



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCR CASE NO. E004 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON MAINA NDERITU.....ACCUSED

RULING

Brief Facts

1. The accused faces a charge of Murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 23rd day of May 2021, at Ragati area within Mathira East Sub-County within Nyeri County unlawfully murdered the deceased herein.
2. The prosecution filed an Affidavit in Objection to Bail dated 14th June 2021 and sworn by PC Ronald Mwirigi the investigating officer in this case. He deposes that the accused is facing a serious charge which attracts a maximum sentence of death if convicted and thus increases the temptation for him to abscond.
3. He further deposes that the evidence gathered so far indicates that the accused participated in the brutal murder of the deceased. The post mortem report shows that the cause of death was trauma by sharp object causing severe head injury; skull fracture and massive intra-cerebral haemorrhage. According to a witness, the accused attacked the complainant and her child who is aged two (2) years and three (3) months with a kitchen knife. Unfortunately, the child succumbed to severe head injuries while the mother was admitted in hospital in stable condition. The deponent is apprehensive that if the accused is released on bail, he will harm the complainant and her witness. Previously, the accused had threatened the family of the complainant by visiting them carrying a jerrican of petrol. He also uttered death threats as he was attacking the complainant and the deceased.
4. It was further stated that one of the key witnesses is a young school going girl who walks to school and the deponent is apprehensive that if the accused is let out on bail, he may waylay and harm the witness. The deponent states that it is appropriate that the accused remains in custody for he is a flight risk. It is further deposed that the life of the accused is at risk from the public and society who may decide to process of justice in their own way in the event that he is released from custody.
5. The prosecution also relied on the Pre Bail Assessment Report dated 5/7/2021 which indicates that the family of the accused are not willing to have him released on bail because they are not sure that he will attend court and it is their preference that the court denies him bail for his own safety.
6. The accused filed his application for bail on 28th July 2021. He deposes that he ought to be released on bail because there are no compelling reasons that would deny him his constitutional right to bail. He further states that he will faithfully appear in court as required and is willing to comply with any conditions set by the court.

Issues for determination

7. The issue for determination is whether the prosecution have demonstrated existence of compelling reasons not to grant bail to the accused.

The Law

8. **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.

9. 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.

10. 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.”

11. 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), should 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.”

12. The prosecution oppose bail on various grounds. Firstly that the accused is charged with killing a two year old child and also attacked its mother. The mother seems to have been the target but she survived the attack but not without serious injuries that caused here admission in hospital. The person who saved the mother of the infant is a witness in this case. He is said to have wrestled with the accused to the ground and disarmed him of the murder weapon. The prosecution argue that the accused was hell-bent to kill the deceased's mother and her infant and that he is likely to kill the mother and her other daughters of tender years if released on bail.

13. The prosecution argued that the mother and one of her daughters are key witnesses in this case and are in danger of being attacked or their evidence interfered with during the pendency of the suit in the event that the accused is released on bail.

14. Before the fatal attack, the accused had declared his intention to kill members of the deceased family. He had gone to their house with a jerrican full of petrol probably to set their house ablaze. After killing the deceased, the accused told neighbours who had rushed to the scene to rescue the victims that they could as well kill him since he had finished his work.

Conclusion

15. The pre-bail assessment report does not recommend release of the accused on bail because his family and that of the victim are still traumatised by the barbaric act of the killing of the infant and the attempt on the infant's mother. The applicant's family are not willing to stand surety for the accused or have him go home for fear of their lives for fear of accused's safety, fearing that the members of public may take the law in their hands.

Determination

16. The paramount consideration for granting bail is whether the accused will attend trial. The accused says he is ready to abide by any conditions granted by the court as the court may direct. He also states that the grounds of opposition to bail relied on by the applicant do not amount to compelling reasons.

17. It is imperative that the accused traumatised his own family and that of the victims and that none of them want him home at least during the pendency of the trial.

18. The seriousness of the offence of murder and the evidence gathered by the prosecution ought to be taken into account. The more serious the offence and the weight of the evidence enhances the risk of absconding. Due to the barbaric manner in which the offence was committed, and the words uttered by the accused as he was being arrested, the probability of harming the witnesses is high. The mother of the deceased seems to have been the target of the heinous act but was found with her two year old baby who was killed. In the event that the accused is released on bail, a second attack on this key witness and assault on her daughter of tender years who is also a witness cannot be ruled out. The likeliness of endangering the safety of victims, individuals or the public is one of the factors to be considered in the Judiciary Bail and Bond Policy Guidelines. I find the fear of the prosecution quite real as far as the victims and key witnesses are concerned.

19. The safety of the accused in respect of the public meting out mob justice on him is also a cause of concern by the prosecution. In some of our communities today, the public are known to take the law in their hands by meting out violence on suspects. I am aware that the state has a duty of according the accused the security and protection that he requires. In my considered view, the safety and protection of the accused does not amount to a compelling reason.

20. I have considered all the reasons raised in opposing bail. The likeliness to endanger the lives of victims who are the key witnesses is a paramount consideration herein based on the facts of this case as well as the conduct of the accused in his attempt to kill one of the witnesses. In my view this is a compelling reason not to release the accused on bond. This goes along with the likeliness of the accused committing or abetting the commission of a serious offence during the pendency of the trial.

21. It is my considered view that the prosecution have established the existence of compelling reasons not to release the accused on bail.

22. I therefore uphold the affidavit of compelling reasons and order that the accused do remain in prison custody pending disposal of the case.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 26TH DAY OF AUGUST, 2021.