



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO E062 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

P.C. KHALIF ABDULLAHI SIGAT.....1ST ACCUSED

P.C. JAMES MULI KOTI.....2ND ACCUSED

P.C. JOSEPH ODHIAMBO SIRAWA.....3RD ACCUSED

P.C. EDWARD KONGO ONCHONGA.....4TH ACCUSED

P.C. NELSON NKANAE.....5TH ACCUSED

RULING

The 1st, 2nd, 3rd, 4th and 5th accused have applied for bail pending their trial on a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya; pursuant to the provisions of articles 20 (3) & (4), 21 (1), 49 (1) (g) and (h), 50 (2) (a) of the 2010 Constitution of Kenya.

I will deal with the application of each accused separately.

The case for the 1st accused.

The application of the 1st accused is based on the following major grounds. The offence of murder is bailable. The 1st accused was arrested on suspicion of having committed murder. The detention of the 1st accused should not constitute punishment and the fact that he is not a convict should be reflected in his treatment. The primary purpose of bail is to secure the attendance of the accused for hearing of his case which can be secured by the sureties. The presumption of innocence, dictates that he be released on bail.

Furthermore, the application of the 1st accused is based on his 12 paragraphs supporting affidavit, whose major averments are as follows. The applicant is a police officer stationed at Kwale police station and has been in the police service since 2011. There is no likelihood of interference with the prosecution witnesses. The applicant has a well known place of residence at Modogashe in Lagdera constituency within Garissa County and is not a flight risk.

The 1st accused has deposed that his brother Mohamed Abdullahi Sigat, who is a well respected business man in Eastleigh 10th street in Nairobi is ready to stand as a surety for him.

The other averments have been set out on the face of the notice of motion; and I find it unnecessary to replicate them. The applicant is still a serving police officer.

The cases for the 2nd accused

The application of the 2nd accused is based on six grounds that are set out on the face of the notice of motion with the major grounds being the following. He was arrested on 18th September 2018 on suspicion of having committed the offence of murder, which is bailable. He presented himself to his superior officer on 30th August 2021 and was arrested the same day. He was then taken to court on 2nd September 2021 and the prosecution asked for more time to complete their investigations till 8th September 2021. By 8th September 2021 the 2nd accused had not been charged. And as a result the magistrate ordered that he be charged or released. There are no compelling reasons to deny

the 2nd accused from being released on bail.

In addition to the grounds in support of his application the 2nd accused has deposed to a 13 paragraphs supporting affidavit, whose major averments are as follows. He was stationed at Nanyuki Railways police station and has a fixed abode at his home in Mbooni East of Makueni County. On 28th August 2021 he was called by his OCS Nanyuki and was told that he was required for deployment in Nairobi. He then proceeded to Nairobi on 29th August 2021 and was then arrested. He then asked the police the reason for his arrest by the deputy OCS Nairobi Railways police. He was then told the Director of Public Prosecutions and the Inspector General of Police had ordered for his arrest. The 2nd accused was then taken to court on 2nd September 2021, which was beyond the stipulated 24 hours. The 2nd accused was in detention for 12 days and no compelling reasons were given for his continued detention. He is still a police officer and is not a flight risk and therefore prays that he be released on bail.

The case for the 3rd accused.

The application of the 2nd accused is supported by the following major grounds. This accused presented himself before his superior officer on 1st September 2021 and was arrested. Thereafter he was taken to court 2nd September 2021. The prosecutor asked that he be detained for 7 days to enable them complete their investigations.

In addition to the grounds that are set out on the face of the notice of motion, the application of the 3rd accused is supported by his 24 paragraphs affidavit, whose major averments are as follows. He was stationed at Changamwe police station in Mombasa at the time of his arrest. He has a fixed abode in Muhoroni sub-county within Kisumu county. While at his home he was called by his OCS Changamwe police station on 1st September 2021 and who told him that he was required for investigations in respect of the offence of murder of an inmate in Nairobi. He went to Nairobi on 3rd September 2021 and reported to the deputy OCS Capital Hill police station, where he was arrested. He then inquired as to why he was arrested since he had never committed any offence. He was told that the Inspector General of police and the Director of Public Prosecutions had ordered for his arrest. He was then taken to court on 6th September 2021 and was detained. On 13th September 2021 he was taken to court for plea.

Furthermore, the 3rd accused has deposed that he is not a flight risk as he is still serving police officer.

He has also deposed that his family members are willing to stand as sureties for him if he is granted bail.

The case for the 4th accused.

The 4th accused has supported his application with the following grounds. He presented himself at Capital Hill police station on 3rd September 2021 and was arrested. He was then taken to court on 6th September 2021. On that date an order for his detention was made by the court pending the taking of his plea on or before 13th September 2021.

In addition to the above grounds the 4th accused has deposed to a 10 paragraphs supporting affidavit; whose major averments are as follow. He is a person of fixed abode in Ekerenyo sub-county in Nyamira county. He is a married person with adult children and has been in the police service for 25 years without any disciplinary issue.

Furthermore, he has deposed that he was informed by his OCS that he was required in Nairobi for investigations in respect of a charge of murder. Upon arrival in Nairobi he was arrested and detained on 1st September 2021. The court ordered that he remains in custody for 7 days pending completion of investigations and plea.

On 9th September 2021 he was again taken to court and was ordered to remain in custody till 13th September 2021 when his plea on a charge of murder was to be taken. He has also deposed that he is a person of fixed abode and his family members are ready to stand surety for him. He is not a flight risk.

The case for the 5th accused

The 5th accused has relied on the following major grounds in support of his application. He presented himself at Kamukunji police station on 6th September 2021, where he was arrested and taken to Capital Hill Police station. He was then taken to court on 9th September 2021 after the stipulated 24 hours rule without any reason being given for the gross violation of his constitutional right to be taken to court within 24 hours.

Submissions of counsel for the 1st accused

Messrs Migos Ogamba & Waudo advocates have urged the court to admit the 1st accused to bail or bond; since in their view there are no compelling reasons to deny him bail.

It is their submissions that the court in considering the issue of bail should be guided by the provisions of section 123A of the Criminal Procedure Code (Cap 75) of the Laws of Kenya; which provisions provide as follows.

- 1) Whether the accused person will fail to turn up for trial or surrender to surrender to custody;

2) Whether the accused person may commit further offences; or

3) Whether the accused person will obstruct the course of justice.

Counsel also cited article 49 (1) (h) as read with article 50 (2) of the 2010 Constitution of Kenya and submitted that the right to bail is a fundamental constitutional right. Counsel further cited article 25 of the said Constitution and submitted that the right to a fair trial cannot be limited. Counsel further cited Republic v Danford Kabage Mwangi, Criminal Case No. 8 of 2016, (2016) e-KLR, in which the court in considering the issue of bail observed that the grant of bail entails the striking of a balance of proportionality between the rights of the accused who is presumed innocent on the one hand and the public interest on the other hand.

Furthermore, counsel cited Republic v David Muchiri Mwangi High Court Criminal Case No.46 of 2017, in which the court observed that bail is a constitutional right of an accused and can only be limited where there are compelling reasons which must be proved by the prosecution on a balance of probability. Additionally, counsel cited Republic v Robert Zippor Nzilu (2018) e-KLR, which substantially restates the same principles as in Republic v David Muchiri Mwangi, Supra.

In respect of the replying affidavit of the respondent, counsel has submitted that no tangible evidence or proof has been presented by the investigating officer to demonstrate that the 1st accused interfered with witnesses. The investigating officer deposed that unknown persons visited and made calls to the family of the deceased to assist with the burial arrangements. Counsel therefore submitted that bail for his client should not be denied in the absence of evidence that incriminates him; since this case has been under investigation since 2018. The averments of the investigating officer are unsubstantiated allegations.

