



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. E007 OF 2021

REPUBLIC.....RESPONDENT

VERSUS

DKN.....ACCUSED/APPLICANT

RULING

1. Before this court is an application dated 15.06.2021 and wherein the accused/applicant seeks admission to bail pending trial. In support of the application is a supporting affidavit sworn by the accused and wherein he deposed that he is a resident of Kiamukuyu at Embu County within the jurisdiction of this court and as such he can't abscond if granted bail. Further that, he is ready and willing to abide by any conditions that the court will impose.

2. PC. Bakari Said Madah, a police officer attached to DCI Mbeere South filed an affidavit opposing bond application and wherein he deposed that the applicant herein allegedly murdered his wife and his two children on 7.02.2021 at 002 hrs and that after the commission of the offence, the applicant locked himself inside his house with the three bodies lying dead. Further that the villagers were crying for the accused's blood and he was rescued from the angry villagers who were armed with crude weapons and the police had to shoot in the air so as to disperse the angry villagers and he was whisked away and as such if released on bond, his life would be in danger.

3. Directions were given that the application be canvassed by way of written submissions and in compliance with the said directions, it was submitted on behalf of the applicant that it is only fair and just that the accused be admitted to bail pending the hearing and determination of the case as he is ready and willing to abide by any conditions that the court may impose. Reliance was placed on article 49(1) (h) of the Constitution of Kenya to the effect that the reasons by the respondent herein in opposing the application for bond were not compelling so as to warrant the denial for bond. Reliance was further made on the case of **R -vs- Robert Zippor Nzilu Machakos HCCR No. 1/2028 (2018) eKLR**. The respondent relied on the affidavit earlier filed in opposing the application for bond.

4. I have considered the application and the affidavit of compelling reasons filed herein. It is my view that the issue I am invited to determine is whether the applicant ought to be admitted to bail/ bond.

5. Under article 49(1)(h) of the Constitution an arrested person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. This right can only be limited where it is shown that there exist compelling reasons not to be released. The prosecution bears the burden to prove the existence of compelling reasons.

6. The Court of Appeal in **Michael Juma Oyamo & another v Republic [2019] eKLR** adopted the definition of the phrase "compelling reasons" in the case of **R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009** where the Learned Judge held as thus; -

".... 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."

The Court went further to lay down some of the compelling reasons to include the likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused.

7. Section 123A of the Criminal Procedure Code which was introduced *vide* the Statute Law (Miscellaneous Amendments) Act. 2014 provides as follows; -

"123A. (1) 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 or 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 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 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.

8. The Bail and Bond Policy Guidelines under section 4.9 further lists the factors to be considered in determining what compelling reasons are and includes; -

a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty

b) The strength of the prosecution case

c) Character and antecedents of the accused person

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

e) Likelihood of interfering with witnesses

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

h) Child offenders

i) The accused person is a flight risk

j) Whether accused person is gainfully employed

k) Public order, peace or security.

l) Protection of the accused person.

9. What comes out from the above legal provisions and pronouncements is that right to bail is not absolute and where there are compelling reasons, the said right may be curtailed. However, it is the prosecution's duty to justify the existence of the compelling reason(s) and to the required standards. The question therefore is whether the prosecution presented compelling reasons to warrant denial of bail/bond to the accused.

10. The prosecution's reasons as to why the accused ought to be denied bail is that his life is in danger as the public was baying for his blood save for the fact that the police were able to whisk him away after shooting in the air. As such, the applicant's life would be in danger if released on bail/ bond. This is a reason which can warrant denial of bond/bail on an accused person.

11. As I have already pointed out, Section 123(2)(b) of the Criminal Procedure Code and paragraph 4.9 of the Bail and Bond Policy Guidelines recognizes safety/protection of the accused as a compelling reason. As such, the applicant's submissions to the effect that the averments put forth did not amount to sufficient reasons can only be said to be misplaced. Where it is proved that the accused's security might be endangered, the court can deny bail or bond. In the instant case, the prosecution's averments were never controverted by the appellant. The applicant deposed that the state has the duty to ensure safety. However, in my view, this cannot be said to be a denial that the applicant's safety is at risk.

12. Since the applicant did not controvert the depositions by the prosecution as to the risk on his life, this court is therefore left with no other option than to deny the applicant bail.

13. The application dated 15.06.2021 is hereby dismissed.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent