REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO E057 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MUSAU.....1ST ACCUSED/1ST APPLICANT

ROBERT MWANGI KIBORORO.....2ND ACCUSED/2ND APPLICANT

REASONS FOR THE RULING DELIVERED ON 17TH DECEMBER 2021

The accused have applied for bail pending their trial on a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya in respect of the deceased Vitalis Owino Ochillo alias Waingo alias Madaraka Baba Anita; pursuant to the provisions of articles 20 (3) & (4), 21 (1), 49 (1) (g) and (h), 50 (2) (a) of the 2010 Constitution of Kenya.

The case for the applicants.

Counsel for the applicant has deponed to a 27 further affidavit in support of the application for bail; whose major averments are as follows. Both applicants are long serving police officers without any disciplinary record. The 2nd applicant is based at Muthaiga police station where he has served for more than 20 years; while the 1st applicant is based at Egoji police station in Embu County.

Both applicants are not flight risks since they have fixed abodes and are family persons married with school going children. Both applicants are still innocent until proven guilty.

In response to paragraph 7 of the replying affidavit, counsel has deposed that the grant of bail is a constitutional right and the prosecution has not produced any compelling reason to deny the grant of bail.

Both applicants are the sole bread winners of their families and their children would suffer if they are denied bail. Again in response to paragraph 8 of the replying affidavit counsel has deposed that the offence of murder took place in May 2020 and both applicants have been actively in service and none has attempted to abscond.

Furthermore, counsel has deposed in response to paragraph 9 of the replying affidavit that since May 2020 when the offence took place none of the prosecution witnesses has made any formal complaint to the police that they have been threatened or intimidated.

In respect of the 2nd applicant, counsel has deposed that he has an exemplary service record of more than 21 years and is a role model for the residents of Mathare slums. And the 1st applicant is based in Embu County and is unlikely to interfere with witnesses as alleged by the prosecution. Counsel has further deposed that the averments of the prosecution are full hearsay and speculation. In response to paragraph 13 counsel has deposed that the replying affidavit is merely speculative; since the prosecution have failed to tender any evidence linking the 2nd applicant to any previous act of intimidating witnesses.

Both applicants are keen to assist the prosecution with any information that may lead to the arrest of the perpetrators of this murder.

Counsel has further deposed that if the applicants are released on bail they will relocate to their rural homes and will undertake to report to the nearest police station. Based on instructions from the applicants counsel has deposed that the tension that was experienced in the Mathare area after the death of the deceased has long died off and there have been no incidents of violence in the area since May 2020.

Counsel has deposed that the denial of bail would condemn and paint the applicants as murderers even before their case is heard and determined. And in response to the contents of paragraph 23 of the replying affidavit, counsel has deposed that they are unwarranted since the court is yet to determine if the applicants are the ones who committed the offence.

Counsel has further deposed that the applicants have a constitutional right to administrative action that is lawful, reasonable and procedurally fair.

Finally, counsel has deposed that it is in the interests of justice that the applicants be granted bail and they hereby undertake to abide with any conditions that the court may impose.

The submissions of counsel for the applicants.

Based on the deposition of their counsel, the same counsel has submitted that both applicants have exemplary service records as they have never been charged or interdicted by their employer.

He further submitted that both applicants have fixed abodes in Kenya and are not flight risks; since their families can easily stand surety for them.

Counsel has further submitted that the applicants are relying on their counsel's further affidavit. He has submitted that constitutionally the applicants are presumed to be innocent until proven guilty and may only be denied bail if there are compelling reasons to do so.

The applicants through their counsel on record (Mr Owang) applied for order to direct the Office of the Director of Public Prosecutions to recall the investigation file from IPOA for further scrutiny. (Court has seen the ruling of the court (Ogembo, J) dated 3rd September of 2021, which dismissed the application).

The applicants presented themselves to the investigating officers for questioning; which demonstrates that they will diligently attend court if released on bail. And prior to their arrest the applicants co-operated with the investigating officers from IPOA. The representatives of the family of the deceased have not filed any documents in opposition to the release of the applicants on bail.

Furthermore, the allegations by the prosecution that the applicants have threatened their witnesses are not backed by any evidence.

Counsel has further submitted that in terms of article 49 (1) (h) o the 2010 Constitution that the applicants have a right to be released on bail unless there are compelling reasons to deny them bail.

