



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL CASE NO, E007 OF 2021

CHARLES KAIRU MWAURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The brief facts of the case are that Charles Kairu Mwaura, the Applicant herein, is accused of having murdered Beth Muhiki Nganga on the 12th day of April 2021 at Kayole area in Naivasha sub-county within Nakuru County contrary to section 203 as read together with Section 204 of the Penal Code.

2. The Accused/Applicant was arrested and brought before the Court on 6th May 2021 when he pleaded not guilty. Defence counsel applied for the accused's release on bond, but the prosecution sought a Pre Bail Probation report as the circumstances of the alleged murder were gruesome. The court ordered a Pre Bail Report.

3. On 17th May 2021, the Pre Bail Report was filed and the Accused made a formal application to be released on bail pending trial. The Pre Bond Probation report recommended stringent bond terms, given the prosecution's opposition to bond.

4. The DPP opposed bail filing Grounds of opposition supported by the affidavit of Corporal Deborah Chepkemoi. The grounds of opposition are:

1. That the respondent is opposed to the bail terms, that the accused is facing a serious offence.
2. That the applicant is accused of killing his wife an offence which the applicant has confessed to.
3. That the applicant is a flight risk and likely to abscond court.
4. That Applicant has no known permanent residence within Naivasha and its environs and thus tracing him should he jump bail will be impossible.
5. That there is a high likely hood of interference with witnesses if the Applicant is admitted to bail or bond at this time.
6. That the prosecution has overwhelming evidence against the accused and has a high chance of success.

5. The supporting affidavit deponed by No.86936 CPL DEBORA CHEPKEMOI of Directorate of Criminal Investigations Naivasha avers that:

- a. She is the Investigating officer in E007 of 2021.
- b. That the accused strangled his wife the deceased at her rental house and disappeared after committing the offence.
- c. That the Applicant/accused fled to Mlolongo area within Machakos County and was later arrested at lake view Naivasha on 16/04/2021 at a relative's house.

d. That the applicant has since been charged with murder contrary to Sections 203 as read together with Sections 204 of the criminal procedure Code.

e. That the applicant has no fixed abode from which he can be traced such as a work place or permanent home.

f. That the Applicant is likely to interfere with witnesses owing to the fact that most witnesses are family members to the deceased.

6. In response, Defence Counsel, Gichuki, filed a Replying affidavit where he deponed:

1. The Accused has a fixed abode at his parents' who live in Timbaroa- Uasin Gishu County (annexed is an affidavit sworn by the accused elder sister (Elizabeth Wakiugu) who confirms the same);

2. That the elder sister one Elizabeth Wakiugu is a businesswoman in Naivasha town and accused has a brother who is a clinical officer at Kimende Kiambu County;

3. The Family had sourced for a title deed of Land parcel SHAWA/GICHEHA BLOCK 5/551 of one Stephen Kariuki Ngugi who is the paternal uncle of the accused and annexed is a copy of the title deed;

4. The fact that the accused person has made a confession does not in any way make him a flight risk and gives credence to the accused;

5. There is no evidence that the accused is a flight risk and that merely being charged with the offence does not make him a flight risk;

6. That the issues raised by the prosecution in both the grounds of opposition and the supporting Affidavit do not meet the threshold of denying the accused bond under the Kenya 2010 constitution as the offence is bailable.

7. The court notes that the Supporting Affidavit is sworn by the Advocate with conduct, which means he has cast himself in two inconsistent roles which is demonstrated by the fact that the Affidavit contains statements of fact as well as a legal submission. The arguments put forward in submissions are that

8. In addition to the Replying Affidavit Counsel annexed Replying Affidavit by Elizabeth Njeri Wakaigu, the accused's older sister, wherein she asserts that her parents live in Timbroa, Uasin Gishu County, that the accused previously worked as a taxi driver; That her paternal uncle had availed **Land Title No. Shawa/ Gicheha Block 5/ 551** in Rongai, Nakuru as surety

9. A probation Officers Report which opines that stringent surety bond terms ought to be in place if the court grants bail to the accused person.

