



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. E024 OF 2021

REPUBLIC.....PROSECUTOR

-V/S-

- 1. MZUNGU SHUME MWANGEMI alias SAIDI CHOTE**
- 2. ONESMUS GAMBO KARISA**
- 3. ROBERT MGANGA MWAGOSHA**
- 4. KENNEDY MWANGEMI SHUME**
- 5. VICTOR KOLE CHINYEZI alias NGATE**
- 6. DANIEL KARISA alias MBOSO**
- 7. ANTONY WANJE MBOGO alias MGANGA**
- 8. LABAN MWATATA RIMBA**
- 9. CLIFF NGOMBO NGARI.....ACCUSED**

R U L I N G

1. Mzungu Shume Mwangemi alias Saidi Chote & Onesmus Gambo Karisa alias Saidi Chote & Onesmus Gambo Karisa alias Onesmus Karisa were initially charged jointly with the offence of murder contrary to Section 203 as read with Section 204 of the penal code in two counts.

2. Subsequently on 8th November 2021 charge against accused persons in H.CR. Case No. E030 of 2021 was consolidation with H.CR. Case No. E024 of 2021. In CR. Case E024 of 2021 accused persons were granted bail pending trial. Similarly in H. CR. Case No. E030/2021 accused persons were granted bail upon plea being taken and accused persons pleading not guilty.

3. Subsequently Mr. Jami prosecuting counsel applied that bond terms for Accused 1 as he had a pending murder case that was coming up for Judgement on 25/11/2021- CR. Case No. 40 of 2014. For CR. Case No. E021 OF 2021 Mr. Jami submitted that reason for opposing bond was granted of offence, apprehension that witnesses will be interfered with.

4. He argued offence was committed by way of mob injustice by accused persons and some were still at large. He argued that as much as accused persons may be innocent until proven guilty it was his view that killing was contrary to public police and peaceful settlement of disputes.

5. It was the prosecuting counsel's position that witnesses for prosecution reside on land in question and are neighbour and persons known to accused persons and their release will re-introduce from on the witnesses. He said fear is legitimate reason for denying bond.

6. It was argued that from conduct of the accused persons are not likely to attend trial if released on bond for reasons they became fugitives after committing the offence. He said some of the suspects were arrested in Kolewa forest while A3 was arrested in Nairobi by special Steng Operation Officers while he was evading arrest. That A5, A6 & A8 were arrested in the forest and A7 who operates bodaboda was arrested at the North Coast where that A4 and A9 were arrested in Majengo area in Mtwapa.

