



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO. E021 OF 2021

REPUBLIC.....ODPP

-VERSUS-

SIMON MURAGE MWANGI.....ACCUSED

RULING

1. The accused is charged of *Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya.*
2. Particulars being that on 27/08/2021 at Kagema Village, Ngano Location in Gathanji Sub-County within Nyandarua County killed Achibon Kariuki Kang'atu.
3. When matter came for plea, the accused pleaded not guilty and thereafter his advocate sought accused to be released on bail/bond pending trial on 10th November, 2021.
4. The court ordered for Investigating Officer to file affidavit on situation of the matter to indicate whether accused is likely to interfere with witness or might be a flight risk. Plus, also whether his life could be in danger in event he is released on bond/bail.
5. By 11th November, 2021 there was no report (PBR) as ordered nor Investigating Officer's affidavit. Court directed the bundle of statements and documentary exhibits copies be furnished to court but by 29th November, 2021, same was not furnished to court. Thus court has to determine the bail/bond application on scanty facts on record.
6. Via accused's Advocate it was submitted that he is not a flight risk and he is not going to interfere with witnesses.
7. There is no gainsaying that bail is a constitutional right. Article 49(1)(h) of the Constitution is explicit that, unless there is some compelling reason, an accused person, be he a citizen or foreigner, ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. It 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.”
8. Moreover, by dint of Article 50(2) of the Constitution, every accused person is entitled to the presumption of innocence. Hence, in the Bail and Bond Policy Guidelines, it is recommended that:
9. The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.
10. Accordingly, Section 123A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, stipulates that:

(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 fulfilment 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.

[13] And, in the Bail and Bond Policy Guidelines, it is restated as a general guideline in Paragraph 4.9 that:

“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”

[14] The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

[a] The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

[b] The strength of the prosecution case.

[c] The character and antecedents of the accused person.

[d] The failure of the accused person to observe bail or bond terms.

[e] The likelihood of interfering with witnesses.

[f] The need to protect the victim or victims of the crime.

[g] The relationship between the accused person and the potential witnesses.

[h] The best interest of child offenders.

[i] The accused person is a flight risk.

[j] Whether the accused person is gainfully employed.

[k] Public order, peace and security.

[l] Protection of the accused persons.

11. Thus under **Article 49 of Constitution of Kenya** bond/bail pending trial is an accused person's right, except where the Prosecution establishes availability of compelling reasons to undermine that right.

12. None has been preferred by the prosecution. Thus the court finds apt to grant Applicant/Accused bail/bond subject to confirmation of whether there is witness who needs protection and conditions to be imposed thereof.

13. The terms and conditions to be set out during the ruling date.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.

CHARLES KARIUKI

JUDGE