



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 18 OF 2019

REPUBLIC

VERSUS

PETER MWAURA MUGURE.....ACCUSED

RULING

According to article 49. (1) (h) of the Constitution, an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are reasons compelling enough to restrict his liberty.

The accused in this case invoked this provision of the Constitution in a motion dated 13 December 2019 but filed on 16 December 2019 and sought, in the main, to be released on bond or bail on such reasonable conditions that this court may deem fit to impose. He swore an affidavit in support of the motion to the effect that since 15 November 2019 until 6 December 2019 when he took his plea, he had been held at Nanyuki police station on suspicion of having murdered his wife and two children.

The accused also deposed that he is an officer of the rank of a major in the Kenya Air Force and that he is based at Nanyuki. He has a wife whom he has identified as CNK and two children. He swore further that his immediate family and his parents whom he has described as aged depend on him as their sole bread winner.

He undertook to comply with all the conditions that the court may impose if he is granted bail and, in particular he committed himself not to interfere with witness and to attend court whenever he will be so required.

The background of the accused's application is the information filed in this honourable court on 6 December 2019 according to which he is charged with three counts of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. In the first count, it is alleged that on 26 October 2019 at Laikipia airbase, in Nanyuki town within Laikipia County, jointly with others not before court, he murdered JSM. Except for the identities of the persons alleged to have been murdered, the particulars of the second and third counts are no different from those in the first count.

The accused pleaded to these charges on 10 January 2020 and not on 6 December 2019 as he has sworn in his affidavit.

Article 49. (1)(h) of the Constitution which, as noted, is the legal foundation of the accused's motion states as follows:

49. (1) An arrested person has the right—

(a)...

(b)...

(c)...

(d)...

(e)...

(f)...

(g)...

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2)...

Strictly speaking, an arrested or accused person need not move the court by any form of application for bail or bond before he is released pending indictment or trial. The presumption is that since bail or bond is a right to which an arrested person or an accused is entitled, he will be released after arrest or arraignment as matter of course unless, for some reason or reasons, the state objects to such release. It follows that where there is an objection to the release, the appropriate course is for the state to take the initiative and present the grounds which it believes constitute what the constitution describes as 'compelling reasons' for refusing bail or bond.

Be that as it may, the state filed a replying affidavit to the accused's motion opposing his release on bail or bond pending trial. The affidavit was sworn by corporal Reuben Mwaniki on 19 December 2019 and was filed in court on the following day.

In this affidavit, corporal Mwaniki described himself as a police officer attached to the Directorate of Criminal Investigations of the National Police Service and who, by virtue of his office in the police force, is charged with the investigations of the complaint against the accused.

Corporal Mwaniki swore that the deceased were murdered on 26 October 2019 soon after the accused had invited them at Laikipia airbase where has hitherto been based. He exhibited on his affidavit copies of records to demonstrate that the accused had on 22 October 2019 and 24 October 2019 respectively sent money to JS apparently to facilitate her and her children's travel from Nairobi where they lived to the accused's residence at the Laikipia airbase in Nanyuki.

The officer also exhibited phone records demonstrating that the deceased not only arrived in Nanyuki and that JS spent the night with him but also that the accused had picked the children and taken them to unknown place while Joyce Syombua was in the bathroom in his house.

Amongst other exhibits to the affidavit of corporal Mwaniki were statements of Peter Maina Mwangi and Collins Pamba recorded under caution. According to Mwangi the accused asked him to help him (the accused) kill Joyce Syombua, a request that Mwangi declined. Collins Pamba, on the other hand, gave a lengthy account of how he assisted the accused dispose of the bodies of the deceased. In this statement, Pamba is said to have written as follows:

I am the above-named Luhya male adult aged 21 years(sic). I have been working at Laikipia Air base as a sanitary orderly at the officers' mess since 5th November, 2018.

I remember very well on 25th October, 2019 at around 3:00 PM I left Nanyuki for Nairobi where I was to meet my girlfriend namely FN who lives and work (sic) at Lavington Estate Nairobi. I arrived at Nairobi at around 8.00PM and I found N waiting for me at tea room, After taking supper we booked a room at stage lodge where we spent the whole night.

On 26th October, 2019 I and N woke up at around 9: 00am. After our breakfast we visited several shops looking for a mobile phone to buy.

After around mid-day I had boarded a matatu back to Nanyuki and N had gone back to Lavington. While still in the matatu and before we had left Nairobi for Nanyuki I received a call from Major Mwaura of Laikipia airbase. He asked me where I live and I told him that I live in a rented room at Thingitu estate; he further told me that he had some work he wanted me to do for him at Laikipia Air base. He requested me to go there so that he could show me the job. The call went off. After some minutes he called me again through his mobile phone no. **. He asked me where I had reached and I told him I was on my way.***

After the matatu had left Nairobi and we were along Thika road (TR) Mwaura called me again and I did not receive his call. Instead I switched my phone off.

I arrived in Nanyuki at around 5:00PM and after arrival I switched on my phone and realised that Mwaura had attempted to call me severally. He immediately called me and asked me where exactly I was. I told him that I was on my way to Laikipia Airbase to see him for the work he had promised me. He told me that he was at Kirimara Springs Hotel in Nanyuki town. He requested me to board a boda boda to Kirimara and meet him. I immediately boarded a boda boda and within a short while I was outside the Kirimara Springs Hotel and I called him. He came out of the hotel and he found me with the boda boda operator. He gave me Kshs. 50/- which I paid the boda boda operator and he left. Mwaura took me behind the hotel and he told me that he had the work he wanted me to perform for him at the Laikipia air base. I asked him what the job was and he told me to go straight to the camp and he would come to show me the work. He gave me Kshs. 100 for me to pick a boda boda. I picked one immediately and proceeded for the air base. I arrived at the camp and went to the bar hall of the officers' mess where I stayed waiting for him. By then I noticed that my phone battery was running out of power. I took a battery at the bar, inserted in my phone and placed my battery on the one at the counter of the mess. I waited for major Mwaura for about 30 minutes and when he failed to turn up, I decided to go to my house at Thingitu and rest. Mwaura called me at around 6.30 PM when I had arrived at my house and he asked me where I was. I told him that I had waited for him at the mess and when he failed to come I went to my house.

I continued staying in my house until 10:16 pm when I saw a message on my phone to the effect that Mwaura tried to call me at about 7:19 pm but I was unavailable may be because of poor network coverage. I called Mwaura and he told me that he had tried to call me but could not reach me. He told me to go to the Laikipia Air Base for him to give me the job he wanted me to do. He told me to board a boda boda. I went out and looked for a boda boda which took me to the barrier gate of Laikipia Air Base. I then walked to the officers mess. I entered the bar hall but I did not find Mwaura. While at the bar hall one lady namely Akinyi who is a senior private in the air force came and asked me why I was at the mess by night and I told her that I had

come to pick my battery. I took my battery as Akinyi went back to guardroom. I then went to the house of major Mwaura which is on Block A situated behind the officer mess. As I proceeded to his house I found Mwaura at the parking bay. He was standing beside his car Reg. No. KCP 740 Subaru Impreza. I greeted him and he led me towards his room which is no. A3. On arrival he did not open room A3 but instead opened room no. A4 which is directly opposite his room no. A3. He entered the room, switched on the lights and ordered me to get in. Immediately I entered the room he closed it from inside. I stood near the bed and he proceeded towards the bathroom and also switched on the lights but appeared it had been destroyed. He switched on the flashlight of his phone. He told me to go closer, as I went closer, he also went inside the bathroom. As I entered on the door to the bathroom I saw some luggage that had been tied with a transparent gunny bag and had also been tied with a rope. Since the gunny bag was clear I saw it was a body of a human being. I saw that the body was lying facing downwards, I could see the hair was plaited, I could also see a trouser. It appeared like a girl child who was also in a white t-shirt and black trouser. The body was lying on the floor of the bathroom. As I looked on the bath tab still inside the bathroom, I saw another luggage which was also in a transparent gunny bag tied with a nylon rope. I also saw it was a body of another human being. I could see it was lying facing downwards and had a shaven head, had no trouser was in a t-shirt and appeared like a baby boy. I got shocked and Mwaura noted that I was. He told me not to be shocked. He told me that that is the job he had been calling me to perform. He told me never to tell anybody what I had seen and if he heard anything he would also kill me. He also assured me that he would make sure that I was recruited into the military during the national recruitment which was near. He told me to give him my academic certificates, for that purpose. He then told me to assist him carry the bodies to his vehicle parked at the parking bay.

We first carried the body of the boy and placed him in the boot of Mwaura's car Reg. No. KCP 740 F Subaru Impreza. We went back to the house and carried the body of the girl and placed it inside the boot of the said car. As we placed the bodies inside the boot of the car I realised the spare wheel had been removed and I had seen it outside Mwaura's room No. A3. After placing the girl's body inside the boot he again told me to follow him back to the house.

