



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL CASE NO. 24 OF 2020

P.C. BEKHAM OSORO OKWARU.....APPLICANT/ACCUSED

-VERSUS-

REPUBLIC.....RESPONDENT/PROSECUTOR

RULING

1. **P.C. Beckham Osoro Okwaru**, the Applicant, approached the court through a Notice of Motion dated 9th March 2021 seeking to be released on bond or bail on reasonable conditions.

2. The application is premised on grounds that: the offence of murder is bailable under **Article 49(1)(h)** of the Constitution of Kenya, 2010; the Applicant has a qualified constitutional right to be released on bond/bail on reasonable conditions; the Applicant has unqualified constitutional right to be presumed innocent until the contrary is proved; he will avail himself to court as of when required until the matter is concluded; he shall abide by any conditions that shall be set by the court as pre-requisite for grant of bond; he shall not interfere with witnesses and investigations should any be carried out; he has been in police custody since 2020, has been disarmed and interdicted from his employment as a police officer thus incapable of readily harming witnesses, he does not know witnesses hence the impossibility of interference with prosecution witnesses; and that since the matter is yet to take of, the Applicant is of the view that he is being punished for an offence not determined by the court and may end up indefinitely risking dying of the Corona virus in case it finds itself in prison.

3. The Application is supported by an affidavit deposed by Danstan Omari, learned Counsel seized of the matter who reiterated what is stated in the body of the application and also averred that the Applicant was denied bail by Justice Wakiaga on the 28th May 2020 for the reason that he was still active in the police force and that he would interfere with the witnesses.

That the circumstances resulting in the denial of bail have changed significantly to warrant a reconsideration of the bail application.

4. A replying affidavit was deposed by Joan Wanjiru Mwaniki on behalf of the family of the deceased who averred that they are apprehensive that if released, witnesses will have legitimate fear on account of the Appellant being a police officer who has engaged them in law enforcement procedures; that he may seek revenge against witnesses upon testifying. That prior to his arrest the Applicant tried to interfere with the course of justice prompting them to complain to the Director of Public Prosecutions; and that the conduct of the Applicant after the incident points to an officer who was on the run and on a mission to conceal his actions since all he believed was that the deceased and his counterpart had committed a cognizable offence, that he should have arrested them to be formally charged, not to whip and shoot one of them.

5. The application was disposed by way of written submission. It was urged that murder suspects have an inalienable right to be released on bail that can only be restricted by the court if there are compelling reasons for him not to be released. That the entitlement is based on the onus of proof on a balance of possibility where the prosecution is called upon to show that there are compelling reasons to necessitate the limitation of the Applicant's right to bail which had not been done hence the requirement of the Applicant to be released on reasonable bond or bail terms.

6. He called upon the court to be guided by the Bail and Bond policy guidelines; the case of **Republic -vs- Salim Said Nassoro & 2 others(2016)** where Kimaru J stated that:

“The Bail and Bond Policy Guidelines recognizes as a matter of principal and constitutional imperative, that an accused person should be released on bond pending trial unless there are compelling reasons. What constitutes compelling reasons must be established by the prosecution.”

7. And **Job Kenyanya -vs- Republic (2012)eKLR** where the court stated that:

“ The prosecution’s other reason in opposing the accused’s admission to bail in this case is that the accused is a repeat offender. I do not find substance in this argument because the Constitution guarantees to every accused person the right to be presumed innocent until proved guilty. The existence of other criminal cases facing an accused person cannot of itself be a basis for denying an accused person bail in subsequent cases. This would in fact be good basis for inferring that such an accused person can be trusted to honor his bail terms if he has not breached the terms of bonds granted to him in several other cases which are pending trial in different courts.”

8. On the question on whether the Applicant is likely to endanger the safety of the victims and interfere with witnesses, he cited the case of **Republic -vs- Dorcas Jelagat Ruto (2019)eKLR** where it was stated that:

“..... this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interest of justice.”

9. On behalf of the victims of the offence, it was urged that in his ruling dated 25th May, 2020, Hon. Justice Wakiaga found that the prosecution had placed before the court compelling reasons to enable him deny the Applicant his right to bail at that stage of proceedings. He imposed a condition that the Appellant be remanded in custody until civilian witnesses who were with the deceased at the time of the alleged shooting together with the two (2) police officers who were with the Applicant testify.

10. That the Hon. Judge was emphatic on the fear that the presence of the accused was likely to have upon the witnesses noting that in case of **Titus Ngamau Musile Katitu -vs- Republic (2020) eKLR** the court of Appeal talked of the blue code of silence in respect of police officers protecting their own.

11. That the Applicant had not tried to explain and, or demonstrate to the court the possible change of circumstances as at the date of denial of his bail to entitle him to bail.

12. And that as stated in the case of **Mahadi Swaleh Mahadi vs Republic(2014)EKLR**, refusal to grant bail does not necessarily mean that the accused is guilty as charged.

13. I have duly considered rival submissions by both parties.

This is a matter where the Applicant sought to be released on bail and the court presided over by Wakiaga J determined the issue. The Court was of the considered view that there was a likelihood of the Applicant interfering with witnesses, victims and the civilians who would live in fear in the event of being released.

14. The learned Judge stated thus:

“I have further taken note of the fact that the victim’s family had to lodge a complaint with the office of the DPP before the accused was finally charged, thereby confirming the likelihood of the accused interfering with the course of justice should he be released on bond. The fact that the offence was committed while enforcing curfew regulations is also a factor I have taken into account as his presence at the area will have an impact on his fellow officers”

This court is mandated to consider whether there has been change of circumstances that would be favorable to move the court to review orders earlier given. As ordered by the court, witnesses and /or colleagues of the Applicant have not testified. The Applicant argues that he has been interdicted and has been in custody since 2020, however, the allegation of having been interdicted is not supported by any evidence, what is before court is just an advocate’s disposition.

15. No doubt, the Applicant remains innocent pending trial and being proven otherwise, but, there is a Ruling on record which establishes existence of compelling reasons, imminent threat to public security and threat of interference with witnesses, circumstances that have not changed. At this point in time, I decline to grant orders sought.

16. In the result, the application fails and is accordingly dismissed.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 28TH DAY OF SEPTEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Okatch for the State

Mr. Kibaba holding brief for Mr. Majimbo holding watching brief for the family of the deceased

Mr. Omenke for accused

The Applicant

Court Assistant -Mutai