



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL CASE NO. E006 OF 2021

REPUBLIC.....PROSECUTOR

VERSES

MELVIN KIMANI KIMAMI alias GIBI.....ACCUSED

RULING

1. **Melvin Kimani Kimami alias Gibi**, the Applicant (Accused) through a Notice of Motion dated 1st April, 2021 seeks to be released on bail pending trial. The application is premised on grounds that the offence is bailable and the Applicant is not a flight risk.
2. In an affidavit in support of the application, the Applicant/Accused avers that: he has a farming business in Kimaiko, Huruma, where he rears pigs; his nuclear and extended family live in Nairobi; and he will abide with any terms to be imposed by the court upon his release on bond.
3. The State through **No.59105 Sgt. Titus Munialo** opposed the application. He filed an affidavit in opposition where he deposed that: the offence was committed when the Applicant /Accused sneaked into the house where the deceased slept and stabbed him; both Accused, deceased, prosecution witnesses were members of Ghetto Youth Farmers club, hence there is a reasonable apprehension that he may intimidate witnesses if released on bail; after the incident the Accused locked up himself in the house before escaping through the window prior to being chased and arrested by members of public; preliminary investigations reveal that the Accused has never applied for an identification card despite being over 18 years; the Accused was born and raised in Huruma slums within Nairobi, and has lived in different locations within villages in Moyale Ndogo area, Mathare Estate and at the time of his arrest he was staying in a rental house hence he had no known place of abode and/ or relative.
4. The application was canvassed by way of written submissions. It was urged by Counsel for the Applicant/ Accused, Mr. Kamau that the Applicant who is presumed innocent until proven guilty has a right of being released on bail pending trial as provided by **Article 49(1) (h)** of the Constitution. That the Applicant whose only known home is in Nairobi has parental responsibility to one child which he can only discharge while out on bond.
5. That in the affidavit sworn in response of the application; allegations are made but the source is undisclosed; the allegation that the Applicant will intimidate a person is unsubstantiated as the individual is not stated; if given time, he can apply for an identity card; the allegation that the Applicant went into the deceased's house to stab him contradicts the statement filed where it is stated that the deceased was stabbed while outside and went banging on the gate to his home.
6. Prosecuting Counsel, Ms Ogweno opposed the release of the Applicant on bail. Relying on the affidavit by the Investigation officer, she urged that the Accused is a flight risk, he lacks an identity card therefore tracking him will not be easy, especially having lived in different places in Mathare without known relatives. On the question of interference with witnesses, he urged that there was reasonable apprehension that he was likely to interfere with civilian witnesses.
7. The application was canvassed through oral submissions. The Accused is alleged to have committed a felony. **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.

8. The afore stated provision of the law gives the court the discretion to determine whether or not to grant bail. In that regard I note that

although bail is an Accused person's constitutional right, it is not absolute.

9. 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 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.

10. In the Nigerian Supreme Court case of ***Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006***, a criteria to be considered in granting bail pending trial was set as follows:

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..."

11. 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."

12. The Constitution does not define the term "Compelling reasons". But, generally 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."

13. From a reading of decided cases, the most important test is whether the Accused 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.

14. A report filed by the Probation Department following a social enquiry shows that all people interviewed view the Accused as a dangerous person who is feared in the community. There is fear of key witnesses being intimidated and failing to turn up to testify against the Accused due to his alleged violent nature. His life is also in danger as he may be lynched upon being released. He is stated to be a leader of a gang that made the place insecure; and that at the time of his arrest, he was rescued as he was about to be lynched by the inhabitants of the area.

15. From the information gathered, the question of the possibility of intimidating witnesses is not as serious as the security of the Accused because of the hostility of the environment to him. It has been stated that at the point of his arrest, the inhabitants of the area were about to lynch him, this calls for protection of the Accused by the court.

16. On the question of being a flight risk. It is stated that the Accused has lived in different locations within Huruma slums. He attained the age of majority about three years ago, but, he has not registered as a Kenyan. Although the Accused is innocent until proven otherwise, the interest of justice must be weighed against the Accused person's right to bail.

17. From the foregoing, I decline to grant the Accused person bail. Accordingly, the application is dismissed.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 27TH DAY OF JULY, 2021.

L. N. MUTENDE

JUDGE