



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. E020 OF 2020**

**LESITT, J**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ROBERT JOHN OUKO BODO.....1<sup>ST</sup> ACCUSED**

**CHRIS PHILIP OKEYO OBURE.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons, **ROBERT JOHN OUKO BODO**, herein after referred to as the 1<sup>st</sup> accused, and **CHRIS PHILIP OKEYO OBURE** the 2<sup>nd</sup> accused are facing one count of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. Plea in this matter was taken on the 9<sup>th</sup> September, 2020 where a plea of not guilty was entered for both accused persons.

2. Both accused persons have applied to be release on bail pending the hearing and determination of their case. The application by the 1<sup>st</sup> accused is dated 7<sup>th</sup> September, 2020 and was supported by the 1<sup>st</sup> accused affidavit. The 2<sup>nd</sup> accused filed a replying affidavit dated 9<sup>th</sup> September 2020, in response to the affidavit by the investigating officer. In brief the counsels for the accused urged the court to consider that the accused were cooperative to the investigating officers throughout the period of the investigations. That the accused were committed to attend their trial and to comply with any terms and conditions of bond set by the court. The counsels also urged that the investigations were over and the firearm involved in the incident was with the police and thus there was no further need to hold the accused in custody.

3. The State has filed an affidavit sworn by Sgt. Bashir Boya Segelan who is the investigating officer of this case 7<sup>th</sup> September, 2020. The State also filed written submissions dated 8<sup>th</sup> September 2020.

4. I have considered the submissions by Mr. Arum for the 1<sup>st</sup> accused, Prof. Lumumba and Ms. Oduor for the 2<sup>nd</sup> accused and those of the learned counsel for the State, Ms. Gichuhi.

5. Bail is a constitutional right which received underpinning under **Article 49(1) (h)** of the **Constitution**. That provision gives an arrested and accused person the right to be released on bail unless there are compelling reasons to deny bail. The question of consideration for bail and the balancing required of the various interests involved is a difficult one. In order to ameliorate that challenge the **Bail and Bond Policy Guidelines** were developed. On the part of the court, the Guidelines urge Courts to evaluate the presence of Compelling reasons based on twelve criterions as follows:

- 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**

6. The prosecution has the burden to establish compelling reasons on a balance of probabilities. The prosecution in this case has advanced several grounds as the compelling reasons why bail should be denied. I will examine each of them. They are the following:

**a. Nature of charge and seriousness of the punishment.**

The prosecution relied on paragraph 14, 18 and 19 of Sgt Segelan's affidavit. In these paragraphs the investigating officer deposes that the killing of the deceased was pre-meditated; that the accused persons are likely to jump bail in order to escape punishment and that the accused had easy access to firearms. Counsel cited the of **Republic vs. Taiko Kitende Munya (2010) eKLR** where Ochieng, J ruled that the offence an accused person faces is a relevant factor. She also cited the case of **Republic vs. Milton Kabulit & 6 others [2011] eKLR** where Anyara Emukule J. as he then was stated that crimes are not equal in the perception of the ordinary common man; that the seriousness of charge and severity of the sentence to be meted out is a major course on the issues of bail.

7. Mr. Arum for the 1<sup>st</sup> accused urged that the nature of the charge is not a ground to deny bail as all charges were bailable and the prosecution cannot be heard to make such an argument at this time.

8. In the case of **Republic v Ahmed Mohammed Omar & 6 Others 2010 eKLR**, Ochieng, J. stated that:

**"... whereas the applicant is still presumed innocent; if he were to be convicted for murder, there is a possibility that the trial court could sentence him to death. To my mind, therefore, the severity of the sentence remains a significant factor for consideration in an application for bail pending trial."**

9. In a persuasive ruling from the Supreme Court of Malawi, in the case of **John Zenus Ungapake Tembo & 2 Others v The Director Of Public Prosecutions, M.S.C.A. CR. Appeal No. 16 of 1995**, the court discussed the consideration whether an accused person may be tempted to avoid trial once bond is granted and observed thus:

**"... where a person has been charged with an offence, the wheels of justice are set in motion and the accused person is expected to be prosecuted for the offence, and the law requires that the accused shall be available to stand his/her trial until the CASE is completed." Their Lordships held that that was the paramount consideration when a court is giving consideration to an application for bail pending trial. The court went on to state that the seriousness of the charge brought against the accused person is one of the factors to be taken into consideration by the court. It was a holding of the court that;" Fear is a natural instinct in human beings, so that generally Speaking, the more serious the Offence, a capital offence for example, and the sentence it may call for upon conviction, the greater the likelihood that the Accused person would be disposed to abscond."**

10. Whereas the ground advanced by the State is an important one. It cannot be relied upon standing on its own without more, unless there are grounds to show or demonstrate that the accused may be minded to evade trial in order to escape punishment. The ground has not been substantiated, and in the circumstances it is not sufficient standing alone to justify denial of bail. The Constitution opened up the enjoyment of bail by all arrested and accused persons notwithstanding the offence they face and the punishment they may face if convicted. That right should not be curtailed without good cause.