This time he opened his room A3 and we entered. He switched on the light, he ordered me to enter. As I entered the room he closed the door from inside and I moved some steps inside.

I also followed him and I immediately saw a body of an adult female behind the chairs. She was in a white trouser, red shirt, face was covered with a poncho. The body was not in a gunny bag. He ordered me to help him put the body in a gunny bag. We put the body in gunny bags. He picked another rope which was on the chairs and tied the body then were carried the body to the parking bay.

The body was heavy and we put it down severally before putting in the boot on top of the children.

When the bodies were in the boot Mwaura covered them with a boot mat and closed the boot. We then entered the vehicle. He drove the vehicle out of the camp as I sat on the front passenger seat. While on the way I asked Mwaura why he had decided to kill the three. He told me that she (sic) loved the lady and wanted to marry her as a second wife but the lady was not faithful and she only wanted Mwaura to spend more money on her with her children. He also told me that the lady had tried to interfere with Mwaura's first wife while the first wife had no problem with her.

Mwaura drove toward Thingitu estate in a dumpsite where so(sic) heaps of the soil are deposited by contractors. He parked the vehicle and put off the lights. He came out of the vehicle and told me to follow him. I followed him towards the heaps of soil. We arrived at a place where a shallow grave had been dug. He told me that is where he wanted us to dump the bodies. We went back to the car and opened the boot. We first carried the lady's body and took it inside the shallow grave. We went back to the vehicle and carried the boy and lastly we carried the girl and placed her on top. Mwaura went to his car and picked a spade from the rear seat. He came and started burying the bodies by returning the dug soil into the shallow grave. When he was tired I also assisted him. He finally picked the spade and did the final touches on the grave. We then went back to the car, he placed the spade inside the boot and he drove away. As we were going away he again warned me not to inform anybody of the incident. He also assured me of the military job and instructed me to take my academic certificates to him on Monday the 28th October 2019. He also instructed me to go to wash his house and vehicle the following day. He dropped me near Nayuki maternity nursing home. I went home and spent the remaining night in my house. He dropped me some minutes before 1:00 am.

On 27th October, 2019 I reported on duty at the officers' mess at around 9:00 am. As I was entering I saw major Mwaura, move out of the gate and called him using my mobile phone and asked him whether I was going to wash his car. He told me that he was going to the office and he would be back with the vehicle in a short while. By 10:00 am I had finished my official work and Mwaura had not come. At around 11:00 am Mwaura brought the vehicle and I washed it at the parking bay. I took the key to Mwaura's house room A3 and went in and washed it. The key had been left with the bar man. At around 1:00 pm, I had finished washing the house and as I took the keys back to the bar I found Mwaura in the bar hall taking lunch meal. I gave him the key and informed him that I had finished washing the house and the car. He gave me kshs. 4,000/- and reminded me not to fail to bring him my academic certificates the following day. I left and went to my house and I did not come back to the mess that day.

On 28th October, 2019 I reported on duty at 7:30 am in the morning. I continued with my work until around 1:00 pm. When I was informed by the bar man SPTE Mbindo that Major Mwaura was looking for me and that he had instructed him to tell me to take my documents to him. I went to Mwaura's room and found him. I gave him a photocopy of my national identity card, photocopy of my school leaving certificate and I told him I will give him my KCSE certificate later. After that I did not see Mwaura again but he had told me that he would go on pass leave. He would call me to go and look at the grave and see if people had interfered with it. I went to the grave twice. He had even sent me Kshs 1030/= through Mpesa to buy (sic) a spade which would assist me to mountain the grave. I bought a new spade at chieni supermarket in Nanyuki town at a cost of Kshs. 550/- which I paid using mpesa. I went with the spade to the grave and added soil on the grave.

I wish to state that sometimes during the month of November 2019 I saw some DCI officers come to Laikipia Air Base and I heard that they were investigating the disappearance of a lady and two kids who had come to visit major Mwaura and their

whereabouts were unknown.

The second time was on 15th November 2019 when I saw on television that major had been arrested. I did not tell anybody what I knew.

On 16th November, 2019 Saturday at around 2:00 pm I was at Laikipia Air Base officers' mess when I was approached by military and DCI officers who wanted to know what I knew concerning the disappearance of the lady and kids. I narrated the whole story to them and I led them to the grave where we had buried the bodies. The three bodies were retrieved and I was arrested and placed in police custody.

