



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HCCR CASE NO. E027 OF 2021**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON KATHIGA TAMA.....ACCUSED**

**RULING**

**Brief Facts**

1. This is a ruling on whether or not the accused ought to be released on bail. He faces a charge of murder contrary to **section 203 as read with 204 of the Penal Code**. The particulars of the offence are that on the 17<sup>th</sup> day of November 2020, at Togonye Village, Murinduko Location in Mwea East Sub-County within Kirinyaga County, he unlawfully murdered one Beth Wathimu Kathiga, the deceased herein.

2. The prosecution filed an Affidavit dated 17<sup>th</sup> June 2021, sworn by CPL Elseba Bungei the investigating officer in this case. He depones that the accused is a flight risk for he stabbed his wife and went into hiding. Further, he is an accused person in Wanguru Criminal Case No. 234/2019 where he was charged with threatening to kill the deceased herein. It is further alleged that he absconded in the said Wanguru Criminal case and a warrant of arrest is still in force against him. The investigation officer states that the accused has been threatening to commit suicide and if he is released on bail, the officer is apprehensive that he may threaten or harm his children.

3. The accused filed his affidavit on 15<sup>th</sup> July 2021 asking the court to release him on bail. He states that he is a staunch member of the Anglican Church at A.C.K Togonye and lives well with the community. He further adds that he has three children and he is the sole breadwinner for them. The accused further states that he is a farmer at Togonye village and that he is a businessman owning an agrovet shop. He further states that he has three children aged 17,12, and three years who depend on him and he has the responsibility to look after them and educate them.

**Issues for determination**

4. On perusal of the affidavits by both parties the main issue for determination is whether the prosecution have established the existence of compelling reasons for the accused not to be released on bond.

**The Law**

**Whether the reasons for opposing bail are merited in terms of Article 49(1)(h) of the Constitution.**

5. **Article 49(1)(h)** of the Constitution provides that:-

**An accused 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.**

6. It follows that the right to bail is not absolute and where there are compelling reasons, that right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exists compelling reasons to deny an accused person bail.

7. The considerations in determining whether or not to grant bail are set out in **Kenya Judiciary's Bail and Bond Policy Guidelines**,

March 2015 at p. 25 which sets out judicial policy on bail thus:-

**“the following procedures should apply to the bail hearing:**

- a) The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:-**
- b) That the accused person is likely to fail to attend court proceedings; or**
- c) That the accused person is likely to commit, or abet the commission of, serious offence; or**
- d) That the exception to the right to bail stipulated under Section 123A of the criminal Procedure Code is applicable in the circumstances; or**
- e) That the accused person is likely to endanger the safety of victims, individuals or the public; or**
- f) That the accused person is likely to interfere with witnesses or evidence; or**
- g) That the accused person is likely to endanger national security; or**
- h) That it is in the public interest to detain the accused person in custody.”**

8. In **Republic vs Fredrick Ole Leliman & 4 Others [2016]eKLR** the court held that:-

**“The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of Ng’ang’a vs Republic 1985 KLR 451 where Chesoni J, as he then was 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), ought grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-**

- a) The accused will fail to turn up at his trial or to surrender to custody;**
- b) The accused may commit further offences; or**
- c) He or she will obstruct the course of justice**

**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;**

- a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- b) The strength of the prosecution case;**
- c) The character and antecedents of the accused;**
- d) The likelihood of the accused interfering with prosecution witnesses.”**

9. Applying the above principles to the case at hand, the question then arises whether the reasons adduced by the prosecution are compelling reasons such that the court shall not grant bail pending trial.

10. These acts which were not disputed do not reflect positively to the accused as a person who is likely to attend trial in the event that he is released on bail. He has a history of absconding and of being violent which led to him being charged in the Wanguru case with the offence of threatening to kill his wife. It is after he absconded court that he killed the deceased which confirms that he acted true to his threats.

11. The charge of murder is a serious offence that if convicted for, the accused would serve a sentence of death and therefore the temptation to abscond would be even greater. The seriousness of the offence and the sentence is one of the factors to be considered in granting bail. If the accused absconds, this would adversely affect the justice that is required to be served to the victims especially the young children who lost their mother through the act of the accused. Although the accused is presumed innocent under the law until proven guilty, his character and behaviours must be considered in determining this application. As I have stated earlier, the accused has a history of absconding.

12. The prosecution stated on oath which was not denied that the accused has threatened to harm himself and as such they fear for the safety of his children. The children are aged between three(3) and seventeen(17) and are the victims of the death of their mother in respect of which the accused has been charged of causing. It would be morally wrong as well as inhuman to place the victims of the offence of murder with the accused under the same roof. The children are already traumatised by the killing of their mother. In my view, it would be adding insult

to injury to allow the accused to stay with his children before the trial is determined. I believe that there is a responsible relative who is already taking care of the children in the absence of their parents. I agree with the prosecution that re-uniting the accused with his children during the pendency of the trial will be putting them at great risk and traumatizing them beyond measure.

13. Consequently, I am of the considered opinion that the prosecution have satisfied this court that the accused is a flight risk and that he is likely to be a threat to the lives of his children. I find these reasons compelling and justifiable to deny release on bail pending disposal of the case.

14. In conclusion, it is hereby ordered that the accused remains in prison custody until the disposal of this case.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 29<sup>TH</sup> DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 29<sup>th</sup> day of July, 2021**