7. Mr. Jami contends that affidavit in opposition to release accused persons on bond met the threshold in the Bail/Bond policy guidelines and that fair trial under Article 50(1) of the constitution envisaged a situation where witnesses are free to give evidence without fear.
8. A1 filed a Reply of Affidavit and averred he was a boda boda operator and was ferrying A2's children to school 1.5km from scene of offence. He said they were never summoned to appear before the police and A1 & A4 would not have known they were re-opened by police. That A1 was arrested at his place of work in Mtwapa and there is no evidence he had run away.
9. That when A1 was arrested pre-bail report was filed and bond terms imposed by the court and that there was no objection to his release on bond. It was argued that although A1 had another case he had been attending court since 2014 and there was no complainant he harassed any witness and he attends court faithfully. It was argued that it would be discriminatory to grant A2 bond and deny the rest of the accused persons who are facing the same charge. It was argued that objecting to bail was an afterthought.
10. Mr. Kinyanju Advocate for A3 also made submissions opposing the prosecutions application to deny bond. He stated that bail is a constitutional right and power to grant bail as well as discretion to set terms rests with the court. He argued that bond terms were already set and that it was an afterthought to open a matter that has been dealt with.
11. Mr. Kinyanjui argued that it is speculative to say that A3 will not attend court when the prosecution knows where he was arrested from. That the fact that an offence has been committed does not mean that suspects should remain in the same place as they have right to reside anywhere in the Republic of Kenya. He said A3 filed an affidavit and explained he went to visit his wife in Nairobi and it was confirmed A3 is not a vangabond as he runs a business where offence was committed. He argued that prosecution didn't follow right procedure to seek for renew of bond terms and application should be dismissed.
12. Ms. Ayieko for A5 requested for pre-bail report to be filed. Mr. Ganzala Advocate for A6 submitted that when accused persons were presented in court and they took plea, pre-bail reports were filed that guided the court in arriving at the bond terms granted. He said A6 was arrested in Mtwapa and not in the forest as alleged and he is innocent until proven guilty. He urged the court to dismiss the application as it was an afterthought and malicious. Ms. Okumu Advocate for A7 submitted that there is no formal application before court seeking for renew of orders made granting bond.
13. She argued that main consideration is whether accused persons will attend court when released on bond or not and that there is no such evidence. She further argued that there are no convincing and forceful reasons given that should make that court deny bond. She stated that the court needs to preserve liberty of accused persons as they are still innocent. She quoted the hold given Republic vs Joseph Irungus & Another where bond was granted as there was no indication that accused person had attempted to interfere with trial.
14. She said material to be placed before the court was actual and perceived interference and there was no such evidence. She said compelling reasons had not been stated, described or explained. She said accused persons had been in custody since 9/9/2021 and their rights and liberties are being violated as they are not able to find for their families. She said reasons given to deny bail don't affect A7 who was arrested at his place of work and he was not hiding. She prayed that bond terms granted on 4/10/2021 be maintained.
15. Mr. Ireri Advocate for A8 relied on an affidavit opposing application to renew orders granting bond and reiterated submissions made by counsel for A1 to A7. He said pre-trial detention should not constitute punishment. He said if order made on 4/10/2021 aggrieved prosecution a substantive application ought to have been made. He said there was no evidence accused persons attempted to evade the law. He said averments by P.C. Wafula cannot constitute compelling reasons and application should be dismissed.
16. Mr. Obara Advocate for Ag stated that prosecution seems to have preferential treatment for some accused persons against others and that court should not issue orders that are discriminatory. He said Ag was not mentioned in the 1st affidavit and mention in supplementary affidavit is reactionary to fill gaps. He said Ag presented himself to police when he learnt police were looking for him and there is no evidence he resided on the farm in question.
17. Mr. Obara argued that it is explainable if Ag ran from the farm in question because they loads of GSU descended in the area and the only influence one could make is that he took off for his own safety and not because he committed an offence. Mr. Obara further submitted that names of the witnesses who are alleged will be interfered with and it was merely speculative. Ag. Counsel urged the court to exercise caution as the matter involves liberties.
18. He said the Investigating Officer has become a witness before trial starts and has given general answers to as which witnesses are being threatened when and now. He said there was no application before the court to renew bond terms made and Ag showed be allowed to process bond terms set on 4/10/2021.
19. Mr. Jami for the state responded that he had no objection if social inquiries are conducted for the accused persons. He also responded that there was no preferential treatment being accorded to the accused persons as bond is considered on a case to case basis and that A2 was arrested at his home and he was not on the run. Mr. Jami submitted further the affidavit opposing bond and the supplementary affidavit are consistent and there is no element of malice.
20. He further argued that no law was painted out by Ms. Okumu and Mr. Obara that requires an application for review to be made formally. That it was a practice to file affidavit opposing application for bond. He submitted that the authority of Republic vs John Irungu was made under different circumstances and that there was no allegation that witnesses were threatened. He said particulars of witnesses cannot be disclosed as it would expose them. Mr. Jami argued that the test to be applied should be subjected and not objective i.e. if welcomed in same neighbourhood with suspects how would we feel as witnesses. He said the investigating officer had brought it out at paragraph 10 of this affidavit. He urged the court to deny bond or impose strict terms.
21. Having considered the affidavit opposing the release of deceased persons on bond, sworn by P.C. Kevin Wafula on 23rd September 2021,

the Replying Affidavit by A1, A2, A3, A4, A5, A6 and A7 in CR. Case No. E030 of 2021 (formely) and the Replying Affidavit of Mzungu Shuma Mwangemi alias Saidi Chote alias Zidini in CR. Case No. E024 of 2021 as well as supplementary affidavit sworn by P.C. Kevin Wafula the Investigating Officer on 22nd October 2021 the issues for court's decision are:- whether the state has satisfied the court that orders made on 4/10/2021 granting bond to the accused persons should be reviewed on account the accused persons are a flight risk and that they will interfere with witnesses; or whether A1 is likely to commit another offence considering he had a pending case in Mombasa High Court CR. Case No. 40 of 2014 when he is alleged to have committed the murder herein.

22. The accused persons in E024 of 2021 Mzungu Shume and Onesmus Gambo Karisa were arraigned in court on 4th August 2021 and detained for purposes of mental assessment and appointment of advocates to represent them.

23. On 2/9/2021 they took plea before Hon. Justice Onyiego and upon prebail reports being availed on 9/9/2021 they were released on bond of Kshs.500,000/= each with a surety of similar amount. Accused person in CR. Case no. E030 OF 2021 were arraigned in court on 23rd day of September 2021 and remanded in custody pending mental assessment and appointment of advocates. The accused persons took plea on 4th October 2021 and when Ms. Okumu Advocate applied for release of accused persons on bond and the prosecuting counsel then said there was no objection to release of accused persons on bond the court in consideration that accused persons facing similar charge in CR. Case No. E024 of 2021 had been released on bond ordered for similar bond terms.

24. On 5th October 2021 Mr. Jami for ODPP appeared before court and requested that bond terms be stayed pending application for review and consolidation.

25. The law governing grant or otherwise of bond/bail is provided for under Article 49(1) (h) of the constitution of Kenya 2010 and Section 123 A of the Criminal Procedure Code.

