REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NUMBER E048 OF 2021

REPUBLIC.....PROSECUTOR

-VERSUS-

EVANS JUMA WANJALA.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Mugun for the State

Mr. Keter for the Accused

RULING

1. The accused herein, faces the charge of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya for which a plea of not guilty was entered. The particulars of the charge were that on the night of 31st December, 2019 and 1st January, 2020 within Soy Sub County in Uasin Gishu County he murdered one SAN.

2. The accused has applied to be released on and/or admitted to bail/bond on reasonable terms pending the hearing and final determination of this case.

3. The application was opposed by the prosecution vide a replying affidavit sworn by **PC Romana Oduor**, the investigating officer. According to her, the accused was responsible for the murders of several victims aged between 10 to 15 years and listed 5 incidents which link the accused to murder of the victims within Moi's Bridge. Further, reports from the government chemists suggested that the accused was involved in the said murder of the victims as DNA samples linked him to the scene of crimes, defilement and subsequent murder of the minors. It was also deponed that the accused had made an out of court confession articulating how he carried out his heinous acts. It was further deponed that the accused is a habitual offender/serial paedophile as there are pending warrants of arrest pending against him from Makindu Law Courts and Kajiado Law Courts and has no fixed abode. Finally it was stated that the accused person resides in Moi's Bridge where most of his victims come from and he may interfere with and intimidate witnesses if released before conclusion of trial and that the offence is serious and attracts a life sentence.

4. I have considered the application and the affidavit in opposition thereto as well as the submissions made.

5. Article 49(1)(h) of the Constitution provides that:-

> **An accused person has the right... : -**
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> **(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.**

6. The Constitution however has not identified what qualifies under the term "compelling reasons." The ordinary meaning according to ***Thesaurus English Dictionary*** of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping.

7. The right to bail is not absolute and where there are compelling reasons the said right may be restricted. It is therefore upon the prosecution to demonstrate that there exist compelling reasons to deny an accused person bail. It is therefore within the Court's discretion to decide whether or not to grant bail to an accused person and in exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice.

8. In **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**, the Court held that:

"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will: -

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system… the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question…the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely: -

(i) **the period for which the accused has already been in custody since his or her arrest;**

(ii) **the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;**

(iii) **the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;**

(iv) **any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;**

(v) **the state of health of the accused;**

(vi) **any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be.**

In ***S* v *Nichas* 1977 (1) SA 257 (C)** it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in ***S* v *Hudson* 1980 (4) SA 145 (D) 146** in the following terms;

"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

9. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

(i) The nature of the charges;

(ii) The strength of the evidence which supports the charge;

(iii) The gravity of the punishment in the event of conviction;

(iv) The previous criminal record of the accused if any;

(v) The probability that the accused may not surrender himself for trial;

(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;

(vii) The likelihood of further charges being brought against the accused;

(viii) The probability of guilty;

(ix) Detention for the protection of the accused;

(x) The necessity to procure medical or social report pending final disposal of the case.

10. Section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

(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 fulfilment 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.

11. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."

12. Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows: -

The following procedures should apply to the bail hearing: -

a. T**hat the accused person is likely to fail to attend court proceedings; or**

b. **That the accused person is likely to commit, or abet the commission of, a serious offence; or**

c. **That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or**

d. **That the accused person is likely to endanger the safety of victims, individuals or the public; or**

e. **That the accused person is likely to interfere with witnesses or evidence; or**

f. **That the accused person is likely to endanger national security; or**

g. **That it is in the public interest to detain the accused person in custody.**

13. In **Kelly Kases Bunjika vs. Republic** (supra) that: -

"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such

defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."

14. The prosecution have opposed the release of the accused on bail for various reasons as stated earlier. In **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** it was held as follows;

> **"Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;**
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> **'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'**
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> **Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."**

15. In **Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009** court defined the term *"compelling reasons"* as follows:-

> **"The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the constitution."**

16. The prosecution have demonstrated and led evidence to the effect that the accused person herein has been linked to several murders of young victims and has cases pending elsewhere where there are warrants of arrest that have been issued.

17. Accordingly, considering the circumstances of this case, I am satisfied that the accused ought to be denied the right to bail.

DATED, SIGNED AND DESPATCHED VIA THE EMAILS AT ELDORET THIS 26TH DAY OF NOVEMBER, 2021.

R. NYAKUNDI

JUDGE