That is all I wish to state.

R.O.C CPL Mwaniki. Signed by: Collins Pamba.

Because of his supposed role in the murders, Collins Pamba was also charged with three counts of murder in High Court Criminal Case No. 19 of 2019. He is remanded separately at Kerugoya government prison.

In a further affidavit sworn on 21 January 2020 corporal Mwaniki swore that Pamba informed him, which information he believes to be true, that on 6 January 2020 the accused's sister identified as Nancy Mwaura Mugure visited Pamba at Kerugoya prison and told him that the accused wanted him to recant his statement ostensibly on the ground that it had been obtained by coercion, torture and intimidation.

When he visited the prison at Kerugoya to verify this information, corporal Mwaniki confirmed from the visitors' book that indeed Nancy Mugure had visited Collins Pamba on the material date and that she had described herself in the visitor's book as Pamba's friend. The officer exhibited an extract of the visitors' book and the statement of Collins Pamba to this effect.

Corporal Mwaniki also swore that although the accused was well aware of what he had done, he had made misrepresentations to the police at Nanyuki that his family was missing. According to Mwaniki, considering the position he holds in the army, the accused has a lot of influence and for this reason he is likely to interfere with witnesses. To prove this point, corporal Mwaniki swore that a psychiatrist had, without any good reason, declined to examine the accused to establish his mental status before he could be charged.

According to the post-mortem report, so corporal Mwaniki swore, the accused's wife had died as a result of being hit with a blunt object while the children died of strangulation. It is his opinion that the charges against the accused for their murder are not only grave but there is also overwhelming evidence to boot; there is, therefore, sufficient incentive for the accused to abscond should he be released on bail or bond.

So much for the background of the accused's application.

As expected, the submissions by both the learned counsel for the accused and the state centered on article 49(1)(h) of the Constitution. Mr Kimani Njuguna for the accused submitted, rightly so, that admission to bail or bond is not an absolute right and that each case must be considered on its own peculiar circumstances. Nevertheless, if bail has to be refused, there must be compelling reasons for such refusal; in the learned counsel's view, no such compelling reasons have been given by the state to deny the accused bail or bond. On the question of the alleged interference with witnesses, Mr. Kimani disputed the evidence exhibited on the affidavit of corporal Mwaniki urging that the extract of the visitor's book was neither stamped nor signed. Although the accused admitted that Nancy Mugure was his sister, he denied that his client ever sent her to visit Collins Pamba.

Mr. Peter Mailanyi, the learned counsel for the state, on the other hand, vehemently opposed the accused's bid to be released on bail. He largely reiterated the depositions in corporal Mwaniki's affidavit placing much emphasis on the gravity of the charges against the accused and the overwhelming evidence against him.

All that the state is bound to do at this stage, so he submitted, is to demonstrate on a balance of probabilities that compelling reasons against grant of bail exist; in his respectable view, the state had discharged this burden satisfactorily.

Now, the practice over the years, in fact centuries, has been that the proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial, and that bail should not be withheld merely as a punishment (**see Noordally versus Attorney General (1986) MR 204**). With the birth of the Constitution of Kenya 2010, the right to bail or bond in Kenya has been elevated to a constitutional right to which an arrested or an accused person is entitled though not absolutely. This right is encapsulated in article 49(1)(h) of the Constitution.

On its proper construction, the essence of this provision of the Constitution is that bail should be granted unless there are good reasons (read 'compelling reasons') not to do so. Liberty of the accused is the rule while his detention pending trial is the exception. It follows that whenever the court is called upon to consider this question, the right approach is not to ask whether bail should be granted but whether there are good reasons to refuse it. This explains why the practice of 'applying' for bail or bond is outdated and ought to have been buried with the 1964 Constitution.

Embedded in article 49(1)(h) is the tension between the rights of the individual and the wider public interest. The Constitution seeks to strike a balance between the two; it is in that spirit that the decision to grant or reject bail should not only be made but must be seen to be made. If, for instance, bail is granted, oblivious of this balance, there is the danger that the public will lose confidence in the administration of justice and possibly pave way for such ills as anarchy.

And so, the accused need not be granted bail if the court is satisfied that there are substantial grounds for believing that if released on bail or bond, the accused will either abscond, commit another offence or interfere with witnesses or, otherwise, obstruct the course of justice. Thus, even if, as counsel for the accused has submitted, the accused is prepared to comply with whatever conditions the court can impose in order to secure his freedom, bail or bond will still be refused if there are substantial grounds for believing that the risks of absconding, committing another offence, interfering with witnesses or otherwise obstructing justice still subsist.

