



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. E026 OF 2021

JAMES KINUTHIA SILIMA ALIAS 'KAJIM' ...APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant, *James Kinuthia Silima Alias 'Kajim'*, was charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. It is alleged that on 19th March 2021 at Kasabuni Estate Area within Starehe sub county in Nairobi County, the accused murdered *Peter Ng'ang'a Nyambura*.

2. The accused denied the charges. On 19th April 2021, through the firm of *Suge & Company Advocates*, the accused filed a notice of motion seeking to be admitted to bond/bail pending trial on reasonable or favourable terms. The application is premised on *Article 49 (1) (h)* of the *Constitution* and *Section 123* of the *Criminal Procedure Code*.

3. In the grounds anchoring the motion and in his supporting affidavit, the accused averred that he has a permanent residence in Baba Dogo in Nairobi where he lived with his nuclear family and his mother; that he was not therefore a flight risk and if granted bond, he will attend all hearings and mention dates without fail; that he will comply with any conditions imposed by the court and he will not interfere with prosecution witnesses. He claimed that in this case, there were no compelling reasons to necessitate his continued incarceration and that his application should be allowed.

4. The application is contested by the state. *Sgt. Evans Gitonga* swore an affidavit on 14th April 2021 in which he deposed that the accused attacked the deceased in public and in broad daylight and that the incident was witnessed by several witnesses; that the witnesses are well known to the accused since they live in the same neighbourhood and if admitted to bond, the accused is likely to interfere with their testimony which will compromise the prosecution case. *Sgt. Gitonga* also deposed that the accused is a flight risk since he had not provided details regarding his residence or employment and given that he was charged with the serious offence of murder which on conviction carries the death penalty and the prosecution has a strong case against him, he had a good incentive to abscond if released on bond.

5. It was also the prosecution case that tensions are still high in Kasabuni Estate following commission of the offence and that for his own safety and security, the accused should be denied bond as he was likely to be attacked by irate members of the public if he is admitted to bond.

6. In addition, the deponent claimed that the release of the accused will disturb public order or undermine public peace and security.

On the above grounds, the prosecution contended that there were compelling reasons to justify denial of bond to the accused person.

7. The application was argued *inter partes* on 29th June 2021. Learned counsel *Mr. Suge* represented the accused while learned prosecuting counsel *Ms Ogweno* appeared for the state.

In his submissions, *Mr. Suge* reiterated the depositions in the supporting affidavit and emphasized that *Article 49 (1) (h)* of the *Constitution* guaranteed an accused person the right to be admitted to bond pending trial unless there were compelling reasons; that the prosecution has not demonstrated that the accused was a flight risk or that if granted bond, he was likely to interfere with witnesses; that the fact that the accused was known to the victim's family does not mean that he was going to interfere with witnesses.

Counsel urged the court to allow the application to enable the accused continue taking care of his mother and children pending his trial.

8. In opposing the application, *Ms Ogweno* expounded on the averments made by *Sgt. Gitonga* in the replying affidavit and further reiterated

that the prosecution had demonstrated that there were compelling reasons in this case to warrant denial of bond to the accused. She identified those reasons as the likelihood of the accused interfering with key prosecution witnesses given that they were known to him and the risk of the accused absconding allegedly because at the time of his arrest, he was living in a rental house which he can change at will meaning that if he absconded, it will be difficult for the police to arrest him. Counsel invited the court to reject the application.

9. After hearing both parties, the court decided to call for a prebail report to assist it in making a just determination in the application.

10. I have carefully considered the application and the rival submissions made by learned counsel in support and in opposition to the application. I have also considered the prebail report.

It is trite that under *Article 49 (1) (h) of the Constitution*, an arrested or accused person is entitled to bond or bail on reasonable conditions pending a charge or trial subject only to existence of compelling reasons that would mitigate against his admission to bond. This is so irrespective of the nature or seriousness of the offence charged. It therefore follows that the seriousness of an offence or the penalty prescribed for it upon conviction through relevant cannot by themselves constitute a ground for denial of bond pending trial.

11. It is important to note that though the Constitution limits the exercise of the right to bond to the existence of compelling reasons, there is no constitutional or statutory provision that defines what constitutes compelling reasons for purposes of deciding pretrial bond applications.

12. The *Concise Oxford English Dictionary 12th edition* defines the term compelling as “*powerfully evoking attention or admiration*”.

The Court of Appeal in *Michael Juma Oyamo & Another V Republic, [2019] eKLR* adopted the definition by the High Court in *Republic V Joktan Malende & 3 Others, [2012] eKLR* where the court stated 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 standards set by the Constitution.”

