



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 3 OF 2020

REPUBLIC.....RESPONDENT/REPUBLIC

VERSUS

FREDRICK OUMA OPIYO..... APPLICANT/ ACCUSED

R U L I N G

A. Introduction

1. The applicant faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 9th January 2020 at unknown place within Embu Municipality of Embu County he murdered Brian Gitonga Wanja. He was arraigned in court on 24/02/2020 and plea taken on 8/04/2020 wherein he pleaded not guilty to the charge. The defence counsel Ms. Ngige made an oral application for bail pending trial which was opposed by the prosecution on grounds that they had compelling reasons.

2. An affidavit of compelling reasons was filed by the State sworn by IP Abraham Gordon Kibalachi the investigating officer. He deposed that the accused had been threatening to kill the witness namely Purity Wanja Marigu the mother of the deceased and that he had been relaying the said threats through telephone calls using a phone which had been sneaked into the police cells. Further that the applicant had been heard swearing that he would escape from custody and trace the said witness and kill her. It was further deposed that the applicant was a flight risk for he had no fixed abode. It was the deposition of the investigating officer that the threat to escape was real as the police officers manning the police cell searched the applicant and found that he had sneaked in a crude weapon which he could have used to clear his escape route.

3. The applicant challenged the said compelling reasons vide his replying affidavit wherein he denied threatening the complainant. He averred that he could not have had access to cellphones or any means to communicate to the complainant as his phone was confiscated the day he attended court on 13th January 2020. Further that he was not a flight risk as he had been living in Embu since 2008 where he lived with his auntie for more than ten (10) years before he got his own place of abode and that he had been working in Embu at Ombonyo garage prior to his arrest. The allegation that he had no fixed place of abode was untrue.

4. The accused further denied having been found with a crude weapon as the prosecution had alleged. He further deposed that this case was likely to take a long time to be heard and determined and thus it is fair that he be admitted to bail/ bond pending trial. Further that he was in the process of registering for a Diploma course in Electrical Engineering at Achievers College and thus staying in prison remand cells was to his detriment and that he would abide with all the conditions that this court may impose in his release.

5. At the hearing of the application, parties elected to canvass the application by way of written submissions. The applicant reiterated the contents of his replying affidavit and further submitted that he had a right to bail pending trial pursuant to Article 49(1)(h) of the constitution of Kenya and that there are no compelling reasons given to justify denying him bond. The prosecution did not file any submissions but erected to rely on the affidavit of compelling reasons earlier filed.

B. Issues for determination

6. I have considered the application herein together with the submissions on record and it is my opinion that the main issue for determination is whether the reason for opposing bail are merited in terms of Article 49(1)(h) of the Constitution.

C. Applicable law and determination

7. Article 49(1)(h) of the Constitution provides that an arrested person has a 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. It thus means that the* right to bail under this Article is a constitutional right and which can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant denial of bail.

8. The Court of Appeal in Michael Juma Oyamo & another v Republic [2019] eKLR defined “compelling reasons” in the following words: -

“..... 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 standards set by the Constitution.”

9. The Court went further to lay down some of the compelling reasons to include the likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused.

10. Further Section 123 A (1) of the **Criminal Procedure Code** as read together with **Section 123** provides for the relevant circumstances a court ought to take into consideration in *making a decision on bail and bond and include: -*

a) *the nature and 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 having committed the offence.*

11. It is trite law that the prosecution bears the burden of proving to the required standard that in any case an accused person ought not to be admitted to bail pending hearing of a criminal case. The issue is whether the prosecution have discharged the burden of proof.

12. The prosecution alleges that the applicant deposed mainly to the effects that the accused had been threatening to kill a witness who is the mother of the deceased and that he had been relaying the same through telephone calls using a phone which had been sneaked into the police cells. It was further deposed that the applicant had been heard swearing that he would escape from custody and trace the said witness and kill her and that the threats to escape were real as the police officers manning the police cell searched the applicant and found that he had sneaked a crude weapon which he could have used to escape. It was further deposed that the accused herein was a flight risk as he had no fixed abode.

13. However, despite the state having made all the said allegations, no evidence was tendered to support the averments, be it affidavit of the person who heard the threats being issued or that of the victim of the said threats. The alleged phone conversations transcripts from the mobile service providers would have worked in favour of the prosecution. None of these transcripts were availed to the court. Neither were the details of the phone allegedly used by the applicant was given or produced in court. There was no affidavit of the said witness who was the recipient of the threats.

14. It was held in the case of Michael Juma Oyamo & another v Republic (supra), that: -

“..... Bail should not, therefore, be denied on weak grounds but on real and cogent grounds that meet the highest standards set in the Constitution. Allegations of witness interference must be supported by evidence. (R V Anthony Mgende Mbungu & Another High Court at Embu Criminal Case No. 34 of 2015).”

15. The prosecution did not substantiate in what ways was the applicant a flight risk. I have perused the court records and I note that it was a common position that the accused was a friend to the mother of the deceased. Further it is not disputed that the accused has been living in Embu and working there. The prosecution did not present any evidence to substantiate the reasons that the accused herein was a flight risk and further with no place of abode.

16. In persuading this court into denying an accused person bail pending trial, the prosecution must not only state the reasons it believes to be compelling but must also tender evidence to support their averments. The prosecution are obligated to prove the compelling reasons to justify denial of bail/bond. I am of the considered opinion that the reasons herein were never compelling. They were not powerful, irresistible, obliging, overpowering, forceful, constraining and providing a strong motive. In other words, the state has failed to present any compelling reasons.

17. As the Court of Appeal held in Republic v Nuseiba Mohammed Haji Osman (supra): -

“.....The liberty of every person is sacrosanct, and being presumed to be innocent until proved guilty is a constitutional principle that is intended to keep intact the general fabric of the accused person’s life. On the other hand, the State has a constitutional duty to prosecute those who commit crimes, to ensure public safety between the time of arrest and trial of an accused person, and to protect the integrity of the criminal justice system. In the course of realizing these goals, the individual right to liberty may be qualified. It follows that where there is sufficient and compelling evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the evidence, or fleeing the jurisdiction of the court, or by posing a danger to himself or to any other individual or to the public at large if released, then there will be justification to either deny such an accused person bail, or set stringent bail or bond terms in the interests of justice.....

.....Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”

18. In conclusion, the affidavit of compelling reasons does not pass the test under Article 49(1)(h) of the Constitution. Consequently, I hereby allow the bail application in the following terms: -

a) That the applicant shall be released on bond of Kshs. 300,000/= with one surety.

b) That he will not leave the jurisdiction of this court without its permission.

c) That he will attend bi-monthly routine mentions pending the determination of this case.

19. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 30th day of September, 2020.

F. MUCHEMI

JUDGE

Delivered through Video Link in the presence of Ms. Mati for State

The Accused