10. The parties made oral arguments in court. The question is whether the applicant should be granted bail.

11. In order to determine the issue of bail the court must consider the following matters carefully:

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. The Applicant is charged with intentionally taking the life of another which is extremely serious.

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 that the decision 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 Applicant and/or the Court.

g. Setting conditions that are not debilitating

h. Setting conditions that (i) prevent and/or restrict absconding, (ii) prevent interference with the trial process and (iii) prevent intimidation of witnesses.

12. Article 49(1)(h) of the Constitution guarantees the right of an arrested person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released.

13. The onus of proof in bail applications in respect of compelling reasons is borne by the state under **Section 123A of the Criminal Procedure Code**. The right for an accused person to be released on bail is not absolute.

14. In determining whether the interest of justice dictate exercise of discretion under **Article 49 (h)** of the **Constitution**, the courts are to be guided by the provisions of **Section 123A** of the **Criminal Procedure Code** which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

- (a) Nature or seriousness of the offence;**
- (b) The character, antecedents, associations and community of the accused person;**
- (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;**
- (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 if released on bail. It is likely that he would fail to surrender to custody;**
- (b) Should be kept in custody for his own good.”**

15. The constitution specifically requires under **Article 49 (h)** of the **Constitution** that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under **Section 123A** of **Criminal Procedure Code**, **Article 49 (h)** of the **Constitution** places the burden of proof in the state to demonstrate compelling reasons.

16. The requirement for compelling reasons under the constitution must be considered alongside the provisions of **Section 123A** of the **Criminal Procedure Code**.

17. The courts have defined compelling reasons in numerous cases. In **Republic v Albert Njiru & 5 others HCCR NO. 79 OF 2012 Korir J** held thus on compelling reasons;

“It is however my considered view that the apprehension on the part of witnesses would not be limited to the applicant, access to guns. It would extend to a perceived position of influence and balance of power between a law enforcement officer vis viz a civilian. Such balance in the mind of any ordinary citizen tilts heavily in favour of the enforcement officer. I would therefore agree with the prosecution counsel that indeed the witnesses would fear to see the accused walking freely in public. They would feel intimidated. Such a state would not serve the interest of justice in the trial at hand. Indeed it is a compelling reason not to release the applicants.”

REPUBLIC v JOHN KAHINDI KARISA & 2 OTHERS MOMBASA HIGH COURT CRIMINAL NO. 23 OF 2010 (UR) the court observed;

“Murder is a serious offence and attracts a death penalty. Self-preservation is a natural reaction or response of any human being. Whatever the court will decide, the fear and anxiety on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused facing a capital offence is real and cannot be wasted away.”

18. Further afield in Uganda in **Republic v Dorine Aoko Nakuma High Court Criminal Appeal No. 36 of 2010 (UR)** the court defined what constitutes compelling reasons as follows:

“In my mind again those compelling reasons are the very same ones spelt out in Section 72 (5) of the Repealed Constitution, and elaborated in Section 323 of the Criminal Procedure Code, namely that the accused person, as the applicant in this case is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (taking away another person’s life, disloyalty to the state of one’s nationality or grievous assault and injury to another person or his property are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society’s sense of fairness and justice and more so, the kin or kin of the victim to see a perpetrator of murder, treason or violence robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence committed or attempted would this be a compelling reason for not granting an accused person bond or bail.”

19. According to the present jurisprudence from the courts, the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial. In practice, the courts have made this evaluation by considering the following non-exhaustive factors:

- (a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.** Where the charge against the accused person is serious, and the punishment heavy, the courts assume that there are more probabilities and incentives for the accused person to abscond, whereas in case of minor offences there may be no such incentives. In this particular case the accused confessed to the commission of the crime and thus has a high chance of being found guilty increasing his chances of absconding if granted bail.