11. The second ground urged is

**b. Strength of the prosecution case sufficient and cogent evidence which keenly implicates the accused persons.** Ms. Gichuhi relied of paragraphs 15, 17, 19 and 29 of Sgt. Selegan's affidavit. In brief the investigating officer deposes that the deceased was linked in business to 2<sup>nd</sup> accused; that the 2<sup>nd</sup> accused company had provided him with a vehicle and paid for his residence; that the 2<sup>nd</sup> accused was placed within the vicinity of the incident by his employee; that the 2<sup>nd</sup> accused contradicts himself on same; that the accused may interfere with witnesses and finally that the two accused had a joint intention to have the 2<sup>nd</sup> accused's firearm utilized in the offence. The officer also contends that the accused are a flight risk especially having seen the evidence available against them.

12. The strength of the prosecution case cannot be used as a ground to deny bail. The constitutional principle that an accused person should be considered innocent until proved guilty is a benefit that cannot be denied to the accused. Strength per se without more is not sufficient to decline bail.

13. The other ground advanced is:

**c. That the accused persons will attempt to evade trial.**

Ms. Gichuhi relies on paragraphs 14, 18 and 19 in which the investigation officer avers that due to the seriousness of the offence, accused persons are a flight risk. She also relies on paragraphs 32, 33, 34 and 35 which deposes that due to the accused operating business involving air and cargo industry and directly as a result of that the many contacts they have in that industry, they are likely to evade trial.

14. Ms. Gichuhi cited **Dr. Ishmael Kabule and 2 others vs. Uganda**, in which the court observed that the Eastern African borders are

volatile and porous and therefore present courts in the region additional difficulties in execution of discretion on matters of bail.

15. Mr. Arum for the 1<sup>st</sup> accused submitted that his client comes from Kisumu which is not a border town. He urged that bond cannot be denied on such ground. Ms. Oduor on her part urged that to deny the accused bail on that ground was applying the law differently to them. Counsel also urged that the aviation connection cannot stand as the industry is strictly controlled.

16. The ground advanced that the accused hail from a border town can be a good ground. The prosecution should however demonstrate that the accused have plans to cross the border or some cogent proof to show that they intend to take advantage of hailing from a border town to skip trial. Mere allegations without anything to support is not sufficient. What the prosecution should have done was demonstrate an attempt by the accused to purchase tickets or attempt to relocate. In any event, unless evidence is adduced to support the claim, using this ground to deny bail is discriminatory. It goes against the accused right to be given equal treatment before the law, and to be given equal benefit under the law.

17. The prosecution has advanced an interesting ground that:

**d). Granting bail in this case will undermine or jeopardize the objectiveness or the proper functioning of the criminal justice system and interference with witnesses need to secure witnesses from interference.** Ms. Gichuhi urged that the Key witnesses in the case are employees of the 2<sup>nd</sup> accused and are also well known to the 1<sup>st</sup> accused. She urged that the release of the accused on bond will cause apprehension and may lead to reluctance on the part of the witnesses to give their evidence in court. Ms. Gichuhi relied on the case by this court of **Republic vs. Zacharia Obado & 2 others (2018) eKLR**. Counsel urged that the accused have the names and contacts of witnesses. That those who have adversely mentioned the accused may be fearful and apprehensive to testify if the accused are released.

18. The counsels for the accused have all denied that there was any plan to interfere with witnesses. They urged the court to ignore the allegations as they were bare without proof.

19. The prosecution objected to release of the accused persons on bond arguing that there was a likelihood they will interfere with witnesses. That issue was considered in the case of **Republic v Joktan Mayende & 3 others 2012 eKLR** where the seriousness with which the court should consider the question of possible interference with witnesses was addressed by the Gikonyo, J. in the following words:

**"All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with Witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused...**

**In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010."**

20. The prosecution needed not to make bare allegations but adduce some proof that the accused had interfered with the witnesses, or have attempted to do so. Such a claim should be established by some evidence. The court would then examine the evidence or other material before it to determine whether the claim has been substantiated, or there determine from the facts before it whether such a conclusion is justified.

