



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO E014 OF 2020

REPUBLICPROSECUTOR

VERSUS

VINCENT OTIENO OTIENO alias OTIS..... 1ST ACCUSED

JOSHUA OWINO ODUOR 2ND ACCUSED

RULING

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code the particulars of which were that on 26th day of July 2020 at Kibera Soweto area within Kilimani Sub- County in Nairobi County murdered KENNEDY OTIENO OLOLA.
2. They pleaded not guilty and the Advocate for the 2nd accused person made an oral application that the same be admitted to bond under Article 49 of the Constitution and section 123 of the Criminal Procedure Code as a means of decongesting prison due to Covid 19 pandemic.
3. The 1st accused filed an application dated 24th August 2020 in which he sought orders that he be released on reasonable bond /bail terms on the grounds that he was considered innocent until proved otherwise and that bail was his constitutional right which may only be limited where there were compelling reasons.
4. The application was accompanied by written submissions where it was submitted that unless there were compelling reasons as stated in the case of **REPUBLIC vs MGUNYA & Another [2011] 2EA 36** as quoted in the case of **REPUBLIC vs DAVID MUCHIRI MWANGI [2018] eKLR** the applicant was entitled to be released on bond. It was submitted that in setting out reasonable bond terms, the court had to take into account the status of the 1st accused and such bond terms must be those that will make it attractive for him to attend trial. It was submitted that bond of Kenya shillings Five Hundred Thousand or cash bail of Kenya shillings two hundred thousand (Ksh.200,000) would be appropriate.
5. The application was opposed through the affidavit sworn by SGT ANNE CHEPCHIENG where she deposed that before the incidence the accused persons and the deceased were neighbours at sarangombe area in kibera and that on the material day the accused were fighting with one of the prosecution witnesses and when the deceased intervened, the 1st accused hit him with a metal on the head while the 2nd accused pinned him on the ground. It was stated that immediately thereafter, the accused persons ran away from the scene and locked themselves into their respective houses thereby demonstrating that they were flight risk.
6. It was contended that the prosecution witnesses are known to the accused persons who were likely to interfere with them should they be released on bond. It was deposed further that members of the public were still outraged and if granted bond they might want to revenge the death thus compromising the security in the area. It was stated that what the accused persons did for a living was unknown, and there was probability of them relocating to an known place if granted bond.
7. The 2nd accused on the 30th of August 2020 filed an application for bond under certificate of urgency supported by his sworn affidavit wherein it was stated that there were no compelling reasons which militated against the grant of his constitutional rights to bond. It was contended that he was ready and willing to abide by all the terms and he was ready to attend court. It was deposed that it was the duty of the court to facilitate the enjoyment of constitutional right.
8. Ms Gikonyo for the State opposed the applications and submitted that all the prosecution witnesses were known to the accused persons and were likely to be influenced by the accused persons if released on bond. It was submitted that the accused persons should be denied bail on account of their safety and security. It was stated that they did not have any known fixed abode.
9. It was submitted by Mr Ondieki on behalf of the 2nd accused that there was no material placed before the court to support the allegation on witness's interference and that the accused had a known place of residence at sarangombe, thereby making him not a flight risk.

DETERMINATION

10. Bond is a constitutional right of every accused person under Article 49 1 (h) of the constitution of Kenya 2010, which may only be limited where there were compelling reasons advanced by the prosecution to the satisfaction of the court on a balance of probability. What constitute compelling reasons have been documented in the Bail/Bond policy guidelines to include but not limited to the likelihood of the accused interfering with witnesses or suppressing any evidence such as incriminating him, being a flight risk or for his own safety and protections as was stated in the case of **REPUBLIC vs DAVID MUCHIRI MWANGI (supra)**

11. As regards interference with witnesses, the prosecution must show the relationship between the accused persons and the said witnesses and the prosecution must demonstrate a more than whimsical probability of interference as was stated in **REPUBLIC v GERALD MUTUKU NYALITA & ANOTHER** and in **REPUBLIC v DWIGHT SAGARY & 4 OTHERS** the state must demonstrate actual or perceived interference. It must show the court the existence of a threat or threats to witnesses, direct or indirect incriminating communication between the accused and the witnesses.

12. In this matter save for the allegations of possibility of interference with witnesses, the prosecution did not place any material before the court to support a finding of interference on the part of the accused persons and neither did they show that any intended interference may not be ring-fenced by adequate terms and or conditions. The witnesses who were likely to be interfered with and the nature of the likely interference was not indicated.

13. On the allegation of the accused persons being flight risk, it had only been alleged that they ran away from the scene and locked themselves in their houses within the area, there were no evidence that they attempted to flee from the jurisdiction of the court and as submitted by Mr. Ondieki, they have known places of abode at sarangombe area of Kibera. I find and hold that the applicants were not reasonably expected to stand at the scene of the alleged offence now having taken judicial notice of the volatile nature of the Kibera slums and them leaving the scene was justifiable. The fact that what they do for a living is not known in my view cannot be a ground for denial of bail otherwise bond will only remain to be enjoyed by those who are employed which is not what the provision of the constitution provides for.

14. From what I have stated herein, it logically follows that the prosecution failed to provide compelling reasons to enable me deny the accused persons the enjoyment of their constitutional right to bail and therefore order that they be released on bail/bond on the following terms and conditions: -

- a) Bond of Kenya Shillings Five Hundred thousand (Ksh.500,000) with one surety of similar amount for each.*
- b) In the alternative cash bail of Kenya shillings two hundred thousand (Ksh.200,000) with two sureties of like amount for each of the accused persons*
- c) They shall upon release report to the Chairman of the Nyumba Kumi of the Area where they are currently living/residing and shall continue to report to the same after every thirty days until final determination of this cause*
- d) They shall make no contact in whatsoever manner with any of the intended prosecution witnesses either directly or indirectly unless such contact is authorised and done in the presence of the Investigating Officer.*
- e) They shall not leave the jurisdiction of this court without the written consent of the Investigating Officer, which consent must be filed and shown to the chairman of the Nyumba kumi committee of their current area of residence who shall thereafter hand them over to the Chairman of the Nyumba Kumi committee of the area they intend to visit*
- f) In violation of any of the terms herein, the bond/bail shall stand cancelled immediately.*

Signed dated and delivered at Nairobi this 24th day of September 2020 Through Teams

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J. WAKIAGA

JUDGE

In the presence of:-

Ms Kimani for the State

Ms Farah for the 1st Accused

Mr. Ondieki for the 2nd accused

1st Accused person present

2nd accused person present