Counsel cited the decision of this court (Mativo,J) in Republic v Danford Kabage Mwangi (2016) e-KLR, which in turn cited Republic v Naftali Chege & 2 Others (2018) e-KLR, in which the court observed that the granting of bail entails striking a balance of proportionality in considering the rights of the applicant who is presumed innocent on the one hand and the public interest on the other hand. Again in Republic v Naftali Chege & 2 Others, the court observed that the fact that the accused is a police officer or were police officers did not provide a unique ground for denial of bail and further that the state had failed to tender proof that the accused if released on bail will interfere with witnesses.

Counsel has therefore urged the court to release the applicants on bail.

The case for the Respondent

The Respondent through its investigating officer (Benedict Otieno) deponed to a 27 replying affidavit in opposition to the application; whose major averments are as follows.

The two police officers were attached to Muthaiga police station and were on patrol duties with five other (5) police officers enforcing curfew orders within Muthaiga Mradi area on the night of 3rd May 2020. The accused came across the deceased who had gone out of the house to answer a call of nature. The accused then descended upon him with rungus for flouting curfew orders. The accused then left the deceased on the ground, who was unable to walk for he had been badly injured. In the meantime the accused went and joined the other officers on patrol. The deceased died subsequently due to bleeding from the injuries he sustained.

The accused are serving police officers and they therefore exercise all police powers and privileges, a fact that inspires fear and intimidation among witnesses. In the course of investigations the investigator was supplied with the employment history of the 2nd accused, which showed that he has worked in Muthaiga police station for a continuous period of 21 years as an investigator, cells sentry, patrol duties, and police operation and manning crime office report in which he interacted with the population of Mathare slums immensely.

The 1st accused as an inspector has authority to order his juniors to locate and convince witnesses to recant their statements when called to testify.

As regards the 2nd accused the investigator has deponed that he has less than three years to retire, there is apprehension that he is likely to interfere with witnesses to give skewed testimony so that he is acquitted which will enable him to be paid his retirement benefits.

The families of the deceased are greatly impacted by the loss of the deceased and the release of the accused on bail would be prejudicial to them.

Furthermore, the three key prosecution witnesses have variously received threats and intimidation from persons suspected to be proxies of the accused and they communicated the same to the lead investigator that they are vulnerable witnesses. These witnesses remain highly apprehensive of their fate should the applicants be released on bail.

If the applicants are released on bail before the prosecution secures the evidence of the prosecution witnesses there is a high likelihood that these witnesses will be intimidated in view of the fact that the applicants have served in Muthaiga area for several years.

Additionally, the applicants being police officers are capable of interfering and intimidating witnesses; since they have the technical knowledge and facilities such as tracking devices which they may use to track the witnesses. Since the applicants have been served with committal bundles and having now become aware of the overwhelming and irrefutable evidence that points to the guilt of the applicants, they may be tempted to flee from the jurisdiction of the court.

Furthermore, the applicants being police officers and since they are based in the vicinity where the incident occurred, they are likely to come into contact with the witnesses who are based in the same area thus raising tensions and fear among the witnesses and the community. The life of the 2nd applicant may be endangered should he be continually exposed to the enraged community. After being taken to court the tension in the community has been high with a lot of animosity towards the police. This was exhibited on Monday 4th May 2020 when irate members of the public assembled and charged protest from Mathare slums to Muthaiga police station**.**

The investigator also deposed that:

> "*THAT we submit to this Honourable court does find that there are compelling reasons as to why the accused person should not be released on bail or bond until the evidence of the three key yet vulnerable prosecution witnesses are heard by this Honourable court after which the court may review the Bail and Bond Application*."

The submissions of counsel for the Republic

Ms Sarah Ogweno, counsel for the Respondent has filed written submissions in opposition to the application. She has advanced two grounds in opposition to that application. First, she has submitted that there is real apprehension that the applicants might interfere with witnesses. She cited the decision of this court (Lesiit, J as she then was) in Republic v Frederick Ole Leliman & 4 others (2019) e-KLR, in which that court observed in respect of the public interest and the compromise of the criminal justice system, that interference with the case may take many forms among them, influencing or compromising or inducing or tarrying a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. That court also pointed out that such interference may take place at any stage of the proceedings including immediately on commission of the offence, during investigations and during trial and can be committed by any person including the accused, witnesses or other persons.

