



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL (MURDER) CASE NO.16 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN LELEI.....1ST ACCUSED

FREDRICK LELIMAN.....2ND ACCUSED

RULING

1. The accused persons, **STEPHEN LELEI and FREDRICK LELIMAN** were jointly charged with the offence of murder contrary to sections 203 as read with section 204 of the Penal Code. It was alleged in respect of the 1st count that the accused persons, **STEPHEN LELEI and FREDRICK LELIMAN** on the 27th day of May, 2016 at Kitanga Hotel in Mlolongo Township in Athi River Sub-county within Machakos county jointly murdered **JACOB MWENDWA MBAI** and in respect of the 2nd count it was alleged that the accused persons **STEPHEN LELEI and FREDRICK LELIMAN** on the 27th day of May, 2016 at Kitanga Hotel in Mlolongo Township in Athi River Sub-county within Machakos county jointly murdered **ELIZABETH NDUKU**.
2. The accused persons took plea on 18.6.2020 and denied the charges. The counsels present for the 1st accused person were Kamwendwa, Wasonga, Shadrack, Anami, Asuma, Clinton Kiptoo, Mungai Sospeter, Cheron Samuel, Miriti James. Present for the 2nd accused was Miss Kalii for Ombeta. Present for the prosecution was Miss Njeru. Present and watching brief for Independent Policing Oversight Authority (IPOA) was Kinoti for Nderitu.
3. Miss Njeru for the state indicated to the court that she had an affidavit in opposition to release of the accused persons on bond.
4. A perusal of the court record indicates that the said affidavit was filed on 4.6.2020 after it had been deponed on 3.6.2020 by George Ayuo indicated as an investigator with the Independent Policing Oversight Authority. It was averred that the deponent was part of the investigation team in the case herein. The deponent averred that during the course of investigation, it was established that Chief Inspector Stephen Lelei interfered with the investigation by declining to provide records and to record statements with the Authority and as such the Authority was forced to make an application to compel the 1st accused to provide documents and record a statement. It was averred that as a result of a cover up of the death of the deceased persons, no inquiry file was opened by the police under the command of the 1st accused who had authority to notify the magistrate under Section 386 of the Criminal Procedure Code. It was deponed that an investigation was completed by the authority which forwarded the file to the ODPP.
5. The deponent pointed out that the 1st accused person had threatened key witnesses and as a result the authority sought the help of the Witness Protection Authority. It was averred that the accused person had a history of tracing and executing persons actively involved in prosecution and investigation of cases where they were adversely mentioned. It was averred that the 2nd accused is the 1st accused in **HCCR 57 of 2016** where he was jointly charged with his co-accused who worked under the direct supervision and command of the 1st accused, Stephen Lelei; and in which case the 2nd accused and his co-accused were denied bail for security purposes. It was averred that the 1st accused was in the company of four other police officers who are part of the dreaded SPIV Squad at Mlolongo and that the said four other officers are still working in the police service, attached to Mlolongo Police station where the 1st and 2nd accused served. It was averred that if the 1st and 2nd accused are granted bail, then they are likely to use other police officers whom they were with during the shooting incident to interfere with the witnesses. It was averred that the investigators in the instant case are well known to the 1st accused and their lives would be at risk if the accused persons are released on bail/bond. It was averred that there are other junior officers who served under the 1st accused and who are witnesses in the instant case hence they will live in fear or may not accept to testify against their senior officers. The deponent averred that the evidence collected during the investigation was compelling such as to secure a conviction but if the witnesses are threatened

and harmed then the prosecution's case may collapse. It was averred that the 1st accused had already abused the terms of the anticipatory bail that was granted to him by failing to appear in court.

6. Mr Kamwendwa informed the court that the affidavit opposing bail was filed on 4.6.2020 and hidden, only to be produced on 18.6.2020 in order to deny the 1st accused from being released on bond. It was therefore counsel's prayer that the 1st accused be released on bail/bond with a surety. Counsel placed reliance on Article 49(1)(h) of the Constitution and submitted that the accused had a right to be released on bond unless there were compelling reason. It was counsel's submission that no compelling reason was given by the prosecution and that the accused was presumed innocent until proven guilty by dint of Article 50(2) of the Constitution. It was submitted that the Bail and Bond Policy guidelines speak to the considerations for grant of bail/ bond and urged the court to consider the case of each of the accused persons. Learned counsel pointed out to the court that the 1st accused is a police officer who was in service for 25years; he had never been disciplined; he had a medical condition that could not be treated if he was in custody as evidenced by the medical notes. It was submitted that the 1st accused had a fixed abode in Utawala where he stays with his children and that his whereabouts were well known by the police hence there was no likelihood of interference with witnesses. It was submitted that the 1st accused was a sole bread-winner.