(b) **The strength of the prosecution case.** An accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence against the accused person is strong. Having confessed as confirmed in his advocates replying affidavit at paragraph 9 in his confession of commission of the crime

(c) **Character and antecedents of the accused person.** Cannot be immediately established and thus cannot be relied upon to deny the accused bail

(d) **The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.** Cannot be immediately established and thus cannot be relied upon to deny the accused bail

(e) **Likelihood of interfering with witnesses.** Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied: i) if there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted ii) the court cannot impose conditions to the bail or bond to prevent such interference.

In the present case, the accused knows the identities of the prosecution witnesses and the nature of the evidence that these witnesses will adduce at trial, there is a real likelihood that the accused person may contact the witnesses as they are family members of the deceased. The likelihood that such an accused person may contact witnesses “could probably inflict genuine fear and anxiety in the potential prosecution witnesses,” and therefore constitutes a compelling reason for the denial of bail as was held in **Republic V Joseph Wambua Mutunga & 3 others [2010] eKLR**. In this regard, defilement cases present a special challenge. The country is not only experiencing an upsurge in defilement cases, but many such cases are compromised as soon as accused persons are released on bail. This happens because the families of the accused person and the victim usually negotiate to settle the cases out of court. Some courts are dealing with this challenge by denying accused persons bail until witnesses, especially the victim, have testified in such cases. The courts have adopted the same approach in murder cases, particularly where the witnesses are closely related to the accused person as in the instant case where the deceased was the wife of the Applicant herein.

(f) **The need to protect the victim or victims of the crime from the accused person.**

(g) **The relationship between the accused person and potential witnesses.** Here, the courts reason that if the accused person is either related to the witnesses or stands in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact the accused person might have on the witnesses, if he or she is released pending trial. However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice.

(h) **The accused person is a flight risk.** Having no fixed abode and the reference by the elder sister in her affidavit of a home where the accused shall allegedly be domiciled pending the determination of the case if bail is granted is in another county presents a challenge to this court as the several county lines have to be crossed to avail the accused person to court. The distance from Timboroa to Nakuru town is 94 kilometers. The distance between Nakuru and Naivasha Sub County is 72 kilometers. 164 (94 +72) kilometers is enough radius to give the accused person incentive to not attend court and aid his flight risk. Having also fled to Machakos County after the commission of the offence is indicative of the proclivity of the accused person take flight.

(i) **Whether accused person is gainfully employed.** The courts also consider the fact that an accused person is gainfully employed to enhance the likelihood that he or she will attend trial. However, it should not matter whether or not the accused person is a casual laborer or is engaged in permanent and pensionable employment. Accordingly, the fact that the accused person is a casual laborer should not, in itself, constitute the basis upon which the court determines whether or not to grant bail but does serve some form of surety of locating the accused person.

(j) **Public order, peace or security.** Whether the release of an accused person will disturb public order or undermine public peace or security. Pretrial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such that the release of the accused person would be likely to lead to a public disturbance.

(k) **Protection of the accused person.** Whether pretrial detention is necessary to protect the accused person.

20. Ultimately, in this case and taking into account all the foregoing matters, the following factors dissuade the court from granting bail at this time:

a. The accused fled prior to his arrest, which suggests that he is a flight risk;

b. The accused person having confessed to the offence has a weaker defence than had he not so confessed, notwithstanding that the accused is always presumed innocent until proven guilty;

c. The court has not heard from, and is desirous of hearing from, the victim’s family in terms of the requirement of **Section 4(2)(b) of the Victim Act No 17 of 2014**.

21. Accordingly bail is denied for now, and the DPP is directed to avail the Victims in court in terms of the Victim Protection Act within forty five (45) days from the date hereof.

Administrative directions

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 28TH DAY OF JULY, 2021

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Mr. D. K. Gichuki for the Accused
3. Accused - Charles Kairu Mwaura - Present in Naivasha Prison

4. Court Assistant – Quinter Ogutu