REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 1 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

FRANKLIN MBITHI MUYANGA

SAMSON KATAKA OTAALO

BERNARD MAORE MANGÓNGÓ.....ACCUSED

RULING

1. The accused herein face the charge of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya for which a plea of not guilty was entered. The Particulars of the offence are that on 26th day of November, 2019 at Matuu Township in Yatta Sub County within Machakos County, they jointly murdered **Paul Kyoko Nzoka**.

2. The accused persons have applied that they be released on bond on reasonable terms pending the hearing of their case. According to the 1st accused, he is 30 years old married with a child aged a year and nine months. He averred that he is currently attached to Spinal Injury Hospital in Hurlingham, Nairobi and is the sole breadwinner of his family. He deposed that he was arrested on 3rd December, 2019 and has been in custody since then. It was his averment that since he is innocent he will attend all court sessions and is prepared to testify as to his innocence. He undertook to be faithful to the court if released on bond and expressed his willingness and readiness to abide by all the conditions that this court may impose against him as a condition for his release.

3. The 2nd accused on his part averred that he is a family man and the sole breadwinner of his family comprising of a wife and two children of tender years. He disclosed that he has a known aboard at Kithimani with deep roots in his community where he works for gain as a businessman thus does not pose a flight risk since his movements are easily discernible and traceable. According to him, he was arrested at Kithimani while running his usual errands and accused of the instant offence. He deposed that he is not known to the deceased's family or the deceased or any of the witnesses the prosecution intends to call thus there is no likelihood of him interfering with the said witnesses. he averred that he is desirous of having the matter concluded expeditiously, the truth revealed and the perpetrators brought to book. He disclosed that he is determined, committed, ready and more than willing to abide by the directions or terms that this Court may impose for his release.

4. The 3rd accused on his part averred that he is employed by the County Government of Machakos as a nurse at Ikombe Health Centre and was arrested on 3rd December, 2019 and subsequently charged with the present offence. He emphasised his innocence and disclosed that he is a father of two and the sole breadwinner of his family.

5. In opposing the application, it was averred that the accused persons, murdered the deceased by strangulation and have refused to disclose the whereabouts of the body claiming that they disposed of the same in the flooded River Athi. There was therefore an apprehension that their release will prejudice the ongoing efforts to find the deceased's body and the Court was urged to withhold their release for the time being. According to the wife of the deceased. She had been informed that the investigations were making progress in tracking the movements of the accused persons and that they needed 2 more months to enable them find the deceased's body.

6. According to the investigations officer, since the death of the deceased on 26th November, 2019 his body is yet to be found for the purposes of post mortem and burial. He was therefore apprehensive that the release of the accused persons is likely to interfere with the investigations since they are the only people who know where they disposed of the said body. It was further averred that the accused are likely to abscond from their area of residence and jurisdiction of the court and make it impossible to trace and apprehend them. It was averred that since the 1st accused is a Clinical Officer and in charge of Kissiki Dispensary, if released on bond he is likely to interfere with the evidence of the witnesses working in the same facility. It was contended that the community is still bitter and aggrieved by the death of the deceased and if released the lives of the accused are likely to be in danger since their security cannot be guaranteed at all times. The Court was urged not to release the accuse till after crucial witnesses have tendered their evidence.

7. Apart from the replying affidavits, Probation Reports were prepared and filed. According to the pre-bail report, the community from where the accused persons hail from have positive attitudes towards them. However, the family and the community of the deceased ate understandably bitter with the accused more particularly as the body of the deceased is yet to be found. They have not rules out the possibility of harming the accused persons if released. According to the family, the accused should be incarcerated until the body of the deceased is traced and buried. They also feared for their safety when attending the court proceedings.

8. I have considered the application, the affidavits in support thereof, the replying affidavit and the submissions made.

9. Article 49(1)(h) of the Constitution provides that:-

> ***An accused person has the right …***
>
> ***(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.***

10. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. See **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**. In that case the Court held that:

> **"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system… the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question… the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;**
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> > **"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."**
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> **In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."**

11. Gravity of the offence as a consideration was appreciated by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

> **"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."**

12. It is true that if found guilty the accused are liable to be sentenced to death. However, they are yet to be found guilty. Secondly, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it is no longer mandatory that those found guilty of murder must be sentenced to death.

13. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

> **"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-**
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> **(i) The nature of the charges;**
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> **(ii) The strength of the evidence which supports the charge;**
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> **(iii) The gravity of the punishment in the event of conviction;**
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> **(iv) The previous criminal record of the accused if any;**
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> **(v) The probability that the accused may not surrender himself for trial;**
>
> **(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
>
> **(vii) The likelihood of further charges being brought against the accused;**
>
> **(viii) The probability of guilty;**
>
> **(ix) Detention for the protection of the accused;**
>
> **(x) The necessity to procure medical or social report pending final disposal of the case.**

14. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> **"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."**

15. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail 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;***
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> ***(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;***
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> ***(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.***

16. In **Kelly Kases Bunjika vs. 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:***
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> ***a. That the accused person is likely to fail to attend court proceedings; or***
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> ***b. That the accused person is likely to commit, or abet the commission of, a serious offence; or***
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> ***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.***

18. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

> **"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."**

19. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution.

20. In this case the main reason why the release of the accused on bond is opposed is that the body of the deceased is yet to be recovered. It is therefore contended that if released on bail, the accused persons may forever conceal the said body. This argument presupposes that the accused persons are the one who committed the offence in question. To acceded to this argument would, in effect, amount to this court accepting that notion. However, that notion runs contrary to the constitutional principle of presumption of innocence. While the Court may on occasion decline to grant an accused person bail for some limited period pending the completion of the investigations, such restrictions to fundamental rights cannot be justified where what is sought is an indefinite period of incarceration such as in this case where the reason is that the body of the deceased has not been recovered. To do so, in my respectful view, amounts to presumption of guilt against the accused. In this case the accused persons have been in custody since mid December, 2019, some 3 and ½ months ago. There is no indication as to the progress made in the search of the deceased's body. In her affidavit which was sworn on 4th February, 2020, the deceased's wife, deposed that she was informed by the investigation officer that he needed two more months to find the body. That period has almost come to an end. Accordingly, that can no longer be a compelling reasons for denying bail.

21. The second reason is that the accused persons are likely to abscond if released on bond. However, there is no evidence adduced to show that the accused are a flight risk. Dealing with a similar matter, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** referred to the decision of **Ibrahim, J** (as he then was) in **Republic vs. Danson Mgunya & Another, (MSA) H.C. Cr. Case No. 26 of 2008,** where bail was granted and held that:

"It is my understanding that he did so because of the special circumstances in the said case. Apart from the fact that one was a chief and the other an Administration Police Officer, both accused persons were senior citizens, who were approaching retirement age. Secondly, they had continued working, uninterrupted, for 2½ years, between the time when the victim was killed, until they were arrested. During that period of time, the two did not run away, or move away from the jurisdiction of the courts. The court expressed itself thus;

> **'For now, the said facts and conduct do not tend to show the accused are the type of people to abscond. If they were worried by the possibility of being charged with murder, why did they not run away after the incident? Why continue with their lives and duties? To me, this shows that they have no fear of being charged or facing the same, and they are unlikely to run away.'"**

23. I am therefore not satisfied, based on the material placed before me that the accused are a flight risk. It must however be appreciated that there is always a risk that an accused may abscond in any matter. In fact, it is not unknown that even in minor offences, the accused persons sometime do abscond. Our Constitution has however taken a calculated risk of granting the right to be admitted bail to **all** accused persons save where there are compelling reasons shown to exist by the prosecution. It is therefore upon the prosecution to prove that the temptation for the accused to flee in a particular matter, based on convincing reasons is so high that it amounts to compelling reason. Those circumstances cannot however be based on mere fear and speculation and each case must be considered on its own peculiar circumstances since each person whether accused or even a convicted criminal has the right to dignity of the person. Therefore, the decision whether or not to admit the accused to bail depends on the circumstances prevailing at the time when the application is made and may be subject to review depending on whether there are changes in the circumstances which warrant such review.

