



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL CASE NO. 50 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMSON MORONGO NESCO.....ACCUSED**

**RULING**

1. The Applicant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 27<sup>th</sup> day of July 2019 at around 2100 hours at Mutumba Estate near Wilson Airport, within Nairobi County, jointly with others not before the court murdered **STEPHEN MKANGI MWASUGA**.

2. He pleaded not guilty to the charges and in compliance with the provisions of **Article 49 (1)(h)** the court directed the prosecution to file affidavits if any objecting to the accused being released on bond, with the same filing response thereto upon service. The court further directed the Probation Officer to prepare and file Pre-bail report.

3. The application was opposed through an affidavit sworn by **CPL. FRANKLINE OKISAI** in which it was deponed that the accused was assigned to guard the residence of former President Daniel Arap Moi and that the same was suspected to have murdered his colleague while at their place of deployment for guard duties at Watch Towers No. 2 Wilson Airport, where two AK 47 assault rifles issued to both got lost and were yet to be recovered. It was deponed that the accused knew the whereabouts of the said rifles and if released on bond he was likely to use them to commit further crimes.

4. It was deponed further that the accused was from a pastoralist's community and there was high likelihood of him absconding if released on bond, as he did not have fixed place of abode. It was further contended that based upon his training and combined with his conduct and given the fact that he had access to the two rifles, there were high likelihood of him interfering with witnesses.

5. In response to the said affidavit the Appellant deponed that he was facing two matters, one before this court for murder and one before the Chief Magistrate for loss of firearm, where he had been released on bond of Kshs.500,000/= with one surety. He deponed further that he had a fixed abode and close family association.

**PRE-BAIL REPORT**

6. In compliance with the Bail and Bond Policy Guidelines, the court called for Pre-bail report where the following were noted:-

a. The accused was employed as a GSU Officer in 2015 and was initially posted to Meru then Baragoi and finally Nairobi GSU Drive-Inn Camp. While in Baragoi he absconded duties for seven days and once assaulted a colleague after a disagreement during a drinking spree. He is married with two children.

b. On the home front it was stated that the family was in support of the Applicant who was currently on interdiction. It was stated that the same cannot flee from the process since he had no link with outside world.

c. On the Victim Impact Statement:- It was stated that the mother of the deceased was suffering from brain tumour. At the time of his death, the deceased had just married and was the bread winner of the family. The family contended that the accused was likely to be harmed by their colleagues within the force as the case elicited some degree of anger amongst his fellow GSU Officers and therefore keeping him in custody was for his benefit.

d. From his employer:- It was indicated that the Applicant had a lot of discipline issues within the force and had absconded duties several times. Before being arrested the Appellant is alleged to have threatened another officer with a knife for which he was facing disciplinary action. It was contended that the same if released on bond was likely to intimidate witnesses and that letting the accused out of bond will mark the end of the trial.

## **DETERMINATION**

7. Bond is now a constitutional right of every accused person which can only be limited under **Article 49 (1)(h)** of the **Constitution** where there exists compelling reasons to be advanced by the prosecution. In the case of **REPUBLIC v DAVID MUCHIRI MWANGI [2018] eKLR** I had this to say on compelling reasons:-

**“14. ... What constitutes compelling reasons are now well settled in the Kenya criminal jurisprudence which can be discerned through a ray of authorities one being REPUBLIC v MGUNYA & ANOTHER (supra):-**

- i. The nature of charge.**
- ii. The strength of the evidence which supports the charge.**
- iii. The gravity of the punishment in the event of conviction.**
- iv. The previous criminal record of the accused if any.**
- v. The probability that the accused may not surrender himself for trial.**
- vi. The likelihood of the accused interfering with witnesses or that he may suppress any evidence such as incriminating him.**
- vii. Likelihood of further charges being brought against the accused.**
- viii. The probability of a finding of guilt.**
- ix. Detention for the protection of the accused.**
- x. The necessity to procure a medical or social report pending the disposal of the case.**
- xi. Accused persons own safety, security and protection – REPUBLIC V KIMUNYA.**
- xii. If the accused person is likely to pose public danger by being released on bail.**
- xiii. If by releasing the accused on bail public confidence in the administration of justice will be dismissed.**
- xiv. The character antecedents, associations and community ties of the accused person.**

