



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. E043 OF 2021**

**DOMINIC INZIANI.....APPLICANT/ACCUSED**

**VERSES**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Dominic Inziani** the Applicant (Accused) approached this court through a Notice of Motion dated 13<sup>th</sup> July, 2021 seeking Bond and/or Bail pending trial. The accused prays to be released on such reasonable bond and/or bail terms. The application which is brought under the provisions of **Article 49 (1) (h)** of the Constitution is premised on the grounds that: The accused has a right to bail; he is not a flight risk as he has a fixed known place of abode in Kawangware within Nairobi and hails from Kakamega which is within the court's jurisdiction; he has no passport and as such has no chance of leaving the country; he is a father of two minors, one aged six (6) years while the other is one is aged three (3) years and he is the sole bread winner as his wife is a housewife.

2. That this is the first time he is before court for a criminal offence and as such he has not been granted bail previously and thus has no record of absconding. That there is no likelihood of interfering with witnesses and there are no compelling reasons to deny him bail.

3. The applicant swore an affidavit in support of the application, he reiterates the grounds on the face of the application and deposes that his family continues to suffer following his incarceration. That he used to do menial jobs at Kawangware to support them but his family currently depends on friends. That denying him bail is akin to denying his young family his guidance and provision. That he has been advised of the consequences of jumping bail and assures court that he will not interfere with witnesses.

4. The State through No.88931 PC Mohamed Baya the Investigating Officer, opposed the application. He deposed that the applicant did not mention in his statement under inquiry that he has a young family. That the applicant married his deceased second wife in November, 2020 and they were not blessed with any children. That the applicant's first wife relocated from Kawangware to an unknown place after he was arrested, as such due to the changed place of residence the investigating officer will not locate him if released on bond. That the applicant stated that he was a pastor at Green Yellow Church at Kawangware and Mukuru slums. And having given contradictory information about himself it was unlikely that he would be traced if granted bond. That his sister is the one who traced him at Kangemi and sought assistance of members of public who arrested him and handed him over to the police, and as a result if he is released on bond before that particular witness testifies he will intimidate her.

5. That the fact that he fled from the scene in Mukuru Kayaba after committing the crime illustrates that he was a flight risk. That there is strong and irrefutable evidence of eye witnesses proving his guilt.

6. The prosecution contends that the right to bail is not absolute and the discretion should be exercised judiciously under the Court's discretion. It attached the statement of inquiry from the police file. In the alleged statement the accused stated that he was a pastor at Green Yellow Cross Church, his family lives in Kawangware and that he hails from Kakamega.

7. The applicant filed a supplementary affidavit in response and stated that he is of Luhya descent and does not hold a passport thus having zero chances of leaving the jurisdiction of the court. That he has a permanent place of abode within his ancestral home.

8. The applicant admits that his first wife relocated from the earlier place to a cheaper residence within Kawangware. That the fact that she relocated to a different and unknown house is not a compelling reason as she is not under a trial or on the run. He undertook to constantly remind the Investigating Officer of his whereabouts. That the fact that he exercised his right of silence under **Article 49(1)(b)** of the Constitution by not divulging information about his family should not be interpreted to be a compelling reason to deny him bail.

9. That he is a pastor as alleged but he similarly engages in men jobs to fend for his family and is not salaried by the church. That there is no contradictory information. That there were no warrants of arrest or orders issued against him when the deceased died. That he was arrested at a public place hence it is unfair and illogical to insist that he had escaped arrest. That if he intended to interfere with witnesses he would have done this before the arrest; and that the witnesses may be put under witness protection but the unfounded fear of the state is not a reason to deny him bail.

