



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL CASE NO. E028 OF 2021

REPUBLIC.....PROSECUTOR

VERSES

FRANCIS MANDE WANJIKU.....ACCUSED

RULING

1. **Francis Mande Wanjiku**, the Accused (Applicant) through a Notice of Motion dated 5th May, 2021 seeks to be released on bail pending trial.
2. The application is premised on grounds that he presented himself at Kayole Police Station the morning of 29th March 2021 and was arraigned in court the following day when the police were granted time to detain him until the time he took plea on 3rd May, 2021.
3. That there are no compelling reasons for his continued detention; he is a Kenyan Citizen serving as a matatu conductor who has a constitutional right of being admitted to bail on reasonable conditions; he is unwell and in need of specialized medical attention that he cannot get while in custody; he has cooperated with the Investigation Officer; victims, witnesses or investigators have not deposed to having been threatened or unduly influenced with a view of interfering with investigations; he is not a flight risk; he is the sole provider of his young family which is bound to suffer physically and psychologically if confined.
4. The State through **No.89080 PC Leonard Ochola** opposed the application. He deposed an affidavit where he averred that the Accused used to live in a rental house with his wife, a key witness in this case; evidence against him is direct and overwhelming which is likely to get him convicted that is an incentive to make him abscond.
5. That the Accused is likely to intimidate or interfere with witnesses who are well known to him as his friends and neighbours; he is a flight risk without a place of abode, he stays in Kayole where he does casual jobs, therefore, likely to abscond the jurisdiction of the court and that compelling reasons exist for denying him bail.
6. Arguments in that respect were made orally. Mr. Mokaya, learned Counsel for the Accused urged that the conduct of the Accused indicate that he is a law-abiding person, he is a young man who can submit to the jurisdiction of the court as and whenever needed; and that he is a tout and father of a young daughter.
7. Ms.Maina, learned Counsel for the State urged that the Accused lived in a rental house with his wife, a key witness in the case and in his affidavit he does not specify where exactly he lives in Kayole. That he was a conductor, and not being in a gainful employment, if released and he absconds, tracing him will not be easy; an argument that the Accused terms discriminatory.
8. I have considered the application, affidavits in support and opposition and rival submissions of both counsels. The Accused person is alleged to have committed murder which is a serious offence and given the seriousness, the penalty to be meted out is equally severe depending on the circumstances in which the offence was committed. **Article 49 (1) (h) of the Constitution** provides that:

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.

9. The afore stated provision of the law gives the court the discretion to determine whether or not to grant bail. Although bail/ bond is an Accused person's constitutional right, it is not absolute.

10. Considerations in determining whether or not to grant bail are set out in Kenya Judiciary Bail and Bond Policy Guidelines, P25 which provides as follows:

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:

- a) That the accused person is likely to fail to attend court proceedings; or**
- b) That the accused person is likely to commit, or abet the commission of, a serious offence; or**
- c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or**
- d) That the accused person is likely to endanger the safety of victims, individuals or the public; or**
- e) That the accused person is likely to interfere with witnesses or evidence; or**
- f) That the accused person is likely to endanger national security; or**
- g) That it is in the public interest to detain the accused person in custody.**

11. The Nigerian Supreme Court (Justice Ibrahim Tanko Muhammad J.S.C.) set out some essential criteria on the issue of whether or not to grant bail in the case of *Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006* as follows:

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- i. The nature of the charges;**
- ii. The strength of the evidence which supports the charge;**
- iii. The gravity of the punishment in the event of conviction;**
- iv. The previous criminal record of the accused if any;**
- v. The probability that the accused may not surrender himself for trial;**
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
- vii. The likelihood of further charges being brought against the accused;**
- viii. The probability of guilty;**
- ix. Detention for the protection of the accused;**
- x. The necessity to procure medical or social report pending final disposal of the case...”**

12. The argument of the State is that there are compelling reasons requiring incarceration of the Appellant until the matter is heard and determined. In the case of *Republic vs. William Mwangi Wa Mwangi [2014] eKLR Muriithi, J* held that:

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

13. The Constitution does not define the term “Compelling reasons”. A compelling argument would be something that is in accordance with the fact or some reality. In the case of *Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009* the court defined the term “compelling reasons” 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.”

14. From a reading of decided cases, the most important test is whether an accused person will turn up for trial. The presumption of innocence while the Accused is yet to be found guilty while being considered, the interest of justice must also be weighed against the Accused's right to liberty.

15. A report filed by the Probation Department following a social enquiry reveals that Accused, aged about 30 years old was engaged as a matatu conductor. His family is willing to support him by standing surety for him, if granted bond. On the other hand, there is the concern of the victim's family regarding witnesses that the Accused is likely to interfere with. The key witness in the matter is his wife, a mother of his 10 years old son. Even if this court were to set conditions upon release where he would be barred from contacting witnesses, it would be impracticable for him to be expected not to be with his wife. Such a witness should be protected until she testifies. What has been urged by the prosecution therefore amounts to genuine fear or anxiety. This is a compelling reason calling for denial of bond at this stage. An application for review of orders may be made after the Accused person's wife will have testified.

16. From the upshot, the application is dismissed.

17. It is so ordered.

Dated, Signed and Delivered Virtually this 27th day of July, 2021

L. N. MUTENDE

JUDGE