8. The purpose for bond still remains as captured by Odunga J. in **REPUBLIC v ROBERT ZIPPOR NZILU [2018] eKLR**, as follows:-

**“13. While agreeing with Justice Ibrahim Tanko Muhammad’s judgement, Justice Niki Tobi gave an illuminating and persuasive decision when he said:-**

**“The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria. The Working Party on bail procedure in Magistrate’s Courts in the United Kingdom said in paragraph 22 of the Report:-**

**‘There are a number of other considerations to be taken account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicators of the likelihood or otherwise of the defendant’s appearance.’**

**As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this is not invariably true. For instance, an accused charged with a capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital and non-capital offence is one way crystallised from the realisation that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to the qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This however does not apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison term of life.”**

16. In **KELLY KASES BUNJIKA v REPUBLIC** [2017] eKLR, Muriithi, J was of the view that:-

**“The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused ‘if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody’...Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court’s mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case.”**

17. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail as follows:-

The following procedures should apply to the bail hearing:

**(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.**

9. The question for the court to determine is whether the prosecution has placed before me compelling reasons to enable me deny the Applicant bond, put differently is whether the accused if so released on bond will fail to appear for his trial.

10. The only compelling reasons advanced by the prosecution is that the Applicant has no fixed abode since he cannot live at the GSU Camp and that he will interfere with witnesses should he be released on bond as confirmed through the pre-bail report. This was however contradicted by the defence which stated that upon release the same shall stay at his rural home and report to the nearest police station. It was further contended that the same had upon the same facts been released by the Chief Magistrate on bond of Kshs.500,000/=.

11. I have noted that the allegation on the possibility of the Applicant interfering with witnesses was not supported by evidence. The witnesses who are likely to be interfered with were not named by the prosecution. It was upon the prosecution to tender in evidence to convince the court that the accused was likely to interfere with witnesses as was stated by Justice Korir in **REPUBLIC v DWIGHT SAGARAY & 4 OTHERS**[2013] eKLR, High Court Criminal Case No. 61 of 2012 Milimani thus:-

**“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. 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 the court, otherwise it is asking the court to speculate.”**

12. From the submissions and the Pre-bail report I have noted that most of the intended witnesses are police officers who know the law and procedures and are not likely to be interfered with by the accused person easily who is now under interdiction.

13. As regards the accused place of abode, the mere fact that he is coming from a pastoralist community cannot in itself be a ground to deny him bail. I am therefore not satisfied that the prosecution has placed before the court compelling reasons to enable the court deny the Applicant the enjoyment of his constitutional right to bail.

14. The next issue for the court to determine is what constitutes reasonable terms:- I have taken note that the Applicant is charged with the offence of murder where one of the sentences available upon conviction is death and any bond terms granted must be those which will make it necessary for the same to attend court. The Applicant shall therefore be released on bond on the following terms and conditions:-

**a. A bond of Kenya shilling one million (Kshs.1,000,000/=) with one surety of similar amount.**

**b. Upon his release the same shall report to the Investigating Officer who shall escort him to the GSU Camp for the purpose**

of taking away his personal belongings from his house.

c. He shall thereafter report to his Area Chief immediately and thereafter after every 30 days and dates to be set by the said Area Chief who shall give a report of his attendance to the Deputy Registrar of this court.

d. He shall not go back to the GSU Camp where he used to live until final determination of this cause and shall not make any contact in whatever form either directly or indirectly with any of the prosecution witnesses.

**It is so ordered.**

**Dated, delivered and signed at Nairobi this 23<sup>rd</sup> day of January, 2020.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

Ms Gikonyo for the State

Mr. Ayuo for the accused

Accused present

Court Assistant: Karwitha