13. It is settled law that in cases where the prosecution is opposed to admission of an accused person to bond pending trial, it bears the burden of proving to the required standard that there were compelling reasons to justify denial of bond. Proof of existence of compelling reasons must be based on cogent evidence not speculation or conjecture. See: *Michael Juma Oyamo & Another V Republic, [Supra]; Republic V Danson Mgunya & Another, [2010] eKLR; Republic V Daniel Musyoka Muasya, [2010] eKLR*.

14. The question that I must now determine is whether the prosecution has sufficiently proved that compelling reasons exist in this case to justify denial of the accused’s right to bond pending trial.

15. I must start my analysis by observing that the overarching consideration for the court in deciding whether or not to grant bail is whether if released, the accused will attend court for his trial or whenever required by the court or whether he is likely to abscond. Other important factors which the court should take into account are those stipulated under *Section 123 A of the Criminal Procedure Code* and the Bail and Bond Policy Guidelines. If the prosecution managed to prove that any or several of the said factors which I will state shortly existed in a certain case, it will have succeeded in discharging its burden of establishing the existence of compelling reasons.

16. *Section 123 A (1) of the Criminal Procedure Code* which is to be read together with *Section 123* thereof provides as follows:

“Subject to Article 49 (1) (h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular -

- (a) the nature and seriousness of the offence;**
- (b) the character, antecedents, associations and community ties of the accused person;**
- (c) the defendant’s record in respect of the fulfillment of obligations under previous grants of bail; and;**
- (d) the strength of the evidence of having committed the offence.”**

17. *Subsection (2)* thereof states that 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 and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.”

18. The above factors have been reproduced in the Bail and Bond Policy Guidelines which in addition lists the following as considerations which should guide the court in determining pretrial bond applications:

- i) The likelihood of interfering with witnesses;

- ii) The need to protect the victim or victims of crime;
- iii) The relationship between the accused and potential witnesses;
- iv) Child offenders;
- v) If the accused was a flight risk;
- vi) Whether accused is gainfully employed;
- vii) Public order peace or security.

19. Having considered the affidavits on record and the prebail report, I find that the main reason advanced by the prosecution in opposition to the application is that if granted bond at this stage, the accused is likely to interfere with prosecution witnesses who are well known to him. But before considering this ground, I wish to first deal with the other reasons cited by the prosecution in its opposition to the application.

20. The prosecution has claimed that the accused is a flight risk as he does not have a permanent residence as he lived in a rental house. This claim has been disputed by the accused who has maintained that the house in Baba Dogo was his permanent place of abode. His assertions are supported by the findings of the probation officer in the prebail report who confirmed that the plot on which the house accused resided was owned by his mother and was therefore not rented.

21. The other reason put forth by the prosecution in alleging that the accused is a flight risk is that it has strong evidence against the accused and that this coupled with the seriousness of the offence facing him and the severity of the sentence upon conviction may induce the accused to abscond. This in my view is a misplaced argument since it runs afoul of the constitutional principle that an accused person is presumed innocent until and unless he pleads or is proved guilty.

Given the foregoing, I am not satisfied that the prosecution has proved that the accused is a flight risk.

22. The claim that releasing the accused on bond at this stage will jeopardize his safety and security as he may be attacked by members of his community who are bitter and hostile towards him and that his release will disturb or undermine public peace and order has not been substantiated by any evidence nor does it find support in the prebail report.

23. Turning now to the claim that if granted bail, the accused is likely to interfere with the prosecution's key witnesses, I find that the averment that the incident which led to the death of the deceased occurred in public and in broad daylight and that the prosecution's witnesses come from the same neighbourhood as the accused has not been disputed by the accused.

24. According to the prebail report, information obtained from residents of Kasabuni area where the accused resides together with some members of the victim's family who are said to be among the prosecution's key witnesses described the accused and his family as one that was "*dreaded and known for criminal activities*".

25. The accused has confirmed that if released, he will go back to live in the same Kasabuni Estate. In the circumstances and considering that only about three months have passed since the offence was allegedly committed, I am persuaded to agree with the prosecution's contention that the admission of the accused to bond at this stage may damage its case as accused's presence in the estate may create fear and cause anxiety to the witnesses who may not feel safe to testify during the trial. This in my view constitutes a compelling reason that disentitles the accused to the exercise of his constitutional right to bond pending trial at this stage.

26. The upshot of this ruling is that I decline to allow the accused's application for bond/bail pending trial for now but accused is at liberty to renew his application after the eye witnesses to the offence have testified.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2021

C. W. GITHUA

JUDGE

In the presence of:

Ms Ogwenko for the state

Accused present in remand

Mr. Suge for the accused

Ms Karwitha: Court Assistant