Furthermore, counsel submitted that none of the witnesses who claimed to have been contacted by the unknown people swore an affidavit to that effect. Instead a third party that is the investigating officer, swore an affidavit.

Counsel further submitted that the 1st accused does not live in Chagamwe and is not stationed there anymore. Additionally, the 1st accused stood interdicted upon arrest and arraignment and without any police powers over police work and its operations. He therefore does not have the authority to exercise any powers and privileges as stated in paragraph 10 of the replying affidavit. Furthermore, the investigating officer, has not raised any issue of the 1st accused's place of residence and has not raised any fear that the 1st accused will not attend court for his trial. Additionally, counsel has submitted that the 1st accused is barred from handling any weapons and is not assigned any duties and for that reason he will not pose danger to the prosecution witnesses.

Furthermore, counsel has submitted that there is no annexure or attachment or an affidavit of the pathologist annexed to the investigating officer's allegation that the accused persons intimidated the pathologist at the Coast General hospital. Counsel therefore submits that the 1st accused should not be denied bail on mere allegations.

The submissions of counsel for the 2nd, 3rd, 4th and 5th accused.

Counsel for the above named accused namely Messrs B.M. Kanyiri & Company advocates have submitted that the prosecution has failed to discharge the burden placed upon them of proving that there are compelling reasons to deny the accused bail.

Counsel has submitted that the accused have sworn affidavits demonstrating that they have fixed abodes in their home areas. Counsel also contends that the replying affidavit of the investigating officer is not supported by any iota of evidence. Counsel further submitted that the burden of proving there are compelling reasons to warrant denying the accused bail is upon the prosecution. Counsel in this regard cited Republic v Mbiti Munguti (2020) e-KLR, in support of this proposition. In the said case also that court observed that the main principle which the court has to consider in a bail application is whether the accused will turn up for his trial and whether there are substantial grounds to believe that the accused is likely to abscond if released on bail. Counsel also cited article 49 (1) (h) of the 2010 Constitution of Kenya which gives to an accused the right to be released on bail unless there are compelling reasons not to be released.

Furthermore, counsel submitted that the strength of the prosecution evidence is not a sufficient ground to deny an accused's release on bail; a matter in regard to which counsel cited Republic v Danford Kabage Mwangi, supra. Counsel also cited Republic v Naftali Chege & 2 others (2018) e-KLR, in which that court observed that the fact the accused is a police officer does not provide a unique ground for the denial of bail.

Finally, counsel cited Republic v Mbiti Munguti, supra, in support of his submission that the respondent has failed to provide evidence in support of his allegation that the accused will interfere with witnesses. Counsel submitted that there ought to be evidence in support of the allegation of alleged interference with witnesses.

The case for the Respondent.

The respondent through its investigator (No 00295 John Maranya) of the Independent Policing Oversight Authority (IPOA), filed a 20 paragraphs replying affidavit in opposition to the application, whose major averments are as follows. He has deposed that the 3rd accused by operation of law and his failure to file a replying affidavit has consented to the "sentiments" of the prosecution that he is not entitled to bail. He has also deposed that the deceased died while in the custody of the accused persons at Chagamwe police station; and that he suffered serious bodily injuries a matter in respect of which he has attached the a copy of the postmortem report marked as annex "JM-I".

Furthermore, the deponent has also deposed that: **"THAT the accused persons do not qualify to be admitted to bond or bail pending trial because the prosecution has strong and irrefutable evidence that points to the accused person's guilt, which is an incentive to have the accused persons fly away from the trial."** He has further deposed that the accused being police officers trained in the use of firearms through their conduct and omissions on the fateful night indicated premeditation on their part towards the deceased person.

