



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE NO. E004 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

VICTOR KIPKOECH KIRUL.....ACCUSED/APPLICANT

RULING

1. The Applicant was formally charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, CAP 63, Laws of Kenya**. The particulars of the offence were that on the 8th day of December 2020 at Mirera area in Naivasha Sub County within Nakuru County, the applicant murdered Sarah Musa Lolonyokie. The Applicant took plea before this Court on 25th January 2021 and denied the charge.
2. After plea taking, defence counsel, Mr Njuguna orally applied for bail. The Pre-Bail Report indicated that the accused has been charged in lower court in a related matter and that the accused person's security cannot be assured.
3. In response, counsel asserted that the claim that the accused tried to escape after his arrest was untrue and that the accused presented himself at Kingero Police Station. That the accused has an aunt living in Kericho who is ready and willing to host the accused upon grant of bail. As to the allegation that the accused poses a danger to the deceased's sister, counsel stated that the accused says he did not commit the offence and that he has no grudge against the deceased's sister.
4. The application was opposed by the State through Grounds of Opposition filed on 18th February, 2021 and supporting affidavits sworn on 17th February, 2021 by No. 76900 PC Nelson Ratemo, the investigating officer and Musa Lolonyoike, the father to the deceased.
5. The application was canvassed before me on 8th November, 2021. Learned counsel, Mr Njuguna represented the accused person whilst learned State Counsel, Ms Maingi appeared for the State. Mr Njuguna reiterated that the accused is ready to comply with bail terms. He further indicated that although the accused's safety is of concerned, the Court can set up restrictions on where the accused will stay.
6. Ms. Maingi asserted that the Applicant was a flight risk and is likely to interfere with witnesses. After he committed the offence, he fled to Kingero area of Kiambu County. He was renting a house in Naivasha and tracing him would be very difficult if he absconded. The accused tried to eliminate one of the witnesses, the deceased's sister, who is a minor, by cutting her on the head. In this regard, he has been charged with the offence of attempted murder in the lower court.
7. In rejoinder, **Mr Njuguna** reiterated that pointed out that the accused walked into the Kingero police station to find out what was being said about him. Further, he pointed out that the pre bail report failed to take into account the fact that the accused's relatives are ready to host him.

Determination

8. **Article 49(1)(h) of the Constitution of Kenya, 2010** gives every arrested person 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.**'
9. **Section 123A of the Criminal Procedure Code** provides guidance on the considerations to be made in determining whether or not bail should be granted, in the following terms:

“(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.”

10. In addition to the foregoing, in determining whether or not bail should be granted, the Court ought to balance between the rights of the individual and public interest. To this effect, the **Judiciary Bail and Bond Policy Guidelines** under **para. 3(e)** at pp. 9-10 provides that in certain instances: *‘The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.’* The Guidelines go on to state that: *‘it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions’.*

11. The primary factor is that the court must be satisfied that the accused shall avail himself in court if granted bail. See: **Republic v Danson Mgunya (2010) eKLR** where the court stated thus:

‘The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.’ See also: Judiciary Bail and Bond Policy Guidelines para. 4.9 at p 16

12. The onus lies with the prosecution to show that there are compelling reasons to deny the grant of bail. As can be gleaned from the submissions, the grounds of opposition and its supporting affidavits the compelling reasons brought out are:

- a. That the Applicant is likely to interfere with witnesses;
- b. That the Applicant is likely to abscond; and
- c. The Applicant's safety.

Whether the applicant is likely to interfere with witnesses

13. The prosecution submitted that the Applicant would likely interfere with witnesses. The reason for this was that the deceased's sister who is a minor and deceased's sister lived with the deceased and the applicant. She allegedly witnessed the murder incident and was stabbed on the head by the applicant during the incident. She recovered and filled a P3 form at Naivasha Level Five Hospital and the doctor formed the opinion that the degree of injury as grievous harm. The prosecution indicated that the Applicant has been charged with the offence of attempted murder in the lower court. The deceased's father indicated that the family fears that if the applicant is released on bail, he will interfere with the witness. He further indicated that the deceased's sister is traumatized and that this will be worsened if the applicant is released on bail.

14. Curiously, these submissions were not controverted by the defence counsel. There is evidence that supports the prosecution's claim by way of the Pre Bail Report and the supporting affidavits sworn on 17th February 2021 by No. 76900 PC Nelson Ratemo, the investigating officer and Musa Lolonyoike, the father to the deceased and the statement made by the witness referred to. Accordingly, since the witness was an eye witness who is likely to give strong incriminating evidence against the Applicant, should the applicant be released, the witness is likely to be covered into silence.

Whether the Applicant is likely to abscond.

15. The prosecution contended that the applicant is likely to abscond. This is premised on the lack of a place of fixed abode. It was indicated that the Applicant lived in Naivasha as a tenant and therefore if he absconded he would not be easily traced. I am inclined to agree that there seems to be no record on the place of abode of the Applicant. Further, although defence counsel asserted that the applicant has an aunt that could host him in Kericho, there is no evidence to support this. This is significant in compelling the court to deny the Applicant bail.

The Applicant's safety

16. Notably, the safety of the Applicant is also of concern. The pre bail report indicates that the applicant's family expressed fears about his safety. The local administration also stated that community members had threatened to harm him should he be released from custody.

Conclusion

17. In conclusion, I am satisfied that the prosecution has advanced good grounds in opposition to the application. I find that there exist sufficient compelling reasons to warrant a denial of bail to the Applicant. I find the application is without merit and the same is accordingly dismissed.

DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF NOVEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. ACCUSED PERSON- DELIVERED IN THE ABSENCE OF HIS COUNSEL WITH HIS CONSENT.**
- 2. MISS MAINGI FOR THE STATE.**