



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 41 OF 2019

REPUBLICPROSECUTOR

VERSUS

MICHAEL MASHETIACCUSED

RULING ON BAIL

1. The Applicant, **MICHAEL MASHETI** faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which are that at unknown time between 26th and 28th day of December, 2018 at Pipeline in Embakasi submissions-county within Nairobi County murdered **PENTALINE ACHIENG ONGARO**.

2. He pleaded not guilty and by an application dated 20/8/2019 sought to be released on reasonable bond and or bail terms pending trial. The application was supported by his affidavit in which he deponed that he was a young man aged 33 years and the husband of the deceased, who had been left with a two and half year old son who was now living with his mother at Tindinyo village in Nandi County. It was deponed that before his arrest he was operating a food kiosk at Embakasi and lived in a rented house at Plot 10 House No. 614.

3. He stated that if granted bail he would either relocate to Nandi County or live at pipeline and was therefore not a flight risk. He stated that since the investigations were over, there was no likelihood of interference with witnesses.

4. The application was opposed by the state through a replying affidavit sworn by **PC BENEDICK MWENDA** who stated that the prosecution had strong and irrefutable evidence that pointed to the guilt of the applicant. It was contended that most of the crucial witnesses were neighbours of the accused whom he might intimate or interfere with. It was stated further that upon the commission of the offence the applicant boarded a bus from Nairobi to Kapsabet in attempt to evade arrest.

5. In compliance with the provision of Bail/Bond Policy Guidelines the Probation Officer filed probation report in which it was stated that the accused was at the time of his arrest operating a food kiosk at Pipeline Taj Mall area. He had earlier been married to one E.M with whom they had one child before separating with her to marry the deceased. He had earlier been released on cash bail of Kshs. 50,000/- which he honoured.

6. On the victim impact statement: it was stated that the deceased was a mother of two children one who was living with the accused parents. The family of the accused had intended to bury the body of the deceased but the request was turned down. His brother attended the burial and a sister had reached out to the family for amicable settlement. The family indicated that the accused had allegedly threatened and intimidated prosecution witnesses having allegedly bragged that he had money and therefore the family of the deceased could not do anything to him. They stated that if granted bail, the accused should not contact or go near them.

DETERMINATION

7. Bail is a constitutional right of any accused person under Article 49(1)(h) which can only be limited where there are compelling reasons advanced by the prosecution on a balance of probability to the satisfaction of the court. In this matter the only reasons advanced by the prosecution are that the accused is likely to interfere with witnesses who have not been named and that the accused had allegedly bragged to the deceased brother and uncle that he had money which he could use to manipulate the case. As submitted by the accused this allegation had not been supported by way of affidavit.

8. The principles that govern the grant of bail were stated by Chesoni J (*as he then was*) in **Nganga v Republic (1985) KLR 451** in the following terms:-

“1. the court in exercising its discretion to grant bail to an accused person under Section 123(1) or (3) of the Criminal Procedure

Code (Cap 75) should consider the following factors:-

a) In principle, because the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that-

(i) The accused will fail to turn up at his trial or to surrender to custody

(ii) The accused may commit further offences or

(iii) He will obstruct course of justice.

b) The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration the court must consider-

(i) The nature of the charge or offences and the seriousness of the punishment to be awarded if the applicant is found guilty.

(ii) The strength of the prosecution case.

(iii) The character and antecedents of the accused.

(iv) The likelihood of the accused interfering with prosecution witnesses.

9. On interference with witnesses Justice Korir in the case of **REPUBLIC v DWIGHT SAGARAY & OTHERS HIGH COURT CRIMINAL Case No.61 of 2012** stated as follows:-

“For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. I must show the court for example the existences 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.”

10. From the material placed before the court, I am not satisfied that the prosecution has advanced enough compelling reasons to enable the court deny the accused his constitutional right to bond and those advised can adequately mitigated by appropriate bail terms and conditions. Interference with witnesses is a criminal offence punishable in law.

11. Having found that there are no compelling reasons advanced and being alive to the nature of the charge the Applicant is facing, I hereby grant the accused bond on the following terms and conditions.

a) Bond of Kenya shillings five hundred thousand (Kshs.500,000/-) with one surety of similar amount

b) In the alternative cash bail of Kenya shillings two hundred thousand (200,000/-) with three sureties of similar amount

c) The accused shall not make any contact with any of the prosecution witnesses in whichever form unless done in the presence of the investigating officer.

d) The accused shall report to the investigating officer in this case once after every sixty (60) days the first such report being immediately upon being released from remand.

e) In default of any term, the bond shall stand cancelled without any further orders.

Dated, Signed and delivered at Nairobi this 29th day of January, 2020

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the state

Mr. Wamwayi for the accused

Karwitha court clerk

Accused person present