



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HCCR NO. 18 OF 2021

REPUBLIC.....APPLICANT

VERSUS

JOSEPH MOGAKA OGECHI.....1ST RESPONDENT

CAYUS MAGENA OGECHI.....2ND RESPONDENT

RULING ON BAIL

1. By an information dated the 1st July 2021 the 1st and 2nd Respondent were charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The respondents pleaded not guilty and the court granted each bond terms of Kshs. 500,000/- with one surety of like amount.

2. On the 15th July 2021 the prosecution filed a Notice of Motion under Article 49 (h) of the Constitution seeking orders that the Court reviews its earlier orders admitting the respondents to bond and to substitute the same with an order suspending the bond until the hearing and determination of the matter.

3. The reasons advanced by the prosecution in an affidavit sworn by No. 236629 CI George Ochieng are as follows; that the security of **Concepta Nyarangi Ogechi & Mary Colleta Moraa Ogechi** being victims as well as mother and sister of the respondents will be at risk/danger if the respondent get released on bond. That the respondents and the victims live in the same compound hence their further apprehension of danger or risk to their lives. That the respondent had earlier on threatened to eject the victims from parcel land no. West Kitutu/ Bogusero 1587 (parcel no. 1587). That the victims are the key witnesses in this case and fear for their lives as prior to the death of the deceased they were threatened and they had to watch over each other’s backs and ensured that they are home after the activities of the day.

4. The application was opposed by the respondents vide a replying affidavit dated the 20th September 2021 in which they aver as follows that; that there is no OB to show that the victims reported the alleged threat. That they have never threatened to eject their parents from parcel no. 1587. They have a right to bail/ bond under Article 49(1) (h) of the Constitution. That they have never had the intentions of eliminating the victims as well as the deceased and that there is no material threat to the victims’ lives, as no evidence has been produced to prove the assertions. That there are no compelling reasons to deny the respondents bail as there is no evidence adduced to prove the same. That if the prosecution feels that the lives of their witnesses are at risk they have the right to place the witnesses under witness protection in accordance with the **Witness Protection Act 2006**.

5. The application was canvassed by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant has demonstrated compelling reasons to warrant the review of the court’s order of granting bond to the accused persons.

6. I do agree that the right to bail and bond is a Constitutional right. Article 49 (h) states that an arrested person has the right to be released on bond or bail on reasonable conditions pending the charge or trial, unless there are compelling reasons not to be released.

7. **Section 123A of the Criminal Procedure Code** highlights some of the essential factors to be considered by courts when arriving at its decision on whether or not bail should be granted. It provides as follows:

“(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.”

8. The main ground raised by the prosecution for the denial of bail to the accused persons are that the victims have been threatened by the accused persons and that they fear that their lives are at risk. The 2 key witnesses are said to be the mother and sister of the accused persons.

9. The offence of murder is a serious offence. I do acknowledge that an accused is presumed innocent until he or she is proved guilty. At the same time as a court I have to balance the rights of the victim and the current circumstances now that there are all family members.

10. In the case of **Republic v David Ochieng Ajwang Alias Daudi & 11 others (2013) eKLR** Sitati, J. pronounced herself on this issue as follows:

"In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety."

11. The 2 witnesses in this case come from the same homestead as the accused persons thus this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the death of the deceased person is a real possibility. In my view this is a compelling reason for the court to review its order granting the accused persons. I therefore suspend the bond terms that were given to the accused persons.

12. On the issue raised that the prosecution can institute witness protection. Indeed, that is an avenue open to the prosecution under the Witness Protection Act (see section 16 of the said Act). I would urge the prosecution to consider placing their witnesses under witness protection upon consulting with the relevant authorities who are charged with the task of ensuring the witnesses are placed in a safe place pending and during the hearing of the case.

DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF DECEMBER 2021

R.E. OUGO

JUDGE

In the presence of:

Applicants/Accuseds No. 1 & Present

Mr. Kaino for the State Absent

Kevin Court Assistant