10. The accused is charged with murder contrary to **Section 203** as read with **Section 204** of the Penal code. The particulars indicate that on the 22<sup>nd</sup> April, 2021 at Mukuru Kayaba slum at Industrial Area, he murdered Maureen Khati. **Article 49(1)(h)** of the Constitution of Kenya provides that:

***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.***

11. The Constitution does not define the term “Compelling reasons”. But, generally a compelling argument would be something that is in accordance with the fact or some reality. In the case of **Republic -vs- Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009** the 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.”***

12. In the case of **Republic -vs- Francis Kimathi [2017] eKLR**, the court held that :

***“... There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Except, however, compelling reason should be a reason or reasons which is rousing, strong, interests, attention, and brings conviction upon the court that the accused person should be denied bail. Flimsy reasons will not therefore do. Therefore, the standard is high for it draws from the constitutional philosophy that any restriction of rights and freedoms of persons must be sufficiently justified given the robust Bill of rights enshrined in the Constitution.***

13. The Bail and Bond Policy Guidelines provides thus, in regard to compelling reasons:

***“(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:***

- a. That 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.”***

14. The argument of the prosecution is that the applicant has no known place of abode and might not be traced once released on bail. This is on the ground that the accused’s first wife relocated from Kawangware to an unknown place. The accused on the other hand indicates in his affidavit that he resides in Kawangware and also hails from Kakamega. An accused person is presumed innocent until proven guilty, therefore, such a person’s liberty should not be deprived over flimsy reasons. The deprivation should be as a result of cogent reasons and in accordance to the principles known in law. In cases where the prosecution is just apprehensive that the individual may not turn up for trial, then, conditions may be set to ensure that he complies. Mostly, the bond is executed by the person with surety in that regard.

15. In the case of **Paul Muli Kikosi -vs- Republic [2019] eKLR** the court was placed with similar grounds of opposition to the accused person’s release on bond on the allegation that the applicant has no job, has no known place of abode and his relatives are unknown, **Odunga J.** held:

***“ ...that to base a decision denying bail to a person based purely on those grounds may well be termed discriminatory based on the status of the person. Whereas the fact that an accused’s place of abode is unknown and has no permanent job and has no relatives are factors that factor may together with others be taken into consideration, I do not understand the law to be that those who have no known source of income, place of abode or relatives are not entitled to bail pending trial. That kind of reasoning in my view would be clearly discriminatory yet the law presumes that all accused persons are innocent until proven otherwise. To my mind it is for that reason that the Court is given discretion to impose reasonable conditions for the grant of bail rather than to***

***deny the accused bail.”***

16. The purpose of bail is to ensure the accused person’s attendance during trial. The State has alleged that [the applicant is](#) a flight risk. That he fled from the scene after committing the offence. However, the accused has been in custody since that time and there is no evidence of an [attempt to](#) flee from custody to defeat trial. It has been stated now and again that mere allegations or strong suspicion does not meet the threshold, the reasons must be compelling. The accused reiterated that there were no orders preventing his movement nor had he fled or evaded a warrant of arrest issued against him. He was arrested in a public place.

The depositions are persuasive since the prosecution have not established any attempts to defeat his arrest or to escape when they came looking for him. The court must desist from making conclusions on guilt of the accused before trial and conviction. His conduct during arrest must be seen in the light of the fact that he was a free man who had not been proven guilty.

17. The prosecution also complains that the applicant may interfere with a witness, his sister in law, who led members of public to arrest him, but the alleged attempts to intimidate, interfere with or compromise the witness have not been materially shown, therefore the allegation remains mere speculation.

18. In the case of ***Republic -vs- Dwight Sagaray & 4 others (2013) eKLR*** when faced by a similar scenario the court had this to state:

***“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others..., at least some facts must be placed before court otherwise it is asking the court to speculate.”***

19. The prosecution have also stated that there is strong evidence that would prove the applicant’s guilt. However, the strength of the case cannot prevent the court from granting an accused person bond during trial .The accused has a right to fair trial and to be adjudged innocent until the case against him is tested.

20. In the case of ***Republic vs. Danson Mgunya & Another [2010] eKLR***, it was held that:

***“...criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence.”***

21. From the foregoing, I find this not being a case where I should deny the applicant bail. Therefore, I grant the applicant/ accused bond on the following terms:

(a) *To execute bond of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) with a surety in a similar sum;*

(b) *He is deterred from communicating directly or indirectly with Susan, the sister to the deceased, until she testifies.*

22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

*Court Assistant – Mutai*

*ODPP – Ms. Maina*

*Applicant/Accused*

*Mr. Gichuki holding brief for Waweru for the Accused.*