7. Learned counsel submitted that the affidavit presented by the prosecution raised two issues, being that the 1st accused did not cooperate with investigations but however there was no evidence that the 1st accused was approached but rather that the 1st accused presented himself to the police and availed all the guns and ammunition for ballistic examination. On the issue that the 1st accused did not open an inquiry file, it was submitted that the accused could not investigate himself. With regard to the 2nd issue of threats to witnesses, it was submitted that there was no record that the witnesses made reports of the same to the police, hence the claims were baseless. It was further submitted that since the witnesses were under Witness Protection Program, then there was no way that the 1st accused could reach them. It was submitted that there was no evidence that the 1st accused conducted executions and that the prosecution sought to drag the circumstances of the 2nd accused so as to prejudice the 1st accused. It was further submitted that the fact that there were police officers known to the 1st accused then that ought not to be used as a compelling reason; in this regard, counsel urged the court to find that no compelling reason had been given by the prosecution. Learned counsel submitted in placing reliance on the case of **R v Danford Kabage Mwangi (2016) eKLR** that mere suspicion was not enough to be a compelling reason. Further that the seriousness of the offence was not a compelling reason for refusing bail.

8. It was submitted by Mr Shadrack Wambui that the names and identities of the witnesses are unknown to the 1st accused. Counsel pointed out to the court that the 1st accused was out on anticipatory bail and adhered to the terms hence the 1st accused was not at flight risk. Counsel reminded the court to factor in the aspect of the Corona Pandemic.

9. Miss Kalii submitted that the 2nd accused was in custody and was not in a position to interfere with witnesses. It was submitted that the 2nd accused is a family man; the sole provider for the family and had a fixed abode in Marigat area. It was submitted that he was a Senior Sergeant in the police force and has been in service for 20 years and had demonstrated that he was willing to abide by the terms imposed by the court hence urged the court to give reasonable bond terms.

10. Learned counsel for the state submitted that in terms of Article 49(1) of the Constitution, the state gave reasons why the accused should be denied bail; this was the gravity of the murder charge. It was submitted that there was evidence that the 1st accused was not cooperative with the investigating officer and it was only after the court intervened that his compliance was secured. It was submitted that investigations had been going on since 2016 and which had been completed, where after it was recommended that the accused persons be charged and this was when the threats came in. Counsel submitted that the court may consider denying bail or giving strict bail terms. In respect of the 2nd accused it was submitted that several applications were made by him and which had been rejected by the court and which therefore spoke to the fact that there were compelling reasons not to grant him bail.

11. I have considered the submissions by respective counsels for the accused persons and the prosecution. I have also noted the averments in the affidavit in opposition to bond by one of the investigating officers. The issue for determination is whether the court may grant the accused persons bail and bond and on what terms.

12. The entitlement to bail is subject to compelling reasons as per Article 49(1) (h) of the Constitution. Nevertheless, the law is silent on what amounts to compelling reasons. In **Hassan Mahat Omar & Another v Republic, Nairobi High Court Criminal Revision No. 31 of 2013**, Lady Justice L.A Achode rendered herself thus:-

"What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."

13. In the Ugandan Trial on Indictments Act, exceptional circumstances are defined by section 15 (3) and additional factors are considered by section 15 (4) which are reproduced for ease of reference:

"(3) In this section, "exceptional circumstances" means any of the following-

(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;

(b) a certificate of no objection signed by the Director of Public Prosecutions; or

(c) the infancy or advanced age of the accused.

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors-

(a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;

(b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;

(c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and

(d) whether there are other charges pending against the accused."

14. I note that there is no evidence from the state that investigations are still continuing, and in any event, counsel for the state admitted that investigations were complete and hence a decision was made to charge the accused persons. I am not satisfied that the accused persons may access important prosecution evidence and, may be, cause it to disappear. There is no evidence presented to this court of any special interest of the State which this court should take into consideration, save that of interference with witnesses that in my view will be catered for by stringent bail and bond terms. Therefore, there is no evidence to satisfy this court that it is for the protection of the public that the accused should not be released from custody.

15. The 1st accused referred to his good conduct when he was previously granted anticipatory bail. The prosecution's case is that after previous experience where the 1st accused did not comply with bail terms and that he should not now be entitled to grant of bail or bond. The prosecution has not presented any evidence to controvert the 1st accused's explanation that he presented to the court upon being granted anticipatory bail. He had indicated that he had been hospitalized and which medical documents upon presentation were not contested by the prosecution then.

16. What this court understands from the opposition to the 1st accused's grant of bail is that he is likely to influence or interfere with the police officers who may testify against him. This is far from convincing, considering that the 1st accused no longer commands the police officers who are said to be his juniors. It is instructive to note that upon arrest and arraignment the 1st accused stands interdicted and without any powers over police work and operations and only has to report to his seniors at specific days and at times compelled to stay within the police lines until the determination of his case. He is also barred from handling any weapons and is not assigned any duties. It would appear to me that the 1st accused has already been dehorned or had his powers clipped so to speak and as such is not likely to be a danger to potential witnesses. The officers who are claimed to have served under the 1st accused are under no obligation at all to entertain him or have any fears since the powers he used to wield have already been clipped. Further, he will then be under close police watch all the time in addition to the role to be played by the sureties pursuant to the strict bail conditions to be imposed. Again the prosecution confirmed that the vulnerable witnesses have already been placed under the Witness Protection programme and hence the likelihood of interference has been minimized. As regards the 2nd accused, it was confirmed by his learned counsel that since he is in remand custody over another case then he is not in a position to interfere with witnesses. It was also confirmed that the 2nd accused had been seeking for release on bail in that case but he is yet to succeed. This court did not get the benefit of the proceedings in that other case for perusal. I am alive to the fact that circumstances for each accused person may not be similar and thus each will be considered on its own merits despite the fact that they are jointly charged. As the 2nd accused has another case whose details have not been fully availed, I am of the view that granting bail at this stage might not be appropriate. The said 2nd accused will of course be at liberty to seek to renew his bail application at any stage of the proceedings whenever there is change in his circumstances.

