



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. E014 OF 2021

REPUBLIC.....APPLICANT

VERSUS

JOHN OCHANGO.....RESPONDENT

RULING

1. The accused *John Onchango* (hereinafter the applicant) faces a charge of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*.
2. The particulars of the charge allege that on 24th February 2021 at Muslim area of Kawangware in Dagoretti Sub County in Nairobi County, the applicant murdered *Delight Naliaka*. On being arraigned before the court, the applicant denied the charge.
3. On 25th May 2021, the applicant's learned counsel, *Mr. Amutalah* made an oral application praying that the applicant be admitted to bond/bail pending his trial. Prior to this date, the state through *PC Josephat Muia*, one of the investigating officers in this case had sworn and filed an affidavit dated 14th April 2021 opposing admission of the applicant to bond pending trial.
4. In his affidavit, *PC Muia* deposed that the applicant should be denied bond because he committed the offence in broad daylight in the presence of an eye witness who was known to him and if released, he was likely to intimidate, threaten or otherwise interfere with the witness as a means of self preservation; that the applicant was a flight risk given his conduct soon after commission of the offence and that for his own safety, he should continue to be held in remand since if released, he might be attacked by irate members of the public in Muslim Kawangware area who are still bitter about the deceased's death; that his continued detention was necessary for the preservation of public peace and security.
5. In his oral submissions before the court and in his affidavit sworn on 20th April 2021, *Mr. Amutalah* urged the court to find that the accused had a constitutional right to be admitted to bond pending trial unless compelling reasons were shown to exist to warrant denial of that right. He submitted that the accused has an unqualified right to be presumed innocent until proved guilty and that he is not a flight risk as he has a known place of abode; that he is a middle aged man with a young family who depended on him. Counsel pleaded that the accused will not interfere with witnesses and that he will abide by any terms this court may impose as a precondition to his admission to bail.
6. On her part, learned prosecuting counsel *Ms Gikonyo* relying on *PC Muia's* affidavit submitted that the situation on the ground was still hostile to the applicant and that pretrial detention was necessary for maintenance of public order and peace in the area the applicant and the deceased used to reside; that since the prosecution witnesses and the accused resided in the same area, in order to avoid interference with eye witnesses, the accused's right to bond/bail should be suspended till after the witnesses had testified.
7. At the close of the hearing, the court found it prudent to call for filing of a prebail report to assist it in making a just decision in the application. A prebail report was subsequently filed on 29th June 2021 whose content I have carefully considered.
8. I have given due consideration to the application, the affidavits on record and the rival submissions made by learned counsel on behalf of the parties.
9. It is trite and this is not disputed that the applicant has a constitutional right to bail/bond pending trial which is guaranteed under *Article 49 (1) (h)* of the *Constitution of Kenya 2010*. This right is not however absolute and is limited by existence of compelling reasons that would militate against the grant of that right.
10. It is settled law that the duty to demonstrate existence of compelling reasons lies on the shoulders of the prosecution. See: ***Republic V Danson Mgunya V Another, [2010] eKLR; Republic V Daniel Musyoka Muasya, [2010] eKLR.***

11. Though what constitutes compelling reasons has not been defined in the Constitution, the word “compelling” is defined in the Oxford English Dictionary as “powerfully evoking attention or admiration”. From this plain meaning, it is clear that for the prosecution to discharge its burden of establishing compelling reasons, it must avail to the court cogent and credible evidence sufficient to convince it that if admitted to bond/bail, the accused will either abscond his trial or is likely to engage in acts that would undermine the administration of justice.

12. In this case, the prosecution has maintained that there was reasonable apprehension that if admitted to bond, the applicant will interfere with its key witnesses who are eye witnesses to the deceased’s murder since they lived in the same neighbourhood. I have perused the witness statements and whereas it is true that the prosecution’s proposed witnesses claim that they live in Muslim Area Kawangware where the offence was allegedly committed, they did not claim that they knew each other with the applicant. The prosecution did not also demonstrate the manner in which the applicant is likely to interfere with witnesses if admitted to bond/bail.

13. In the prebail report, the probation officer has confirmed that upon being interviewed, the applicant pledged not to abscond or to interfere with witnesses if his application was allowed. In my view, the prosecution has not established by way of evidence that if released, the applicant was likely to interfere with its witnesses. In any case, if there is any basis for the prosecution’s aforesaid apprehension, the same can be taken care of by the terms of bond the court may set if in its discretion, it was minded to allow the application.

14. On the claim that pretrial detention was necessary for the applicant’s own safety and for peace and security to prevail in Kawangware Muslim Area, I find that this would be a compelling reason to deny the applicant bail if the applicant did not have an alternative place of abode and would have to go back to live in the neighbourhood in which the offence was committed when released on bond. In this case, however, as shown in the prebail report, the applicant’s mother and uncle have offered to provide him with alternative accommodation.

15. In applications of this nature, the overarching consideration the court takes into account in its determination whether or not to grant an accused person bond/bail is whether or not there is evidence to demonstrate that the accused will attend his or her trial or is likely to abscond. There is nothing on record in this case to suggest that if admitted to bond/bail, the accused will abscond his trial.

16. Besides the above important consideration, the court is also obligated to consider several other factors including the views of the victim’s family. In this case, the deceased’s brother was among the persons interviewed when the probation officer was undertaking his social inquiry and according to the prebail report, the deceased’s family did not express any objection to the applicant’s admission to bail/bond pending trial.

17. In view of the foregoing and having taken into account all relevant factors, I have come to the conclusion that the prosecution has not established to the required standards existence of compelling reasons to justify denial to the accused person of his constitutional right to bond/bail pending trial.

18. But in order to address the prosecution’s aforesaid apprehensions and to ensure that the applicant will not abscond or interfere with witnesses, the application is hereby allowed on the following conditions:

- i. The applicant will be released upon executing a bond of KShs.500,000 with one surety of like amount. The surety will be approved by the Deputy Registrar of this court.
- ii. Upon his release, the applicant will reside in a place of his choice other than Kawangware Muslim area.
- iii. The applicant will not contact or in any way interfere with the prosecution witnesses.

19. The applicant is warned that breach of any of the above conditions will lead to cancellation of his bond.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Agan holding brief for Mr. Amutalah for the applicant

Ms Ogweno for the respondent

Accused absent

Ms Karwitha: Court Assistant