



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 24 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PC BECKAM OSORO ORWARU.....ACCUSED**

**RULING**

1. The Applicant is charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which are that on the night of 13<sup>th</sup> April 2020 at Mathare area four within Nairobi County murdered **REUBEN KARANI KIRIINYA**.
2. He pleaded not guilty to the said charges and by a Notice of Motion under certificate of urgency dated 8<sup>th</sup> May, 2020 sought to be granted bail pending hearing and determination of this cause. The application was supported by an affidavit sworn by the applicant in which it was stated, that his continued detention pending the trial would greatly undermine, devalue and contravene his constitutional right to be presumed innocent until the contrary is proven.
3. It was contended that the continued deprivation of his liberty and freedom of movement amounted to being punished before a finding of guilty was made and that he had undertaken to attend the trials without fail since his family resides in Kenya and he had no intention of relocating therefrom.
4. The application was opposed by the State and the family of the victim through replying affidavits. On behalf of the prosecution, it was deposed by **CPL. ROBERT NDUNGU** the Investigating Officer, that the applicant being a police officer was well trained in the use of reasonable force, safe use of guns and keeping public order and therefore his action on the fateful night indicated a premeditation on his part towards the deceased. It was stated that the accused being a police officer within the area where the crime was committed was likely to get into contact with the prosecution witnesses who are based in the same area.
5. It was the prosecution's contention that the release of the accused will disturb or undermine public order, peace and security as tension in the community was still very high and therefore pretrial detention was necessary. It was stated that there was a likelihood of the same intimidating the prosecution witnesses who knew how the deceased met his death. Further based on the possible sentence on conviction, there was real likelihood of the applicant absconding trial should he be released on bail.
6. The victim's family opposed the application through the affidavit of **JOAN WANJIRU MWANIKI** an aunt of the deceased in which she stated that on the fateful day the accused and his two colleagues were deployed to patrol the Mathare North area and the applicant later on left his colleagues and went to drink alcohol at Bachelors bar within the area and it is when he left the bar that he went to the nearby Kiosk where the deceased was and started whipping them and in the process shot the deceased person unprovoked.
7. She stated that the witnesses she had spoken with feared that the accused if released might take deliberate steps including threats and blackmail to enable them withdraw their testimony. It was stated that there had been attempts to interfere with investigations before the decision to charge the accused was reached since there had been an earlier recommendation for an inquest, which led to the family lodging a complaint with the office of ODPP.
8. She contended that since the accused had not been interdicted, upon his release the same will resume his duties in the area including patrolling the area which will intimidate witnesses. It was deposed further that the conduct of the accused after the incidence pointed to an officer on the run, in a mission to conceal his action.
9. This matter came for hearing during the COVID 19 Pandemic period and was heard by way of Skype. By the emergency created the court did not have the benefit of pre-bail report but took in the submissions of the Advocates for the State, the family of the deceased and the accused.

## SUBMISSIONS.

10. It was submitted by Mr. Omeke for the accused that bail was his constitutional right, only limited where there were compelling reasons. It was submitted that the applicant was still a serving police officer and that the offense was committed in line of his duties while enforcing the curfew regulations, it was submitted that the state had not provided compelling reasons as to why the accused should not be released on bond. It was contended that no names of the witnesses likely to be interfered with by the accused were given, and that the same was not a flight risk.

11. On behalf of the family Mr. Majimbo submitted that the accused was still in active service and if granted bail will have access to fire arms and other tools which he can use to threaten, eliminate or interfere with witnesses, reliance was placed on the case of **AHMED MOHAMMED OMAR & 7 OTHERS [2010] eKLR** where Ochieng J held that the applicants being AP officers with access to guns were likely to cause fear to the civilian witnesses. The case of **ALBERT NJIRU & 5 OTHERS [2013] eKLR** and **FREDRICK OLELENINA & 4 others [2016] eKLR** were submitted in support.

12. On behalf of the state Ms. Gichui submitted that if released on bond the accused was likely to interfere with prosecution witnesses making them fearful thereby damaging the case. It was contended that there was a lot of animosity towards the police in the area and the release of the accused would undermine public safety and order since the issue had been high lightened in media and tension was still high on the ground.

## DETERMINATION.

13. Bail and bond is a constitutional right of every accused person under the provisions of **Article 49 (1) (h)** of the **Constitution** which may only be limited where there are compelling reasons advanced by the prosecution to enable the court do so. What constitute compelling reasons have now been put to rest in Kenya through BAIL AND BOND POLICY GUIDELINES and through several judicial pronouncements as follows:-

*(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.*

14. In this matter the undisputed facts from the affidavit evidence are that the accused is a serving police officer who allegedly committed the offence while in the course of his duties as such and if and when released on bond, having not been interdicted as confirmed through his affidavit will resume his duties as such. I am therefore persuaded that his presence in the area is likely to intimidate prosecution witnesses. I have taken note of the fact as stated in the victim's family affidavit that the civilian witnesses might not feel safe in the presence of the accused person in the area.

15. I have further taken note of the fact that the victim's family had to lodge a complaint with the office of the DPP before the accused was finally charged, thereby confirming the likelihood of the accused interfering with the course of justice should he be released on bond. The fact that the offence was committed while enforcing curfew regulations is also a factor I have taken into account as his presence at the area will have an impact on his fellow officers.

16. I am therefore satisfied that the prosecution has placed before the court compelling reasons to enable me deny the accused his right to bail at this stage. The same shall be remanded in custody until the civilian witnesses who were with the deceased at the time of the alleged

shooting, together with the two police officers who were with the accused have testified. In this holding I find support in the cases submitted by the Advocate for the victim's family herein on the fears the presence of the accused is likely to have upon the witnesses and the Court of Appeal's decision in the case of **TITUS NGAMAU MUSILA KATITU VS. REPUBLIC [2020] eKLR** where the court talked of the 'blue code of silence' in respect of the police officers protecting one of their own.

17. The upshot of this ruling is that the application for bond is hereby dismissed at this stage.

**Signed Dated and Delivered At Nairobi this 28<sup>th</sup> Day of May 2020 through Microsoft Google Teams.**

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**J. WAKIAGA**

**JUDGE**

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**In the presence of:-**

*Ms Onunga for the state*

*Mr. Omeke for the accused*

*Mr. Majimbo for the family*

*Accused person present*

*Court Assistant: Karwitha*

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