21. The court took the liberty to call for Social Inquiry Reports from the Probation Department, and they were filed. In the report in respect of the 1<sup>st</sup> accused the family of the deceased objected to his release on bail. The brother of the deceased who also was present at the time of the incident and who is a key witness of incident said that he is traumatized and feels insecure. He however said that there has been no attempt to interfere or contact him by the accused.

22. In the report in respect of the 2<sup>nd</sup> accused, the family of deceased said that they were apprehensive of their security and felt that they need State Protection. The family of deceased were however clear that no threats or intimidation have been received by them so far.

23. The issue of interference or threats to the deceased family has been ruled out by the family itself. There was no foundation so far that such a threat exists. If at all hereafter it is demonstrated to have taken place or attempted, the same should be reported to court for the necessary action to be taken. As for the feelings of insecurity by the brother of the deceased, the State has the necessary mechanisms to deal with it and should address that issue.

24. The other ground that the prosecution has advanced is:

**e). Public security and peace and National Security.**

Counsel relies on the definition of National Security by Hermann C. which I have considered. Counsel urged that there was need to protect the victims of crime. Counsel relied on the ruling of this court in **Republic vs. Leliman & 4 others (2018) eKLR** where I considered the need to afford victims of crime a say on matters of bond thus:

**“It is clear from the recent development in the law that victims of crime should be given an opportunity to be heard including on matters of bond as a decision on that issue is likely to affect them.”**

25. Counsel also relied on paragraph 24, 25, 26 and 27 of Sgt Selegan’s affidavit to the effect the accused could easily access firearms; that the victims of this crime were greatly impacted by loss of the deceased; that the family of deceased have received threats and intimidations; that the accused facing firearm charges in the lower court where some of the witnesses in this case may also testify in that court.

26. The issues raised in this case, the seriousness of the charge, the punishment the accused face, issues of likelihood to jump bail have a remedy that can be applied rather than denial of bail to the accused. Stringent bond terms that would serve as mitigation to discourage the accused to jump bail is a very effective remedy, given the circumstances of this case.

27. In the result, I will grant both accused bail on the following terms. There are prerequisite terms to be met before bond and security provided to support it is considered as follows:

**1. Before release on the below stated terms the accused persons:**

**a. Must surrender to the police for safe custody all firearms and ammunition in their possession whether licenced or not and swear an affidavit declaring they have surrendered all the firearms, ammunition in their possession.**

**b. Both accused are disqualified from owning or holding any firearm or ammunition until this case is finalized or this term is cancelled.**

**c. Each accused should swear an affidavit specifying the place or estate where they intend to reside during the pendency of this case.**

**2. Subject to the above prerequisite conditions being met each of the accused may be released on the following bond terms:**

**a. The 1<sup>st</sup> accused may be released upon deposit of cash bail in the sum KShs. 500,000/- and in addition provide two sureties who should each provide security of KShs.500,000/-.**

**b. The 2<sup>nd</sup> accused may be released on deposit of cash bail in the sum of KShs. 2 (two) million and in addition provide two sureties who should each provide security of value equivalent to like sum.**

**c. Each accused should deposit with the court all the travel documents and or passports they own.**

**d. The accused persons are barred from approaching the witnesses in this case or the close friends or relations of such witnesses whether directly, indirectly, physically, through social or other media platforms or in any other way, whether in regard to the instant case or for any other reason nor intimidate, threaten whether by covert or other means.**

**e. The accused will not directly or indirectly delay the finalization of this case unreasonably and without a good cause.**

**3. The accused are warned that the breach or threatened breach of the terms of bond as set herein above, which breach must be demonstrated to the satisfaction of the court, will lead to the revocation of the bond terms, forfeiture of the cash bail and the immediate arrest and detention in prison custody of the defaulting accused person.**

Those are the orders of the court.

DELIVERED THROUGH TEAMS THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2020.

LESIT, J.

JUDGE

Delivered in the presence of

Gitonga Court Assistant

Ms. Gichuhi For the State

N/A For the 1<sup>st</sup> Accused

Prof. Lumumba/Ms Oduor/Ms. Aluda For 2<sup>nd</sup> Accused

Accused both present.

**LESIT, J.**

**JUDGE.**