17. According to the bail and bond policy guidelines it is indicated thus;

"4.26 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.

(b) The accused person shall be entitled to the disclosure of any information relied upon by the prosecution in objecting to bail,

provided that there is no good reason for withholding such information, such as the protection of witnesses or the preservation of national security.”

18. It is trite law that if there are any genuine concerns on the part of the state they should be disclosed to the court in a manner provided by law for that purpose. I note that the prosecution in an attempt to steal a match against the accused persons filed an objection to grant of bail even before the application was made. The affidavit in opposition was filed on 4.6.2020 and only served upon the defence counsels a few minutes before the business of the court kicked off. According to counsel for the 1st accused, the same was not even served on them in good time but that the affidavit in opposition to bail was popped up in a move attempted to surprise counsel. This appears to have got the defence by surprise yet under all circumstances they were entitled to have been served in good time bearing in mind that there were allegations that had been raised which the accused persons had every right to respond to. The defence counsels nonetheless opted to proceed with the oral bail application.

19. I have considered the legal authorities including those cited by Counsel for the state and for the accused persons. The Judiciary Bail and Bond Policy Guidelines have listed a number of factors to be considered by the court when making a decision whether or not to grant bail and bond; the same have been reproduced in paragraph 19 above. Various authorities have established the principle that the court must be satisfied that the applicant will appear for trial and not abscond. If facts come to light that there is a substantial likelihood of the applicant offending bail, it is advisable to reject the application. In **Republic –vs- Danson Ngunya & Another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then the state must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

20. In the instant case I have considered the following factors:

- a) The need to give the applicants the full benefit of their constitutional rights and freedoms.*
- b) The absence of any evidence that the applicants may cause lawlessness to society if released on bail.*
- c) Absence of any evidence from the state that there is a risk of the applicants absconding.*
- d) Absence of any evidence that the applicants have any likelihood of interfering with the course of justice.*
- e) The seriousness of the charges against the applicants.*
- f) Absence of any evidence that the applicants are likely to commit other offences while on bail.*
- g) Absence of any indication that the applicants are violent or threaten violence against anyone.*
- h) Absence of any evidence that the applicants are likely to interfere with the prosecution’s witnesses.*
- i) The status of the case that investigations had been ongoing since 2016 and in 2020, a decision was made to charge the applicants.*
- j) The Constitutional requirement that the applicants must be presumed to be innocent until proved guilty or plead guilty.*
- k) The caution that bail should not be refused as a form of punishment for the applicants.*
- l) The indication that the 1st accused has an abode in Utawala, whereas the 2nd accused has a fixed abode in Marigat and the applicants have indicated they shall comply with the conditions of their bail.*
- m) Absence of concrete evidence that there are other charges pending against the 1st accused while the 2nd accused had been named as having a pending case namely Nairobi Hccr No.57 of 2016 wherein his quest for release on bond is yet to come to fruition. See the court of Appeal case of Michael Juma Oyamo & Another v R (2019) eKLR.*

21. Considering all the foregoing factors, I find that the compelling reasons advanced by the prosecution against the 1st accused herein do not meet the threshold under Article 49(1) (h) of the Constitution to warrant a denial of bond whereas the circumstances regarding the 2nd accused merits denial of bond at this stage but with leave to renew his quest for bail at any stage of the proceedings whenever his circumstances change. In the result it is my finding that the request for bail by the 1st accused is merited whereas that of the 2nd accused lacks merit though he is at liberty to renew his bail request whenever his circumstances change. Consequently, I make the following orders:

- a) Bond request by the 2nd accused is declined for now but he is at liberty to renew his bail application whenever his circumstances change.**
- b) The 1st accused is released on bond on the following terms:**
 - i) He shall deposit the sum of Kshs 500,000/ into court and in addition secure two sureties of Kshs 1,000,000/ each and who shall be approved by the Deputy Registrar of this court.**
 - ii) He shall deposit his passport with the court.**

iii) He shall not leave the jurisdiction of the court without the authority of the court.

iv) He shall not interfere with prosecution's witnesses or relatives of the deceased either by himself or through proxy in any manner whatsoever.

v) He shall attend court without fail on all mention and hearing dates until the final determination of the case or until further orders.

vi) In default to adhere to these conditions the bond shall stand cancelled and he together with his sureties called to account.

It is so ordered.

Dated and delivered at **Machakos** this **23rd** day of June, **2020**.

D. K. Kemei

Judge