23. As regards the issue whether the accused is likely to interfere with the witnesses, it is trite that where bond is opposed on the ground that the accused is likely to interfere with witnesses, there ought to be a basis for forming such a belief. The Court in granting bond does invariably impose as a condition a warning to the accused not to interfere with the prosecution of the case under the paid of cancellation of the bond.

24. While I appreciate that the offence with which the accused are charged may carry death penalty, the accused persons are however presumed innocent till proven guilty. I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & other High Court Criminal Case No. 61 of 2012** that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."**

25. It was submitted that since the family of the deceased are still bitter, the accused ought to be kept in custody in their own interests. I agree that where there is danger to the life and safety of the accused if so released, that may constitute a compelling reason. In this case however not all the accused persons hail from the locality of the deceased. Accordingly, that ground cannot be a blanket reason for their denial of bail. In my view that ground ought only to be resorted to in exceptional circumstances since the Courts ought not to readily deny an accused his constitutionally guaranteed rights merely because there is threat by some people to commit a crime if the accused is granted the said rights. It is the duty of the State to ensure that all persons enjoy their fundamental rights and this applies to both the victims and the accused persons. Dealing with public interest as a ground for denial of bail, in **Republic vs. Muneer Harron Ismail & 4 Others, H.C. Criminal Revision No. 51 of 2009**, **Warsame, J** (as he then was) stated as follows:

> **"In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public."**

26. In **Republic vs. Ahmad Abolafathi Mohamed & Another [2013] eKLR, Achode, J** observed:

> **"The respondents have a right to enjoy their fundamental rights and freedoms, but it is my humble view that Kenyans and aliens of good will also have a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life or limb, and without being placed in harm's way.**
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> **I have looked at other jurisdictions on the issue of public interest. In South Africa, Section 60(4) of the Criminal Procedure Act lists the grounds on which it would not be in the 'interests of justice' to grant an accused person bail. These are that the accused person, if released on bail, would:**
>
> **a. Endanger the safety of the public, or any person, or will commit a certain specified offence;**
>
> **b. Attempt to evade trial;**
>
> **c. Attempt to influence or intimidate witnesses or to conceal or destroy evidence;**
>
> **d. Undermine or jeopardize the objectives or the proper functioning of the criminal justice system, or,**

e. Where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security."

27.There was no material placed before me apart from bare allegations that the accused's release on bond is likely to jeopardise public interest.

28. It is also my view that even in cases where limitations contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. The Court is for example obliged to consider whether the invocation of the provisions of the ***Witness Protection Act*** where allegations of threats to the lives and safety of witnesses is the ground for denial of bail may be a less restrictive measure as opposed to denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to ***Thesaurus English Dictionary*** is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and griping evidence in order to amount to compelling reasons.

29. In the circumstances of this case, balancing the interests of the accused, the public, the victim and the complainant, I order that the accused be released on bond pending his trial in the following terms:

a. **The accused shall not leave the jurisdiction of this court without court's prior permission.**

b. **The accused shall be released on a bond of Kshs. 500,000.00 each with two sureties of the like sum. The said sureties to be approved by the Deputy Registrar of this Court.**

c. **The accused shall not threaten, harm or interfere with the case/witnesses and shall attend court without fail whenever required to do so. If there is credible evidence presented before this court of any attempts to either interfere with the case or the witnesses, actions which in themselves, if proved, amount to a commission of another criminal offence, the accused's bond shall stand cancelled and the accused shall be remanded in custody till the conclusion of his trial.**

d. **During the pendency of this case, or until further orders of the court, the accused shall appear for the mention of his case once every 30 (thirty) days and in default of any one appearance without justifiable cause, the bond shall stand cancelled and sureties called to account.**

30. Orders accordingly.

31. This ruling has been delivered pursuant to section 168 of the ***Criminal Procedure Code*** as read with Article 50 of the Constitution in the absence of the accused due to the prevailing restrictions occasioned by COVID 19 pandemic and particularly as the decision is in favour of the Accused.

Ruling read, signed and delivered in open court at Machakos 30th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Edna Ntabo for the State

Sadique for the Prison

CA Josephine