26. Article 49(1) (h) provides than an arrested person has the 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.

27. Section 123A of the Criminal Procedure Code states that:-

“Exception to right to bail

(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”

28. In the Bail & Bond policy Guidelines under paragraph 4 & 9, it is restated that:-

“In terms of substance; the primary factor considered by the courts in bail decision making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the constitution of Kenya 2010 is determining the existence of compelling reasons for denying an accused person bail particularly in serious offences”.

29. The test to be applied was enunciated in **Republic vs Willian Kipkori Kipchirchir & Another [2018] eKLR** where the court held:-

“Intimidation, interference and threatening of witnesses are serious matters and they are compelling reasons where evidence of such intimidation interference authorities is provided to the trial court...In the absence of the evidence to support the same these remain first mere speculation/suspicious and fears harboured by the prosecution...”

30. In **Republic vs Joseph Thiongo Wawere & 17 Others vs Republic [2017] eKLR**, it was held as follows:-

“The constitutional standard for denying bail is “compelling reasons” test. The burden is on the prosecution to establish the existence of the ‘compelling reasons’ that would justify denial of bail. Our emerging jurisprudence on the question is clean as to the kind of evidence needed to establish the compelling reasons: the evidence presented must be “cogent” very strong and

specific and that mere allegations, suspicious, bare objections and insinuations will not be sufficient”.

31. The accused persons herein were arrested separately from different places. There is no dispute that A1 Mzungu Shume was facing a charge of murder in CR. Case No. 40 of 2014 which this court has confirmed he was convicted on 25th November 2021 and he awaits sentencing on 9th December 2021. In those circumstances, I do find that indeed there was evidence that when A1 was released on bond in CR. Case No. 40 of 2021, he went and committed another offence. Although he has now been convicted I do not think the court has to wait until another murder has been committed by a suspect to find that he is not fit to be released on bond.

32. The suspect/accused person’s character, antecedents associations and community ties as well as record in respect of the fulfilment of obligations under previous grants of bail have to be considered. This court finds that in respect of A1 evidence as to compelling reasons was sufficient and therefore bond granted to him on 9th September 2021 is hereby cancelled.

33. A2 was granted bond following pre-bail report being presented to court in which probation officer found that he was suitable to be released on bond. The prosecuting counsel has not applied for cancellation of his bond terms save that they should be stricter and should be enhanced. The pre-bail report which the court relied upon to grant bond to A2 indicated that he was a person with good standing in society and was not a threat to community and the witnesses. He was also said to have a fixed abode. The prosecution has not given any reason why his bond terms should be reviewed and this court declines to grant that application.

34. From the investigations diary annexed to P.C. Wafulas affidavit sworn on 22nd October 2021 more than 40 suspects including men and women were arrested but out of that number only 9 were charged. Out of those charged it is only A2 Robert Mganga Mwangoshe who was said to have been arrested in Nairobi and he explained that he had a family living in Nairobi A6 Daniel Karisa Mwero was also said to have been arrested at Kolewa forest and that he resisted arrest. However Daniel Karisa averred that he was arrested at Foretu Bakery together with his supervisor and a colleague Victor Kole.

35. Following the courts perusal of the investigations diary this court finds no evidence at all that accused persons went into hiding or attempted to go into hiding to avoid arrest. No such evidence has been adduced to warrant review of orders made on 4th October 2021 to deny bond.

36. The prosecution through witness protection Agency applied for protection of one of their witnesses and an order was issued to that effect. Allegations of threats and interference with witnesses have not been proved. It has not been shown that anyone of the accused persons has interfered with or attempted to interfere, threaten or intimidate any witness.

37. The best that this court can do is to enhance conditions pegged on the order for bond in the following terms:

i. Accused persons except A1 to be released on bond of Kshs.500,000/= each with a surety of similar amount.

ii. The accused persons are restrained from contacting, interfering or intimidate any witnesses that will testify on this matter.

iii. Accused persons to reside within the jurisdiction of the court unless authority is sought and granted by the court.

38. Orders accordingly. Mention – 15/12/2021 for pre-trial proceedings.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 29TH DAY OF NOVEMBER, 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Turuki – Court assistant

Mr. Mulamula hold brief for Mr. Jami for state.

Accused 1 to Accused 9 – present in persons

Mr. Mwaboza Advocate hold brief for Mr. Ireri Advocate for A8

Ms. Ajiemo for A2 & A5 – No appearance

Mr. Ganzala Advocate for A6 – No appearance

Mr. Kinyanjui Advocate A3 – No appearance

Mrs Okumu Advocate A7 – No appearance

Mr. Obara Advocate for A9 – No appearance

HON. LADY JUSTICE A. ONGI'NJO

JUDGE

Mr. Lyoodi Advocate

DCI Mtwapa were shown to verify surety documents. I pray that they be urged to fast track the verification.

Mr. Mulamula

No objection.

Mr. Kinyanjui Advocate for A3

ORDERS

Investigating Officer is hereby instructed to fast track verification for purposes of examination of sureties.

Mention – 15/12/2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE