relied on the case of ***Grace Kananu Namulo V Republic [2019] eKLR***.
5. Ms. Kudate continued to submit that the prosecution which bears the onus of proof has not proved any compelling reasons to warrant denial of bail. Counsel relied on the cases of ***Republic Vs Danford Kabage Mwangi [2016] EKLR; Republic Vs Dwight Sagaray & Other High Court Criminal Case No. 6 of 2012 and Kelly Kases Bunjiks Vs Republic .***

**ANALYSIS AND DETERMINATION**

**The subject of bail/bond generally**

6. Bail or bond has been subject of intense interrogation by scholars as well as judicial authorities and instruments. A string of judicial authorities on bail has now established some of the important matters a court of law should buttress in an application for bail, to wit:
  - a. The presumption of innocence, in other words every person is presumed to be innocent until he is found guilty;
  - b. The particulars and the seriousness of the offence.
  - c. The rights of the victims including taking their wishes and feelings into account
  - d. The character and circumstances of the Accused/Applicant

- e. Ensuring the decision taken on bail engenders respect for and confidence in the legal system within the community generally
- f. Guarding against community anger and unrest whether it is directed towards the Police and/or the Applicant and/or the Court.
- g. Setting conditions that are not debilitating

h. Setting conditions that (a) prevent and/or restrict absconding, (b) prevent interference with the trial process and (c) prevent intimidation of witnesses.

7. It is now abundantly clear that Bail/Bond is a constitutional right designed to afford the accused an opportunity to enjoy his liberty whilst guaranteeing his attendance in the trial. The Constitution requires terms or conditions of release on bond will be reasonable. But, I should state that reasonableness of terms or conditions of bail will be dictated by the circumstances of the case. In one case a free bond may be reasonable. In another, personal bond with surety or sureties may be reasonable. And so forth and so forth.

8. Bail or bond may however be denied on compelling reasons- reasons that bring conviction upon the court that releasing the accused on bail shall be prejudicial to the course of justice. For instance, absconding or interference with witnesses will not only impede the trial but will rattle administration of justice in the case. Of essence, however, bail should not be denied as a punishment to the accused; for the accused under Article 50(2)(a) of the Constitution enjoys the right to be presumed innocent until proven guilty.

9. See also the ***Bail and Bond Policy Guidelines*** at Paragraph 4:9 on some of circumstances that are relevant when considering bail application. These are:

***a. Nature of charge or offence and seriousness of the punishment.***

***b. The strength of the prosecution case.***

***c. The character and antecedents of the accused persons.***

***d. The failure of the accused person to observe bail or bond terms.***

***e. The likelihood of interfering with witnesses,***

***f. The need to protect victims of the crime.***

***g. The relationship between accused and potential witnesses.***

***h. The best interest of child offenders.***

***I. The accused person was a flight risk.***

***j. Whether the accused person was gainfully employed.***

10. And, I will not forget section 123A of the CPC which provides as follows:

***“123A. (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;***

***(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;***

### **The Constitutional test**

11. Under article 49(1)(h) of the Constitution:

**49(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.**

12. The prosecution must therefore prove that there are compelling reasons not to release the accused on bond. The phrase “compelling reasons” was considered in the case of **R vs. JOKTAN MAYENDE & 4 OTHERS**[1] where the court stated as follows:

**“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.”**

13. In this case, the prosecution has adduced two grounds which they believe are compelling reasons for which the accused may be denied bail, to wit; (a) there is likelihood of the accused interfering with witnesses; and (b) he is a flight-risk.

**Interference with witnesses**

14. The investigating officer avers in his affidavit that some of the witnesses as well as the victim family members who come from the same area with the accused have expressed fear that they will not be able to testify freely if the accused is released on bond. Ms. Kudate, counsel for the accused on the basis of **R vs. DWIGHT SAGARAY & OTHERS**[2], was of the view that that the prosecution needed to place material before court to demonstrate actual interference.

15. It is not denied that the accused hails from the same village with the deceased’s family. The possibility that his presence may make witnesses resign to fear is not far-fetched idea. I am content to cite Sitati J where she stated in the case of **R VS. DAVID OCHIENG AJWANG ALIAS DAUDI & 11 OTHERS**[3] that:

**“...It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. 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 or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.”**

16. Interference with or likelihood of interference with witnesses by accused person would be a direct affront to the administration of justice and a deliberate compromise of fair trial in the proceedings. It is therefore a compelling reason for which bail may be denied. In this case, other than expressing fear that he may interfere with witnesses, the prosecution did not establish real or cogent circumstances which tend towards possibility of interference with witnesses. I therefore, find and hold that the prosecution has not proved that there is likelihood of interference with witnesses by the accused as they come from same locality.

**Of Flight-risk**

17. The second ground relied upon by the prosecution in opposing bond to the accused is the fact that they have reason to believe that he is a flight risk. They have stated that the accused was arrested at the border trying to flee the country to Tanzania.

18. In these circumstances, the primary consideration is whether the attendance of the accused during trial may be guaranteed. The uncontroverted evidence before the court is that the accused was arrested at the border trying to flee out of the country into Tanzania. Possibility of absconding has not been obliterated in this case. Accordingly, I find that the prosecution has proved that the accused is a flight-risk. Such is a compelling reason under article 49(1)(h) of the Constitution for which bail will be denied.

19. In the upshot, I find and hold that the prosecution has established compelling reasons to deny the accused bail. I therefore decline his request for bail. I am, however, aware he is a student. But, I must balance his circumstances with the interest of justice and the need to safeguard the trial herein. Accordingly, I order the case to be fast-tracked.

**Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application this 19<sup>th</sup> day of May, 2021**

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**F. M. GIKONYO**

**JUDGE**

**In the presence of:**

**1. The accused**

**2. Ms. Kudate for accused**

**3. Ms. Torosi for the Republic**

**4. Mr. Kasaso CA**

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**F. M. GIKONYO**

**JUDGE**

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[\[1\]](#) [2013] eKLR

[\[2\]](#) [2012] eKLR

[\[3\]](#) [2013] eKLR