The second ground advanced by counsel is that the presence of the accused is likely to disturb public order. In this regard, counsel cited Republic v Kelvin Murithi Muthuri & 2 others (2019) e-KLR, in which this court (Gikonyo, J) observed that there was a likelihood of harm being occasioned by the general public on the accused. That court then found the likelihood of harm among other reasons to be a compelling reason for denying bail.

She therefore urged the court to reject the application of the applicants.

Issue for determination.

I have considered the affidavits of the parties, their submissions and the authorities cited in the light of the applicable law. As a result, I find the following to be the issues for determination.

1. Whether the applicants are a danger to public order and whether their release on bail will endanger their safety.

2. Whether the applicants are likely to interfere with witnesses.

Issue 1

I find as credible that following the death of the deceased after the applicants were taken to court there was tension in the community which was high with a lot of animosity towards the police; which exhibited itself on Monday 4th May 2020 when irate members of the public assembled and charged a protest from the heavily populated Mathare slums to Muthaiga police station. This was in response to the killing of the deceased. Counsel for the applicant has deposed that the said tension has gone down as there is no report of any similar incident to the police since then. I find that the deposition of counsel is not credible in the light of the underlying animosity towards the police.

In the light of the foregoing I find that the release of the accused on bail will endanger public order and their safety of the accused will also be in danger. Their release on bail will rekindle and act as a catalyst to the existing animosity and this will disturb public order. This is more so given the credible deposition that both accused have served for a long time at Muthaiga police station. The 2nd accused has served in that police station for over 20 years.

In this regard, I find as persuasive Republic v Kelvin Murithi Muthuri & 2 others, supra, in which the accused was denied bail after finding that that there was a likelihood of harm being occasioned by the general public on the accused.

In the instant application, I find that there is evidentiary basis that supports the finding that the accused are a danger to public order and that their safety will also be in danger.

I find that the authorities cited by counsel for the accused namely Republic v Naftali Chege & 2 Others, is distinguishable in that in that case bail appears to have been rejected on the basis that the accused therein was a police officer; whereas in the instant application the basis for

the opposition to the release on bail is that both accused are a danger to public order and their safety is also in danger. I hereby reject the contention of the Respondent that the mere fact that the accused are police officers without more is a ground for denying bail. An accused police officer or any other accused has to enjoy his rights to be released on bail unless there are compelling reasons to deny him bail. In the eyes of the law the status of an accused is irrelevant; for what is relevant is whether there are compelling reasons to deny an accused bail.

Counsel for the applicants has submitted that the family of the victims has not filed any affidavit in opposition to the release of the accused on bail. The short answer to this is that hearsay evidence of the investigator in an application of this nature is admissible. I therefore reject this submission for lacking in merit.

Furthermore, I find no merit in the deposition of the investigator that there are three key yet vulnerable prosecution witnesses whose evidence needs to be taken by the court after which the court may review the bail and bond application; for if that was the position, the prosecution should have sought the assistance of the Witness Protection Agency to have them protected**.**

Issue 2

Furthermore, I find as credible the deposition of the Respondent that three key prosecution witnesses have variously received threats and intimidation from persons suspected to be proxies of the accused and they communicated the same to the lead investigator that they are vulnerable witnesses. I find that this is sufficient evidentiary basis in finding the accused if released on bail; they are likely to interfere with the witnesses. The contention by counsel for the accused that there is no evidentiary basis lacks merit I hereby reject it.

Furthermore, I find that there are highly objectionable contents of the Respondent's affidavit when one bears in mind that an affidavit should only be deposed to matters of fact and not law. It also should not be in the form of submissions for that is the role of counsel for the prosecution. Additionally, the deponent should not depose to the conclusion that there is overwhelming and irrefutable evidence that points to the guilt of the accused; because this is a matter for the court to find and not the investigator. In other words, the finding of guilt or innocence is within the province of the court and not the investigator.

In the premises, I find that the accused pose a danger to the public order and to themselves if released on bail; in that their safety will also be in danger if they are released on bail. I further find that they are likely to interfere with witnesses if released bail.

I therefore find that these are compelling reasons within the meaning of article 49 (1) (h) of the Constitution to deny them bail.

The application of the applicants fails and is hereby dismissed in its entirety.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Quintus court assistant

Mr. Owang and Mr. Karoki for the applicants

Ms Ogweno for the Respondent.