



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL CASE NO. E004 OF 2021

DEDAN NJERU NJERU.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant approached this court vide an application dated 22.03.2021 and wherein he seeks admission to bail pending trial. The grounds in support of the application are that the applicant has been in custody since 12.01.2021 and that he was arraigned in court on 15.03.2021. That the prosecution did not explain the reasons for the delay in presenting him to court for plea and as such, there was a likelihood that he will remain in custody for a long time before the case is heard and determined. That he resides with his parents and his family and none has reported having received any threats from the members of the public. Further that he is not capable of absconding as he lives in Kavengero within Embu County and as such, he is not a flight risk. Further that he will not interfere with the witnesses and the Investigation Officer has not placed any material to demonstrate actual or perceived interference. As such he ought not to be denied his constitutional right.

2. The respondent vide an affidavit sworn by Brian Olweny the Investigating Officer in this matter opposed the release of the accused on bail/bond and in so doing, proffered the reasons that it took the investigating team four (4) weeks to unearth the plot by the applicant to murder the deceased as he had threatened to harm key witnesses who gave information to the police and that he is likely to interfere with evidence of the witnesses if released from custody. That, it is in the best interest of the applicant's personal safety as the public is baying for his blood and that the applicant is a flight risk since he has no fixed abode as his dwelling home was set ablaze by the members of the public.

3. The application was canvassed by way of written submissions and wherein the applicant submitted that the affidavit by the Investigating Officer does not demonstrate any compelling reasons to warrant denial of bond. That the prosecution has not proved that the applicant has no fixed abode and that since the main witness had been placed under witness protection unit, it would be difficult for him to interfere with the witnesses. The applicant submitted further that the state has a duty to ensure safety and security of its citizens and as such, the depositions that his life will be endangered are unfounded. That an accused person has a right to a fair trial under Article 49(1)(h) and 50(2) of the Constitution and a believe, should not be used as a ground to deny one his constitutional rights.

4. It was submitted on behalf of the respondent that the applicant's house was torched by angry residents and that the case draws public interest arising from the fact that the deceased was a child of tender years who was subjected to unwarranted torture before being killed and which case was extensively covered by the media. As such, the state cannot guarantee the safety of the accused herein and hence a need to have him incarcerated throughout the trial as the same will be in the best interest of justice given the history.

5. I have considered the application and the affidavit of compelling reasons filed herein. It is my view that the issue I am invited to determine is whether the applicant ought to be admitted to bail/bond.

6. The applicant faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on 19.12.2020 at Kiriari village, Nguthi Location within Mbeere North Sub-county in Embu County jointly (with Kelvin Ngari Namu - later became prosecution's witness) murdered **Brayden Mutwiri**.

7. Under Article 49(1)(h) of the Constitution, 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. It therefore means that the right to bail/bond pending trial is a constitutional right and which can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person.

8. The phrase "compelling reasons" was explained by the court in **R -vs- Joktan Malende and 3 Others Criminal Case No. 55 of 2009** as denoting those reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. They ought not to be flimsy grounds but real and cogent grounds that meet the high standards set by the Constitution. As such, the right to bail is not absolute and where there are compelling reasons, the said right may be restricted. However, it the prosecution's duty to justify the existence of the compelling reason(s).

9. As I have already noted, one of the grounds in opposition to admission of the accused to bail/bond is that the accused herein had threatened the key witnesses who gave the information to the police and if released he would interfere with the witnesses. However, in the affidavit in support of the application before me, the accused deposed that he would not interfere with the witnesses and that the Investigating Officer has not placed any material before the court to demonstrate the interference.

10. It is now trite that possibility of the accused interfering with witnesses is 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. Any accused person who is likely to interfere with witnesses does not deserve bail or bond irrespective of the offence in question. In the instant case, the prosecution deposed that the accused herein had threatened to harm key witnesses as a result of which it took four weeks to unearth the plot to murder the deceased and further that the accused would interfere with the witnesses.

11. From perusal of the committal bundle, I note that there are witness statements from the father and the mother of the deceased, the grandmother and neighbours. However, I note that there is an admission by one Kelvin Ngari Namu who was a co-accused in this matter and who is most crucial in unearthing whatever transpired in relation to the whole issue and as such, he is a crucial witness. The said witness is said to be a juvenile male aged sixteen (16) years of age. It is my considered view that there are chances that the said witness might be intimidated by the release of the accused herein. From the committal bundles, it is clear that the witness and the accused are from the same village and which, in my view, increases the chances of interference. I am guided, by the case of **Republic v David Ochieng Ajwang Alias Daudi & 11 others (2013) eKLR** in which Hon. Sitati, J held that: -

"In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. 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." (emphasis mine)

12. It is my considered view that the circumstances of this particular case do not allow for grant of bail to the accused.

13. I note that the accused submitted that there would be no likelihood of witness interference since there is no blood relationship between the accused and the witness whom the prosecution told the court is under witness protection. However, I have perused the court record and note that on 15.03.2021, Ms. Mati for the state informed the court that she had instructions to have the 2nd accused testify as prosecution witness and that plea can be taken in respect of the 1st accused (applicant herein) as they organize how the second accused can testify under witness protection.

14. There is no evidence of the said witness having been placed under the witness protection. In his confession which is in the committal bundle, he stated that on 12.01.2021 when they were in the police station, the accused herein said that he would ensure that he would kill the said witness for exposing the murder. The threats were made even on 14.01.2021. It is my view that irrespective of these being mere statements, they ought not to be ignored by this court. The witness needs protection. In the circumstances it would not be proper and more so at the moment to have the accused herein released on bond.

15. As the court held in **Republic –vs- Patrick Ntarangwi [2020] eKLR**; -

"In considering the question of bail or bond, the court should balance the right of an accused, pursuant to the presumption of innocence, to be released on bail pending his trial against the public interest of prevention of crime and the right of the victims to access to justice. The right of the victims to access justice no doubt will be gravely affected if the prosecution witnesses are interfered with."

16. On those grounds, the application ought to be dismissed.

17. The same is dismissed.

18. It is so ordered.

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

L. NJUGUNA

JUDGE

.....for the Accused/Applicant

.....for the State