REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER E050 OF 2021

REPUBLIC.....ODPP

VERSUS

PAUL OTIENO OCHIENG.....ACCUSED

RULING (ON BAIL)

1. The accused person Paul Otieno Ochieng is charged with **Murder Contrary to Section 203 as read with 204 of the Penal Code.** It is alleged that on 5th October 2021 at Stadium Flats Nakuru East Constituency within Nakuru County he murdered Lucy Njeri Kamande.

2. Plea was taken on 21st October 2021 and he pleaded not guilty. He was represented by Mr. Muriuki Advocate and Ms. Rita appeared for the state.

3. The state opposed bail on the reasons that the accused is a flight risk, because on the night of the alleged offence he was arrested while attempting to flee, and if released on bond he would abscond.

4. That he had no fixed abode because since the incident he had not gone back to his house, and no evidence produced that he had a home. That he also had no known place of employment. That the eye witness to the offence was his step daughter who was at risk of being interfered with by the accused should he be released. That other prosecution witnesses also neighbours were at risk of being interfered with by the accused.

5. In response, counsel for the accused submitted that the accused was not a flight risk. He had a job, he had a home provided by his aunt, he had no passport and was not a flight risk. He produced his job identification card, and letter from the employer. Counsel referred to the **Bond and Bail Policy Guidelines**, and the Constitutional provisions on bail.

6. I requested for a Pre Bail Report from the Probation and After Care Services Nakuru.

7. Before I could deal with the Pre Bail Report the Investigating Officer filed an affidavit titled;

> **"Affidavit Pending Bond Ruling"**

8. This affidavit elicited objections from the defence in that it had been filed without leave of court, there were no known legal provisions for such an affidavit. However it was on record and its contents warranted its consideration, and response by the defence

9. In this affidavit the Investigating Officer No. 98433 PC Rashid Oyuyo deponed that the sister and mother of the deceased had reported that they had each received a call from a number 0763….686, from a person claiming to be a DCI officer, who asked them whether they could talk about the case of Paul Otieno Ochieng. That this person refused to identify himself. That they *"became suspicious"*, because in addition the person asked them to *"come and sign a document in the office stating that they had forgiven the accused person and to sign a document that would be presented to the court for the accused to be released on bond."*

10. That as a result they were fearful that there was an attempt to intimidate them and to arm trust them to reconcile with the accused person.

11. Upon perusing this affidavit and the report that was filed by the Probation and After Care Services Nakuru on 3rd November 2021, counsel for accused told the court that the phone number belonged to the Probation Officer. He told the court that this was another effort to have the accused person denied bond. That all the investigating officer could have done was to call the number and would have established that the same belonged to an officer of the court.

12. I perused the affidavit and the Pre bail Report to find out whether these persons had been interviewed by the Probation Officer. The Probation Officer victim's captured the concerns of the victims thus:

> "*The victim in this case was a woman he was cohabiting with after he separated from his wife. Her relatives are still emotional and bitter about the incident. They were however informed of the constitutional right for the accused person to be granted bond. They would (sic) to see justice been done for their kin. They have concerns that he may interfere with witnesses since one of the victim's children is a witness in the matter."*

13. It became clearly evident that there was something not adding up. The defence was saying that the Probation Officer had interviewed these complainants using the mobile number given by the Investigating Officer. The report indicated that the victims had been interviewed and had expressed their views as captured in the report yet at the same time the investigating officer was saying that the same people, whose concerns were captured in the Pre Bail Report had not been interviewed but that they had threatened through the same number to give information that would lead to the release of the accused person, leading to the fears that resulted in the report and the *affidavit pending bond ruling.*

14. Ms. Murunga for the state was relying on this affidavit to urge its position that the accused using other people was bent on interfering with their witnesses and he ought not to be released on bond.

15. At this juncture it became inevitable that both the Investigating Officer and the Probation Officer would have to appear in court for cross examination on their statements.

16. Mr. Samwel Ndung'u a Probation Officer stationed at Nakuru Probation Office told the court on oath that he authored the report filed on 3rd November 2021. He said he had seen the Affidavit sworn by PC Oyuyo with respect to the phone number that rang the victim's aunt and grandmother. He confirmed that that was his mobile phone number. He denied any mischief, stating that he had called each of those persons, introduced himself and explained the purpose of the call. That in response the deceased's mother simply told him she had a serious head ache, and was still traumatized by what happened to her daughter and was not willing to speak. That he asked her whether she would be ok if the accused was released on bond. She became emotional and asked him how he could release the accused who was a murderer and promptly switched off her phone. He then called the victim's sister. He said she was totally uncooperative told him that the matter was with the investigating officer, and despite explaining his mission, she declined the interview. He was therefore unable to get any reliable information from the victims.

17. Mr. Ndung'u wondered why the Investigating Officer did not bother to call the number the two (2) gave him, or even to have the same investigated before swearing the affidavit. He termed PC Oyuyo's failure to do so as malicious and irresponsible.

18. The court was curious however as to where he got the sentiments he entered in the Pre Bail Report as views of the victims, and he said that he got the information from the prosecutions file.

19. On cross examination by defence counsel he told the court that upon perusal of the prosecution file and consideration of other interviews he drew the conclusion that the court could consider favourable bond terms for the accused, that there was no guarantee that accused was not a flight risk, but his estranged wife told him that accused was unlikely to abscond as he was still providing for their children whom he was very close to. That an aunt had confirmed that she would provide him with a home and that his boss the Sub County Probation Officer had rang the accused's employer at Geothermal Development Company and confirmed that accused worked there, though the Probation Officer did not have information as to whether the accused was permanent and pensionable.