The deponent has also deposed that the accused know where the witnesses live and they still exercise all powers and privileges of being police officers which includes access and use of firearms, arrest and detention of persons and property; and by virtue of civil service policy, *“they are supposed to report to their masters within the area of the offence.”* He has also deposed that on 20th September 2018 three police officers in civilian clothes went to Kijiweni area in Changamwe area where there was a fund raising for the deceased and demanded to be shown the relatives of the deceased, who are key witnesses in the instant case, but the congregation refused. The Independent Policing Oversight Authority (IPOA) is apprehensive that the three police officers intended to contact the witnesses with a view of interfering with them.

Furthermore, the deponent has also deposed that in the course of investigations, one of the key witnesses received a phone call from a person claiming that he hailed from Seme and wanted to assist in the burial arrangements; but when the witness demanded that the caller introduces himself to the family, the caller declined to do so, which matter is still under investigations. The deponent has deposed that on several occasions during investigations, a witness in this matter received calls from unknown numbers instructing the witness that they meet within Changamwe so that the callers can assist with the burial arrangements. The said witness feared for his life and switched off his phone and changed his sim card and mobile number. If the accused are released on bail they will interfere with the witnesses

The deponent has further deposed that during investigations the accused persons in trying to cover up their actions intimidated the pathologist at Coast General Hospital which led to the postmortem examination being delayed for a whole month. As a result the investigative agency was forced to seek the assistance of the Government chief pathologist (Dr. Johanssen Oduor), who is based in Nairobi, a matter in respect of which a statement under oath from him will be filed in due course.

The deponent has deposed that for the accused to be arrested and taken to court the office of the Director of Public Prosecutions had to employ measures to ensure their appearance in court.

Finally the deponent has deposed that the accused persons did not produce any proof of their fixed abodes.

The submissions of counsel for the Respondent

Ms Sarah Ogwen, counsel for the prosecution has filed submissions in opposition to the application. Based on the replying affidavit of the investigator counsel has submitted that the accused are likely to interfere with witnesses. She cited *Albert Njiru & 5 others v Republic (2013)*, in which that court observed that the apprehension of the witnesses would not be limited to the applicants' access to guns but it extends to the perceived position of influence of the applicants as police officers.

Again based on the investigator's affidavit, counsel submitted that the accused are likely to abscond from the jurisdiction of this court and since they are faced with a charge of murder there is a possibility they might not show up for their trial.

Issues for determination.

I have considered the affidavits of the parties and the submissions of their counsel including the authorities they cited. I find the following to be the issues for determination.

1. Whether the accused are persons of no fixed abodes.
2. Whether the accused attempted to interference with witnesses.

Issue 1

Additionally, I find as credible the depositions of the accused that they have fixed abodes and I find as incredible the deposition of the Respondent that they have no fixed abodes. I find as incredible the deposition of the investigator that the accused persons did not produce any proof of their fixed abodes. I therefore reject that deposition.

Issue 2

I find as credible the replying affidavit of IPOA'S investigator namely No 00295 John Maranya that the accused attempted to delay the postmortem examination of the body of the accused. I further find as credible the said affidavit that IPOA was forced to seek the intervention of the chief Government pathologist to ensure that the said examination was carried out. I also find as credible the affidavit of the investigator that on 20th September 2018 three police officers in civilian clothes went to Kijiweni area in Changamwe area where there was a fund raising for the deceased and demanded to be shown the relatives of the deceased, who are key witnesses in the instant case, but the congregation refused.

In the circumstances, I find that the accused not only attempted to interfere with witnesses but they also attempted to obstruct the course of justice.

I find no merit in the submissions of counsel for the 1st accused that that none of the witnesses who claimed to have been contacted by the unknown people swore an affidavit to that effect. Instead a third party that is the investigating officer, swore an affidavit. The reason for this is that in applications for bail, hearsay evidence is admissible as long as the source of the information is disclosed. I also find that although it is desirable for the investigator to have annexed the statement of the witness who was contacted; failure to do so is not fatal to the said deposition. It is also important to point out that counsel did not seek to have the investigator cross examined in that regard.

