



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. E008 OF 2021

BENJAMIN NJIRU BEDAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant herein faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that on 1.02.2020 at Kambevo village Gikuuri Sub-location Runyenjes location in Embu East Sub-county within Embu County murdered Alexander Munene Njiru. The applicant was arraigned before this court and whereby he initially pleaded guilty. However, when the facts were read to him, he disputed the same and the plea was changed and a plea of not guilty entered.

2. He has now moved this court vide the application dated 26.05.2021 and wherein he seeks bail/bond pending trial. The said application is premised on the grounds on the face of it and further supported by the affidavit sworn by the applicant herein and wherein he deposed that he is a senior citizen of seventy five (75) years old and sickly suffering from asthma and arthritis and that his health has deteriorated since he was put in custody. He thus prayed that he be released on bail so that he can be able to seek further medical treatment. Further that his life will not be in danger if released on bail nor will he interfere with witnesses and that he is the sole breadwinner of the family.

3. The respondent filed an affidavit of compelling reasons in opposition to release of the applicant on bond and which affidavit was sworn by Rose Wamaitha the Investigating Officer in this matter. In a nutshell, she opposed the admission of the accused to bail for the reasons that most of the witnesses are close relatives to the accused being his wife, daughter and granddaughters and since they live in the same compound, there is a possibility of the accused interfering with them (witnesses). Further that, there is no guarantee of the security of the accused as his sons are very bitter about the incident.

4. It was further deposed that the applicant and his wife had been living separate lives and that the hostility between the applicant and the said wife is the cause of the deceased' death as he sided with his mother and as such, it is hard to predict the outcome of any further aggression due to this pending case. As such the applicant herein ought to remain in custody.

5. At the hearing of the application, Ms. Mutegi the Learned counsel for the defense relied on the affidavit in support of the application.

6. I have considered the application and the affidavit of compelling reasons filed herein. Article 49(1)(h) of the Constitution provides that an arrested person has a right to *be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released*. This therefore means that the right to bail/bond pending trial is a constitutional right which can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person.

7. The Court of Appeal in **Michael Juma Oyamo & another –vs- Republic [2019] eKLR** adopted the definition of the phrase “compelling reasons” in the case of **R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009** where the Learned Judge held as thus; -

“.... 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 standards set by the Constitution.”

8. As such, where the reasons are presented by the prosecution and which are not forceful and convincing as to make the court feel very strongly that the accused should not be released on bond, he is entitled to be released on bail or bond on reasonable terms. It is my considered view therefore, that the main issue for determination is whether the prosecution has presented compelling reasons to warrant denial of bail/bond to the applicant herein.

9. In the affidavit of compelling reasons, PC. Rose Wamaitha the Investigating officer deposed that the family members are bitter with the accused and further that there is hostility between the accused and his wife and as such, there might be aggression attacks due to the pending case. However, these depositions were never proved. There is no separate affidavit by any of the sons or a probation officer's report which

has been filed to that effect. It is my view that in the circumstances herein, the prosecution did not prove to the required standards that the accused's life might be in danger once released on bond. As such, the same cannot be a ground for denial of bail.

10. The Investigating Officer further deposed that the witnesses are relatives of the accused (being the wife, daughter and two grandchildren) and thus, there is a possibility of the accused interfering with the witnesses and which reason has been held to be a compelling reason to warrant denial of bail. {See **Michael Juma Oyamo & another –vs- Republic (supra)**} and paragraph 4.9 of the Bail and Bond Policy Guidelines.

11. I have perused the committal bundle and I note that indeed, the witnesses are indeed the wife, daughter and granddaughters of the accused. Further, this was not disputed by the accused. In **Republic –vs- Antony Karanja Njeru [2016] eKLR** the Learned Judge held that (paragraph 9); -

“.....It has long been recognized that an accused who interferes with witnesses does not qualify to be granted bail. In Panju v R (1973) E.A. 282 the High Court held that where an allegation of interference with witnesses is used as a ground of opposing release on bail, the prosecution must produce evidence. This was the practice under the independence Constitution of 1963. The requirement to produce evidence to support an allegation of interference with witnesses is in principle good law. The reason being that a decision of a court must be based on evidence.”

12. In the persuasive authority of **Republic –vs- Gerald Mutuku Nyalita & another [2015] eKLR** E.M. Murithi J held that; -

“[5In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of the Constitution of Kenya, the Prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant...”

13. It is my considered view that in the instant case and by the close family relationship and the fact that the accused lives with them, there is a likelihood of him interfering with the witnesses. The depositions in that respect were never controverted by the defence. As such, the prosecution has proffered compelling reasons to persuade the court into denying the accused person bail pending trial. The application for bail/bond is hereby dismissed.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JUNE, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant/Accused

.....for the State