20. In cross examination by Ms. Murunga for state he confirmed that he had only interviewed two (2) people from the side of the victim, and six (6) people from the side of the accused, three (3) relatives, a person from GDC, the enstranged wife. He said that the victim's family closed the door for him and he could not get much information from them. However, from the prosecution file he got information that there were fears that accused could interfere with the key witness, the minor daughter of the deceased, and that he could be a threat to the witness. Asked whether he believed this information to be true, he responded in the affirmative. Asked why he would then proceed to recommend bond if he believed this information, he responded that his recommendation was the outcome of an assessment, that accused had a fixed abode, he had a stable job, that on the possibility of interfering with witnesses, the accused could be warned by the court, all in all that in his view the favourable consideration outweighed the negative ones, and in any event the court could grant conditional bond terms.

21. The Investigating Officer No. 98433 PC Rashid Oyuyo on his part told the court that when the two (2) ladies reported the suspicious phone call, he was of the view that this being a serious offence, the two (2) appeared fearful claiming that they had been threatened through the said mobile phone number. That when he confirmed that the number did not belong to any of his colleagues he decided to swear the affidavit to urge the court not to grant bond because the accused was likely to interfere with the relatives of the deceased. He confirmed that he did not call the said number.

22. On cross examination he told the court that having heard the Probation Officer own up the phone number, he was now satisfied that the probation officer had made the phone calls for purposes of a legitimate inquiry. He confirmed that the fears that the accused person may interfere with the witnesses as indicated in his affidavit had been allayed.

23. Each counsel made brief submissions. The defence was of the view that any fears of interference of witnesses by the accused person had been cleared. That the fears of the victim's family were out of ignorance and they could not be blamed, that all this happened out of a routine inquiry, and there was no evidence to support denial of bond. The state on their part pointed out that the Pre Bail Report was not credible as it lacked the victim's concerns. That the Probation Officer had clearly testified that he had not obtained their views. Ms Murunga pointed out that since they were in court and they were aware that they had a duty to express their views in the matter it was only fair that time be allowed for them to do so and thereafter for the court to consider bail.

24. Ms Murunga offered to speak to them as they were present in court so that they would visit the probation office for the said purpose.

25. Having considered the submissions it was only proper that the victims be allowed time to have their views recorded and presented to court. I directed that a supplementary Pre Bail Report be availed to court bearing the views of the victim.

26. Upon receipt of this supplementary Pre Bail Report, it became clear that the greatest fear was that the accused if released he would interfere with the six (6) year old minor who was the key witness in the matter. I did note however that the Probation Officer had neither seen nor spoken to the minor, who was the actual victim, and for whom all this energy was being expended. What he reported was what he gathered from the aunt and grand mother.

27. To bring this to an end I was of the view that the way out was to take the evidence of the child at the earliest if she was ready to testify. Taking into consideration her stated age, it was also necessary that the prosecution ensure that she received the necessary psycho social support to enable her testify. I asked the prosecution counsel to ensure that the child received the appropriate counselling and proper arrangements be made for her testimony.

28. Having taken the child's testimony, the only issue now is whether the accused ought to be released on bond.

29. It is noteworthy that under **Article 49(1) (h) of the Constitution** it is only upon compelling reasons that an accused person can be denied bond.

30. But before I make the determination, I find it necessary to deal with the issues that arose in this matter with respect to the conduct of the inquiry for the Pre Bail Report.

31. The Pre Bail Report or Bail Assessment Report comes in handy to the court as it is a Social Inquiry Report that is expected to bring to the court an unbiased, neutral report on the social background of the accused and the views of the victim, as required by the **Bail & Bond Guidelines** and the **Victim Protection Act.**

32. However, it is evident that, with the onset of the Covid Pandemic, and the Covid 19 Protocols there are serious gaps in the process of interviewing the victims virtually or on phone. In this case, the two victims had clearly not dealt with their trauma, and the Probation Officer does not appear to have prepared them properly in his introduction, as would be the situation in a face to face. It is also evident from their reaction that they did not believe what he said about who he was, again raising an issue of trust and/or ignorance, evidence that the Probation and After Care Services Department has not sufficiently made known to the public of its other roles in the justice system.

33. This begs the question, are there procedural safeguards available to the Probation Officer interviewing a victim on phone or virtually? How should a Probation Officer conduct a phone interview with a victim whose information he needs without re-victimising the victim? What and how should the officer prepare the victim for the interview? Should that phone call be recorded for purposes of record? This circumstances of this case suggest the great need for some guidelines or standard operating procedures on how to interview the victims on phone online or virtually *inter alia;*

i. To provide for means to authenticate that the caller is indeed the Probation Officer.

ii. To provide for some form of pre-interview counselling, tele counselling, to build trust.

iii. To comply with Victims Protection Act.

34. That said, I find that the main compelling reason to oppose the accused's bail was based on the fear that he could interfere with the minor witness. This witness has since testified. The prosecution has indicated its change of mind and the fact that they no longer oppose bond. However, should there be any fears as to the safety of the witness post testimony, the caregivers are at liberty to report the same to police and the court for requisite action.

35. Hence the accused is admitted to bond of Kshs. 500,000/= with a surety of similar amount. The Surety be examined by the Deputy Registrar.

36. An exclusion order be and is hereby issued against the accused person with respect to the minors herein. The accused person is not to have any contact with them without the leave of court.

37. When released on bond the accused is to attend court as and when required for hearing and/or mention until the determination of the case.

38. This Ruling be served on the Director, Probation and After Care Services to consider the development of the requisite guidelines for phone/virtual interview of victims when necessary.

39. Mention on 17th January 2022.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

For state: Ms. Murunga

For accused: Mr. Muriuki

Accused: present virtually