



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. E013 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN ODIWOUR OTIENO.....1ST ACCUSED

SAMUEL OKOTH ADINDA.....2nd ACCUSED

JUSTUS NYAMETE MANYURA.....3rd ACCUSED/APPLICANT

RULING

The case for the applicant

The 3rd accused moved this court pursuant to the provisions of articles 3, 19, 20, 25, 29 (b), 49 (1) (h), 51 (1) 159, and 259 of the 2010 Constitution of Kenya and sections 123 and 124 of the Criminal Procedure Code (Cap 75) Laws of Kenya, under certificate of urgency, seeking the following orders.

- 1) Spent
- 2) An order directing that the applicant be released on bail pending the hearing and determination of his trial on a charge of murder.
- 3) That the court makes such other order as deems just.

The application of the 3rd accused is based on seven grounds (7) that are set out on the face of the notice motion; with the following being the major grounds. The 3rd accused was arrested on 5th March 2021 on suspicion of having been involved in a murder case that was under investigations and has been in custody to date.

The 3rd accused pleaded not guilty to the charge of murder. He has a right to be released on bail in terms of article 49 (1) (h) of the Constitution of Kenya and he is presumed to be innocent.

The 3rd accused has also deposed to a ten (10) paragraphs supporting affidavit; in which he has replicated the same matters that are set out as his grounds in support of the notice of motion; except for the following matters. He is a Kenyan citizen working for gain in Nairobi County. Murder is a bailable offence and that he will always be attending court if he is released on bail. He has also deposed that he is married with two children who solely depend upon him as their sole bread winner.

The submissions of counsel for the 3rd accused

Messrs Mayia Juma & Associates Advocates for the 3rd accused have submitted as follows. They have submitted that the 3rd accused is not a flight risk and that there is no evidence that he will interfere with witnesses.

Counsel has also submitted that the assertion by the investigating officer that the 3rd accused is a person of no fixed abode is not true; since he was traced to his rural home by the police; and that is where his sickly mother resides. Additionally, the pre- bail report has elaborately described the home of the 3rd accused. Counsel has also submitted that bail cannot be refused simply because the 3rd accused is charged with a very serious offence that also carries a serious sentence.

Based on the observation of the court in Republic v Robert Zippor Nzilu (2018) e-KLR, counsel submitted that in deciding the terms of the bail the court has to exercise its discretion in striking a balance between protecting the liberty of the individual and safeguarding the proper administration of justice.

Counsel have also submitted that the prosecution has not demonstrated the existence of compelling reasons to deny releasing the 3rd accused on bail. They have therefore urged the court to release the 3rd accused on bail.

The case for the Republic/Respondent

The prosecution has filed a twelve (12) paragraphs supporting affidavit deposed to by No. 97238 PC Earnest Kinyua, who is the investigating officer; whose major averments are as follows.

The deceased was murdered on 12th February 2021 and her body was dumped in a thicket in Kajiado County. The 3rd accused who was alleged to be among the assailants took flight immediately after the incident to his rural home in Kisii County. It took the efforts of the detectives and mobile phone service provider to track him and eject him from his hideout.

Furthermore, the accused was brought back to Nairobi and was taken to court and charged with the murder of the deceased. The accused's place of employment and occupation is unknown.

The investigating officer is apprehensive that the 3rd accused is likely to interfere with witnesses since he is aware of the witnesses who are likely to testify against him as they are well known to him.

The submission of the prosecution

The prosecution declined to make any submissions and instead they relied on the replying affidavit only.

Issues for determination

I have considered the affidavits of the parties and their submissions in the light of the applicable law. I find the following to be the issues for determination.

1. Whether the 3rd accused is likely to interfere with witnesses.
2. Whether the 3rd accused is a flight risk.

Issue 1

There is no reported incident of the 3rd accused attempting to interfere with witnesses. He has also denied that he will interfere with them. I find no evidentiary basis for the contention that the 3rd accused is likely to interfere with witnesses.

I further find as lacking in merit the contention that the 3rd accused is a person of no fixed abode; since the police by their own admission deposed that they traced him to his home in Kisii County.

Issue 2

I find as credible the deposition of the investigator that the 3rd accused escaped to his home county immediately after the commission of this offence. The police had to use the telephone service provider to track down the 3rd accused. This conduct of the 3rd accused clearly shows that he is a flight risk and if released on bail, he is unlikely to attend his trial.

In the premises, I find that the applicant's application fails and is hereby dismissed in its entirety.

Ruling signed, dated and delivered in open court at Nairobi this 28th day of December 2021.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Mr. Gichuhi for the Republic/Respondent

Mr. Juma for the accused/applicant.