



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE 32 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

CHARLES OMWOYO.....ACCUSED

RULING

1. The accused person was charged with the offence of murder contrary to **Section 203 as read with 204 of the Penal Code**. The particulars of the offence are that on the 30th of April, 2019, at 1200hrs at Soweto Estate Kibera Sub-county within Nairobi County murdered Irine Akello. He denied the charge.
2. By a Notice of Motion application filed on the 11th of June, 2020, the Applicant has approached this court seeking bail pending trial. The application was canvassed before me on 17th June, 2020. Counsel for the accused, Mr. Ondigi made oral submissions and subsequently filed written submissions on 17th June, 2020. In summary, he submitted that bail is a right of an accused in line with **Section 123 of the Criminal Procedure Code**. Further that the accused's presumption of innocence in line with **Article 50 (2) (a) of the Constitution** qualifies his right to bail. It was his submission that pretrial detention is unjust and risks dilution of the presumption of innocence and should therefore be avoided. He relied on the cases of **Danford Kabage Mwangi V R [2016] eKLR** and **R v Muneer Harron Ismail and Four (4) others V R [2010] eKLR**) to buttress this submission.
3. Mr. Ondigi also responded to the assertions made in the affidavit sworn by the Investigating Officer, IP Asupo filed 16th June, 2020 by submitting that the accused was not a flight risk. He cited the fact that the Applicant had participated in the burial of his wife, worked as a cook in South C from where he was arrested, lived in Kibera and had held one mobile phone all the time. As such, should the police have needed him he was readily reachable. As such, the assertion that he was a fugitive and hence likely to abscond could not be substantiated and could not be relied upon to deny the accused bail.
4. Finally, counsel submitted that the accused faces no incentive to abscond court. This was because the death sentence is no longer the only applicable penalty for the offence of murder. Further, that the accused had committed to attend court whenever required to do so. He further made a plea that owing to meager earnings and the difficulty of raising a young child while incarcerated mitigated that reasonable bail terms be considered.
5. Miss Kimaru, for the prosecution opposed the application for bail. She relied on the affidavit of the investigating officer. It was her submission that bail is not an absolute right as it is subject to compelling reasons that may inform the limitation of this right. Further, that the accused was a flight risk based on the fact that he could not be traced for a whole year after the incident. Secondly, that the prosecution was apprehensive that if the accused was released on bail he would interfere with witnesses. This was because some of the witnesses were his relatives or otherwise known to him. Lastly, she urged the court not to be dictated to the terms of bail the accused should be granted by the defence as the grant of bail is squarely in the discretion of the court.
6. In rejoinder, Mr. Ondigi reiterated that the ground of being a flight risk could not be substantiated. That the prosecution had failed to establish using documentary evidence that they had been trying to arrest the accused. It was his submission that documentary evidence was vital to substantiate an allegation as was observed in the case of **R v Muneer Harron Ismail supra**. That the same case applied to the assertion that the accused could interfere with witnesses or abscond the trial. He denied he was dictating the terms under which the accused could be released. Rather, he had only suggested probable bail terms based on settled case law. On the whole, he was of the view that the prosecution had failed to demonstrate that there existed any compelling reasons to warrant the denial of bail to the accused.

Determination

7. **Article 49(h)** gives every arrested person the right *‘to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.’* The onus lies with the prosecution to show that there are compelling reasons to deny the grant of bail.

8. It was argued that owing to the seriousness of the offences faced by the Respondent, he may abscond attending court; further, that he was a flight risk, as shown by the fact that he could not be arrested one year after the offence. It was further cited that there was likely interference with witnesses since they were either his relatives or known to him.

9. The underlying consideration for the grant of bail is to secure the attendance of the accused in court when required. As stated in the case of **Republic v Danson Mgunya & Another Cr. Case No. 26 of 2008 [2010] eKLR**

‘The main function of bail is to ensure the presence of the b 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 enumerated above.’

10. Denial of bail is a limitation on a fundamental human right and freedom as per the guiding constitutional principles under **Article 24(1)** which provides that:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

11. It is not in question that the Accused faces very serious offences. However, that alone is not compelling to justify denial of bail. The Constitution does not make an exception as to who may be granted bail. The Applicant currently enjoys a presumption of innocence until proved guilty or he admits to the charges against him.

12. It was challenged that the Accused is a flight risk owing to the circumstances surrounding his arrest.

13. In the case **Muneer Harron Ismail and 4 others** (supra) the court made the finding that compelling reasons:

"...must be particularized, and... must be objective, specific and precise."

14. The court went on further to state that:

"I reckon that ...suspicion must be founded on reasonable grounds, mere suspicion cannot be a basis to indict an individual that he is likely to compromise national security. In my mind specific events and facts must be disclosed to court to enable the judge to judge the genuineness and reasonableness of the allegations. It is important to note that reasonable suspicion must not be illusion, fantasy or fanciful in imagination."

15. I then hold the view that compelling reasons must be convincing and not merely founded on suspicion. They must be substantiated and reasonably disclosed so as to convince the court that the liberty of an accused should be limited to the extent of denial of bail. Further, the principle duty of the court is to interpret the law in view of facts presented in the form of evidence. As such, mere allegations that have no reference to fact are below the threshold of what a court is guided by.

16. Bearing this in mind, I turn to the submissions brought up by respective counsel. In this case the prosecution bears the burden of proof; to demonstrate the existence of compelling reasons. Miss Kimaru raised two grounds to substantiate denial of bail: likelihood to abscond and the likelihood to interfere with witnesses.

17. In the first ground, it was the gist of her submission that the accused had evaded officers for one (1) year. It was the averment of the IP Asupo that the accused was eventually arrested at his place of work. Therefore, this sequence of events demonstrates that the accused could abscond. The accused in his response stated that the police found him at his place of work, has a place of residence at Kibera, a mobile contact and that he was part of the funeral procession of his deceased wife. As well, that despite interruption of the funeral procession by the police they did not arrest him then or require his attendance for investigation purposes.

18. From the committal bundle the accused has remained a resident of Kibera until his arrest. Further, he appears to have been working at the same place at a hotel in South B over the period that the officers claim to have sought after him. I find therefore, the assertion that the

accused person has been a fugitive is not founded.

19. The second ground is that the accused is likely to interfere with witnesses. The Bail and Bond Policy Guidelines qualify this compelling reason as follows:

“(i) there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and

(ii) the court cannot impose conditions to the bail or bond to prevent such interference.”

20. The primary consideration in this regard is whether there exists strong evidence on the likelihood that the accused will interfere with the prosecution witnesses. Miss Kimaru urged that the accused person knows the witnesses as they constitute both friends and relatives. However, I find it difficult to conclude that simply because they are known to the accused that he will succeed in compromising them on this basis alone. I find that a subtle yet indispensable criterion admitting the evidence of likelihood to interfere with the witnesses is the demonstration of the ability or access to influence, undue advantage or power to compromise witnesses. In my view, the prosecution has failed to satisfy this threshold.

21. It follows that the application is meritorious. The prosecution has failed to demonstrate that there exist any compelling reasons to warrant the denial of bail to the Accused. I accordingly admit him to a bond of Kshs. 500 000/- with two sureties of a similar amount or cash bail of Ksh. 300.000/-. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH JUNE,2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Ondigi for the Accused/Applicant.
2. Miss Kimani for the Prosecution/Respondent.