



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 35 OF 2020

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

DENNIS ORORA ONSANDO.....ACCUSED

RULING ON BAIL APPLICATION

1. The State in this case filed an affidavit opposing bail. It is sworn by Corporal Maurice Muwavi of DCI Karen. He advanced two reasons for opposing bail as being the accused person’s crude behavior during his arrest, of driving off in a vehicle with Police Officers on board towards the wrong direction. He claimed that this was proof the accused had a violent trait. He also deposes that the accused went underground between May 2nd to May 27th, 2020 after the offence. He also listed witnesses whose life would be threatened if the accused is released on bond, and suggested that the bail ruling be deferred until they testify.

2. The sister of the deceased, Sylvia Linda Nyanchama also filed an affidavit opposing bail on grounds raised by CPL Muwavi. She also complained of receiving threats in the form of summons to appear at the Langata Police Station. She also complained of receiving threats through phones from unknown persons.

3. The accused has filed two affidavits in response to those by the Investigating Officer and the sister to the deceased. In those affidavits he contends that he was cooperative with investigations. He contends that he knew most of the witnesses but avers that he has no ill intention towards them. He denies having gone into hiding or being a flight risk saying that in fact he was involved in the search to locate the deceased when it was reported that she was missing. He also avers that he has a home in Dagoretti away from the potential witnesses where he intends to stay.

4. I have considered the filed affidavits, together with the submissions by Ms. Onunga for the State and Ms. Waweru for the accused. The two counsels reiterate what was deposed in the affidavits sworn by their clients, so I need not add anything. The undisputed fact is that the accused has been in police custody for one month since his arrest for the murder of the deceased in this case. He faces a **murder** charge contrary to **section 203** as read with **section 204** of the **Penal Code**. He claims to be a mechanic by profession, which the State does not dispute, and claims to be the sole bread winner of his young family.

5. The prosecution has the burden to prove that there are or is a compelling reason to deny the accused bail. The proof required is one on a balance of probabilities. The definition of the phrase compelling reasons adopted by the court in **Republic vs. Joktan Mayende & 3 others [2012] eKLR** was:

“...the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.

6. Paragraph 4.9 of the **Bail and Bond Policy Guidelines** deals with compelling reasons. The said Paragraph provides:

"In terms of substance, the primary factor considered by the Courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the Courts face since the promulgation of the Constitution of 2010 is determining the existence of Compelling reasons for denying an accused person bail, particularly in serious offences. ... The determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial..."

7. The **Bail and Bond Policy Guidelines** urge Courts to evaluate the presence of Compelling reasons based on twelve criterion which include the following:

- i. **The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty**
- ii. **The strength of the prosecution case**
- iii. **The failure of the accused person to observe bail or bond terms**
- iv. **Likelihood of interfering with witnesses**
- v. **The need to protect the victim or victims of the crime**
- vi. **The relationship between the accused person and potential witnesses**
- vii. **The accused person is a flight risk**
- viii. **Public order, peace or security; and**
- ix. **Protection of the accused person**

8. The principles set out under the Bail and Bond Policy Guidelines are the same ones that were set out in the celebrated case of **Ng'ang'a Vs Republic 1985 KLR 451** where Chesoni J, as he then was, held thus:

“The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should grant bail to the accused person unless it is shown by the prosecution that there are substantial grounds for believing that:

- i. **The accused will fail to turn up at his trial or to surrender to custody;**
- ii. **The accused may commit further offences; or**
- iii. **He or she will obstruct the course of justice.**
- iv. **The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;**
- v. **The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- vi. **The strength of the prosecution case;**
- vii. **The character and antecedents of the accused;**
- viii. **The likelihood of the accused interfering with prosecution witnesses.”**

9. . In the case of **WATORO V REPUBLIC (1991) KLR 220** at 283, Porter,J stated:-

“... I think I have made it clear over a number of rulings in bail application that I take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for his trial... The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody

What I think is important for the court to bear in mind, and the reason for the caution to remember the presumption of innocence, is that it would be wrong to leap to the conclusion that the Accused was guilty merely because he had been charged and decide the bail application on that basis.

Nevertheless the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases.

I do not mean to say that because other people have decided to leave business family and friends, for other climes, rather than to face prosecution, this applicant will do so, that decision depends on all prevailing circumstances of the applicant. All I mean to say is that the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction.”

10. It is settled that in an application for bail pending trial, the paramount consideration in granting or denying bail is whether the accused person will turn up for his trial.

11. The Investigating Officer and one of the victims/potential witness in this case have sworn affidavits opposing bail on several grounds. They are apprehensive the accused may interfere with the witnesses and the investigations. They are opposed to his release on account of his temperament said to be abrasive/hot tempered. These are serious and warranted concerns. However, they are not sufficient in themselves to deny bail to the accused person. There is a cure for that, which is to restrict the accused movement and post stringent bond terms to motivate him to behave properly.

12. Regarding threats to the witness, this is a matter that should be addressed through Witness Protection Agency. The witness did not claim that the threats were by the accused himself or his known agents. As for the allegation he went underground and so is a flight risk. That cannot be correct for reason he could not have hid between 2nd and 27th May when the murder is alleged to have taken place much late on 26th May. That allegation has no merit.

13. On the whole I find that the prosecution has failed to prove that there are compelling reasons to deny the accused bail. I will grant the accused person bail/bond on the following terms which the accused is expected to strictly comply with. 14. The accused may be released on bail and bond on the following terms:

1. Upon payment of cash bail in the sum of Kshs. 300,000/-.

2. In addition, upon providing one surety in the sum of Kshs. 300,000/- each.

3. The accused should, upon release, report every fortnight to the DCI Karen Police Station.

4. The accused person should not set foot in Karen Plains Mystica Homes Estate or its environs, the place where the incident took place, until this case is concluded.

5. The accused person should also not reside in the same area during the pendency of this case, but should live in his Dagorreti home. Alternatively, the accused must swear an affidavit to disclose the place where he will be residing before he is released from custody.

6. The accused person should not visit or contact by any means whatsoever, or approach, intimidate, threaten or interfere by any means with the potential witnesses in this case, whether by himself or through proxy.

7. If any report is filed whether with the police or court complaining of any breach of the conditions set in this order, the accused will stand to have his bond withdrawn and his cash bail forfeited to the State.

8. The hearing dates for this case will be given on notice.

14. Those are the orders of the court.

DATED AT NAIROBI, THIS 22nd DAY OF JULY, 2020.

LESIT, J.

JUDGE.