The converse is true, if the conditions imposed will limit or reduce these risks then bail should be granted.

The severity of the sentence risked is matter to be taken into account but the risk of absconding on account of the severity of the potential sentence has to be assessed in the light of other relevant factors. Simply put, the severity of the sentence will be considered, not in isolation, but amongst other relevant factors.

Again, the seriousness of the offence is obviously a consideration to be weighed in the balance and not by itself a ground for refusing bail. It is not the intention of the Constitution that once a person is charged with what is acknowledged as a serious offence, he should automatically be refused bail.

Bearing this in mind, it is an irrefutable fact that it is almost natural that a person charged with a serious offence, facing a severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him; where there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail; but, as noted, they do not do so themselves, without more; they are factors relevant to the judgment whether, in all circumstances, it is necessary to deprive the applicant of his liberty; whether or not that is the conclusion reached, clear and explicit reasons should be given. (See **Hurnam versus The State of Mauritius (2005) UKPC 49**)

In considering such relevant factors as the gravity of the offence or the severity of the sentence, there is always the looming danger of the parties delving deep into the evidence whose strength can only be tested during and after the trial. The Court must of course guard against such danger and refuse to be swayed into an elaborate or detailed analysis or examination of the evidence.

The burden on the state is satisfy the court that it has a prima facie case for refusal of bail; it need not prove beyond reasonable doubt that the case against the accused is grave, or that there is overwhelming evidence against him or, otherwise, there are grounds against the grant of bail. Any of these things will be tested at the trial where the appropriate test of proof beyond reasonable doubt will be applied; it is for this very reason that this test cannot be held as the threshold in pretrial proceedings such as the present one.

It is apparent that in the present case the court has been given a glimpse of the evidence that the state will be mounting in the prosecution of its case against the accused. For reasons I have given I am conscious to treat this evidence with abundant caution; at the risk of repeating myself, I reiterate that this evidence has not been tested and proved to meet the necessary threshold of proof. For the same reason, the court need not attempt to make a detailed evaluation of the evidence though its nature may be a relevant consideration.

Still on the accused's case, it is not in dispute that he faces three counts of murder; there is no dispute and, as a matter of fact, his own counsel has admitted as much, that the charges are grave. The accused faces a potential death sentence if he was to be convicted on any of these counts. Thus, the gravity of the charges and the severity of the sentence that the accused is exposed to cannot be underestimated or, for our present purposes, ignored.

Of importance to note also is the allegation against the accused that he is likely to interfere with witnesses. This allegation was first raised in corporal Mwaniki's affidavit of 19 December 2019. At that time the allegation was merely based on the influence that the accused is perceived to hold thanks to his position in the army. Subsequently, and in particular, in corporal Mwaniki's further affidavit of 21 January 2020, it came to light that Mwaniki's fears may not have been far-fetched after all because it emerged that, if that affidavit is anything to go by, tangible attempts have been made not only to interfere with witnesses but also to obstruct the course of justice.

I come to this conclusion because the allegations that the accused's sister visited Collins Pamba in prison with instructions to recant his statement to the police have not been refuted. Neither the accused nor his sister swore any affidavit to controvert these factual allegations. In the absence of any sort of response from either the accused himself or his sister, it is reasonable for this court to proceed on the assumption that the depositions in Mwaniki's assumption are true. And with this sort of evidence, the state has demonstrated, to my satisfaction, that having made attempts to interfere with witnesses and obstruct the course of justice while in custody, the accused is bound to achieve much more in that direction if he granted bail or released on bond.

In short, considering the accused's conduct, I cannot think of any conditions that this honourable court can possibly mete out to limit or reduce the risk of the accused committing another offence, interfering with witnesses or otherwise obstructing the course of justice if he is released on bail.

The accused's untoward conduct would be sufficient by itself to deny him bail; however, it is worth noting that this conduct is not considered in isolation; it is only one among other factors to which reference has already been made.

In the ultimate, the safer option is to detain the accused rather than set him at large pending his trial. If I may borrow the language of the constitution, I am satisfied that the state has presented compelling reasons why the accused should not be released on bail or bond pending his trial. Bail or bond is refused. Orders accordingly.

Signed, dated and delivered in open court this 21st day of February 2020

Ngaah Jairus

JUDGE