Furthermore, I find merit in the submission of counsel for the 1st accused the fact the accused is a police officer does not provide a unique ground for the denial of bail. I therefore find as persuasive the decision in Republic v Naftali Chege & 2 others, supra, in that regard. The status of the 1st accused being a police officer per se cannot be a ground for denying bail; there must be other circumstances.

Counsel for the Respondent submitted that the accused are a flight risk. This submission is not supported by the Respondent's replying affidavit. I therefore reject this submission for lacking in merit.

Furthermore, I am unable to agree with the decision of the court in Albert Njiru & 5 others v Republic (2013), in which that court observed that the apprehension of the witnesses would not be limited to the applicants' access to guns but it extends to the perceived position of influence of the applicants as police officers. The reason for this is that the accused stood interdicted after being arraigned and were without any police powers over police work and its operations. They therefore do not have the authority to exercise any powers and privileges as stated in paragraph 10 of the replying affidavit of the Respondent.

It is equally important to point out that there are highly objectionable parts of the Respondent's depositions which include matters of law such as that the 3rd accused by operation of law and his failure to file a replying affidavit consented to the "sentiments" of the prosecution that he is not entitled to bail. This is a matter of law that falls outside the province of the deponent who in law is required to only depose to matters of fact within his knowledge. This should have been left to counsel for the prosecution to raise as part of her submissions.

Furthermore, the deponent should not have deposed that: "THAT the accused persons do not qualify to be admitted to bond or bail pending trial because the prosecution has strong and irrefutable evidence that points to the accused person's guilt, which is an incentive to have the accused persons fly away from the trial." This court (Bwonwong'a, J) in Douglas Okwii Marcus versus Director of Public Prosecutions (DPP), Nairobi High Court Criminal Case No E023 of 2021, disapproved of a similar deposition in the following terms. "*This deposition is inadmissible and highly prejudicial. This deposition amounts to a finding of guilt by the investigating police officer. Even the trial court is not allowed to make such a finding until all the evidence has been presented before it and closing submissions, if any, have been made by the parties. The investigating police officer has assumed the role of an investigator, the prosecutor and the jury (court). This deposition is inadmissible for it is not evidence but a finding.*"

An affidavit should only contain matters that are capable of being presented as evidence by the person making the deposition. It therefore follows that counsel for the applicant (Mr. Kiprotich) should not have made the deposition in support of his client's application. It is legally impermissible for counsel to have deposed to matters of fact. These are matters which are for the client to depose to; for they are matters that are clearly within his knowledge.

Furthermore, it is also legally impermissible for the investigating police officer to depone that:

"THAT it would be in the public interest and the interest of justice that bail denied in this case taking into account the unprovoked and violent manner in which the accused caused the death of the two deceased persons."

This deposition is also inadmissible for it amounts to a finding of guilt by the investigating police officer in deposing that the accused caused the death of the deceased; which is a matter for the court to decide. This is clearly the position because the accused have pleaded not guilty. And by virtue of that plea of not guilty every allegation in the information (the charge sheet) including as to who caused the death of the deceased is in dispute and is subject to proof beyond reasonable doubt. The investigating police officer has trespassed into the province of the trial court which is allowed to make findings of fact at the conclusion of the evidentiary hearing of the trial."

In the circumstances, I find that the prosecution have established on a balance of probability that the accused are likely to interfere with the prosecution witnesses in view of their conduct following the incidents that took place after the death of the deceased.

In the premises, I find that there are compelling reasons to warrant the denial of bail for the accused with the result that their application fails and is hereby dismissed in its entirety.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021.

J. M. BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua, court assistant

Messrs Ogamba for the 1st accused/applicant

Ms Sambu holding brief for Mr. Muriuki for the 2nd, 3rd, 4th and 5th accused/applicants.

Mr. Naulikha for the Respondent

Mr. Mutitu for the victims

