



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE 37 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

KEVIN OTIENO ODUOR ALIAS

WYCLIFFE OTIENO ODUOR.....ACCUSED/APPLICANT

RULING

1. The Applicant was formally charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, CAP 63, Laws of Kenya**. The particulars were that on the 27th of May, 2020 at Junction Area within Korogocho in Nairobi County jointly with another not before court murdered **Duncan Odhiambo Guda**. He took plea before this Court on 30th June, 2020 and denied the charge. He further applied to be admitted to bond or bail.
2. The application was brought by way of a Notice of Motion dated 8th July, 2020. It is premised on two main grounds, First, that the Applicant is a young man who is ready to religiously attend all court sessions and shall conduct himself in a manner that this court shall order. Second, that the Applicant is a first offender and that he shall not interfere servants with witnesses either by himself or his or agents and shall cooperate with the prosecution during the trial. To buttress these grounds is a Supporting Affidavit sworn by the Applicant sworn on 8th July, 2020.
3. The application is opposed by the State through an affidavit sworn by PC Collins Musiomi, the investigating officer on 2nd July, 2020.
4. The application was canvassed before me on 15th July, 2020 via Google Teams Video Links. Learned counsel, Mr. Kariu represented the accused person whilst learned State Counsel, Miss Onunga appeared for the State. The following is a summary of the arguments advanced. Mr Kariu urged that the Applicant be granted bail with reasonable terms on ground that the offence is bailable and that the accused person should benefit from the presumption of innocence until the contrary is proved. Further, that the Applicant is a young man barely 20 years old, unemployed and that, he is 'heavily' dependent on his parents. His parents are, in turn, casual workers and therefore the Applicant would be hard pressed to raise high bail or bond terms. Counsel added that the family would depend on well-wishers to satisfy the terms set. The Applicant further committed through his counsel to avoid contact with the witnesses or victims, or engage in crime if released on bail.
5. On the contention that the Applicant would interfere with witnesses, counsel submitted that the Applicant's family resided in Nairobi in Kariobangi and that he could not be regarded as a flight risk. As well, that since the Respondent had not tabled any evidence to indicate that there was a vulnerable witness needing protection or that there was any evidence that needed to be taken in camera there was no merit in the assertion that the Applicant would intimidate witnesses. Therefore, the mere assertions were not evidence that could help the court determine the suitability of the Applicant to be admitted to bail. He urged the court to find in favor of admitting the Applicant to bail.
6. Miss Onunga, the prosecutor in this matter, opposed the application for bail. She asserted that the Applicant was a flight risk since his co-perpetrator was still at large. Further, that a key witness was known to the Applicant and therefore the witness feared for his life. The witness had since relocated to Baba Dogo from Mathare where the Applicant also resided due to this apprehension. As well, that the witness had begged for protection and that the process was ongoing.
7. The prosecutor also submitted that the Applicant presently lived in Baba Dogo and not Kariobangi, as asserted by Mr Kariu. That the locality being an informal settlement meant that tracing the Applicant would be an uphill task. Lastly, that the Applicant has no registration documents. It was only when they traced his mother that they were able to find out his real name. This was because on arrest he presented himself as Kevin Otieno Oduor and not Wycliffe Otieno Oduor as later revealed by his mother. Miss Onunga submitted that bail was not

merited in the circumstances.

8. In rejoinder, Mr Kariu reiterated that a statement from DPP on the need for protection of a witness was not supported by any evidence. Further, that the fact that the witness had since relocated from Mathare to Baba Dogo was testament that no witness needed protection.

Determination

9. Article 49(1)(h) of the Constitution 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.’***

10. The Constitution does not define or provide what constitutes compelling reasons to warrant a denial of bail. Over time, courts have given guidance in this regard holding that some of the factors that a court should consider include but not limited to, the seriousness of the offence and the attendant penalty attached to it, whether the accused is a flight risk, whether the accused can interfere with witnesses, public interest factor and the security of the accused.

11. **Section 123A** of the Criminal Procedure Code gives further guidance on considerations to be made in determining whether or not bail should be granted, in the following terms:

“(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;

(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;

(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.”

12. A balancing act is required between the rights of the individual and public interest. The **Judiciary Bail and Bond Policy Guidelines** recognize this principle under **para. 3(e)** at pp. 9-10, acknowledging that in certain instances: ***‘The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.’*** The Guidelines proceed to provide that: ***‘it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions’.***

13. The omnibus of all the factors to be considered is that the court must be satisfied that the accused shall avail himself in court if granted bail. See: **Republic v Danson Mgunya (2010) eKLR** where the court stated thus:

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

14. It must be borne in mind always that the onus lies with the prosecution to show that there are compelling reasons to deny the grant of bail. A look at the submissions and the affidavits of the respective parties disclose the compelling reasons brought out as:

a. That the Applicant is likely to interfere with witnesses; and

b. That the Applicant is likely to abscond;

Whether the applicant is likely to interfere with witnesses

15. It was the submission of the prosecutor that the Applicant would likely interfere with witnesses. The reason for this was that the witness claimed be known to the Applicant. According to the prosecutor, the witness had pleaded to be protected since he was apprehensive that his life was in danger. Counsel for the Applicant, Mr. Kariu, contended that there was no evidence supporting the assertion that the witness feared for his life.

16. While the Applicant’s counsel holds the view that this ground is unsupported, I find there is a thread of evidence that supports the prosecution’s claim. The committal bundle contains statements made by the witness from which I deduce that the witness referred to was an eye witness who is likely to give strong incriminating evidence against the Applicant. Therefore, should the Applicant be released even

without active intimidation, the witness is likely to be covered into silence.

17. That said, the prosecution also admitted that they have begun the process of admitting the witness to protection under the Witness Protection Act. I find that this, therefore, nips the issue of the safety of this particular witness at the bud. I do however add that, should the prosecution procrastinate on actualizing this intention, then the Applicant shall be at liberty to reapply for admission to bail.

Whether the Applicant is likely to abscond.

18. The prosecution put up a spirited fight to demonstrate that the Applicant was likely to abscond. They raised the lack of a place of fixed abode and the character of a co-perpetrator as reasons for this court to deny the Applicant bail. My view is that the character of a co-perpetrator should not necessarily affect the interest of justice for an Applicant to bail. Least of all because the difficulty to arrest the co-perpetrator could be attributable to various reasons independent of the Applicant. For this reason, the Applicant herein should not be denied bail merely because his co-perpetrator has not been arrested.

19. As regards that the Applicant has no fixed place of abode, the prosecution submitted that the Applicant lived in Mathare as a tenant and therefore on his arrest he had no known place of abode. I am inclined to agree that there seems to be no record on the place of abode of the Applicant. Further, aside from the assertion in the affidavit of the applicant that he has a family, there is no evidence of where the family lives. There is further no evidence that even the relative on record is a family member able to ensure that the Applicant abides by the bail terms. This is significant in compelling the court to deny the Applicant bail.

20. It is also suspect why the Applicant presented himself with names that were not his. Had his mother not been reached out and for a reason the court granted him bail, the net effect would be that he would not easily be tracked. Furthermore, he was not found with any identification documents that could authenticate his real identity. That again places him at high risk of flight which is a compelling reason to warrant a denial of bail.

21. I am therefore satisfied that the prosecution has advanced good grounds in opposition to the application. I find that there exist sufficient compelling reasons to warrant a denial of bail to the Applicant. Conversely therefore, the application is without merit and the same is according dismissed.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1 Mr. Kariu for the Applicant.

2. Miss Ogweno for the Respondent.