



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. E037 OF 2020

REPUBLIC .....PROSECUTOR

VERSES

BERNARD JAKAIT.....APPLICANT/ ACCUSED

RULING

1. **Benard Jakait**, the Accused (Applicant) is charged with the offence of murder contrary to the provisions of **Section 203** as read with **Section 204** of the Penal Code.

Particulars being that on 5<sup>th</sup> May, 2021 at Mathare 3B area in Starehe Sub-County within Nairobi County murdered **Kelvin Omondi** alias **Foke**. He seeks to be released on bail. It is urged that there are no compelling reasons to deny him his constitutional right to bail.

2. The application is opposed by the State/Prosecution on the grounds that the accused hails from Busia County and that he may disappear to Uganda. That the accused does not have a fixed place of abode and is not in gainful employment. That the nature of business the accused engages in is not known, and the court has also not been informed of his contact person. Further that the accused was subjected to mob justice during his arrest and therefore his security is at risk. The prosecution contends that the Constitutional right to bail is limited.

3. Mrs. Lichuma, learned Counsel for the applicant filed a further affidavit where she deposed that the accused is innocent and is a law-abiding citizen. That he does not have a previous record and that they are not aware of any past or present danger to his safety and that the police have a duty to guarantee his security like any other citizen until he is proven guilty. That it is discriminative to urge that citizens in border towns cannot be granted bond.

4. Counsel also submitted that the accused is not aware of any warrant of arrest against him; he is a hardworking business man and has been in custody since May 2021; the facts stated by the prosecution are in dispute and will be part of evidence; and, that the court cannot allow the argument that there was mob justice during arrest. That the applicant is free to live anywhere; he used to live in Huruma and the fact that he has no fixed place of abode in Nairobi does not mean that he has no place to stay.

5. The application is brought pursuant to **Article 49(1)(h)** of the Constitution of Kenya that provides thus:

***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.***

6. The term '**compelling reason**' is not defined in the Constitution or the Criminal Procedure Code (CPC). In the case of **Republic -vs- Victor Oricho Ochwal [2021] eKLR** This Court held that compelling reasons that would call upon the court to ensure the accused person is incarcerated during trial are not provided for in the Constitution but they have been considered in case law and the Bail and Bond Policy Guidelines. It was noted that these reasons vary according to circumstances of each case.

7. Therefore, compelling reasons vary according to the circumstances of each case but the general rule is that they should be reasons which are strong and which bring conviction upon the court that the accused should be denied bail.

8. In **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.*

9. It is the allegation of the prosecution that compelling reasons exist requiring the applicant to be incarcerated pending trial therefore the burden of proof is on It.

**In the case of the Republic -vs- Danson Mgunya & Another [2010] eKLR Ibrahim J. (As he then was) having adopted the reasoning in M. Lunguzi -vs- Republic CMSA Appeal No. 4/995 stated as follows:**

***“In my judgment, the practice should never be to require the State to prove to the satisfaction of the Court that in the circumstances of the case the interest of justice requires the accused to be deprived of his right to be released from detention. The burden should be on the State and not the accused. He who alleges must prove. That is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is up to the State to prove when the Court should make such an order...”***

10. The court was of the view and rightly so that the liberty of an accused person should only be limited where there are compelling reasons not to be released and it is the duty of the State to demonstrate the same, and even then, each case must be decided on its own circumstances, touch and context.

11. When it comes to exercising the discretionary power to grant or deny bail which as I have argued is on a case to case basis, the principle that must be borne in mind is that the key consideration is the availability of the accused during trial. Following this principle, this court had an input of the Probation Officer who carried out a social enquiry. Upon being interviewed, the mother of the victim, a born-again Christian, did not have any issue with the applicant being released on bond. However, the local administrator at his home described him as a law-abiding citizen but was fearful that since he has relatives in Uganda, there was a possibility of absconding. The Probation Officer was also apprehensive that since the applicant knew witnesses he may not interfere with them, but his security was in jeopardy.

12. The most important consideration is therefore, whether the applicant will turn up for trial if released on bail? The applicant lived in a rental house in Umoja III with his family that comprised of a wife and two children who have since relocated to her maiden home. According to his landlord who was however not disclosed, the applicant possessed two identity cards, a Kenyan and Ugandan one which suggested that he was likely to abscond, these allegations must be supported by evidence that was lacking.

13. In the case of **Republic –vs- Dwight Saragay & Others** the court stated that:

***An accused person is presumed innocent until proven guilty, his/her liberty should be weighed against the allegations of the possibility to evade trial. In granting bail, the court gives conditions that would secure the attendance of the accused during trial. The accused comes from a border town hence the argument that there is eminent risk that he exits the country to frustrate the trial. That ground, however, should have been proved. But, the prosecution has not established this ground.***

14. It is alleged that the accused’s security would be at risk if released. The enquiry conducted established that the applicant knows witnesses but there is no possibility of him interfering with them as the community is hostile to him. Therefore, he should live at Musemwa Village, his fixed place of abode, but not where he can be spotted by members of Mathare 3 D. These however, remain mere allegations meant to intimidate the applicant. Declining to release an accused person following such allegations would undermine the objective of the proper functioning of the criminal justice system.

15. The upshot of the above is that, I grant the applicant/ accused bond of Kenya shillings Eight Hundred Thousand (Ksh.800,000/-) with two(2) sureties in a like sum. Upon being released on bond he should not interact with witnesses in the matter.

16. 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*

*Applicant/Accused*

*Mr. Lichuma for Accused*

*Ms. Ogweno - ODPP*