



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO 19 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILLIAM MASIKA TASIKA.....ACCUSED**

**RULING**

1. The accused was charged with the offense of murder contrary to section 203 as read with section 204 of the penal code to which he pleaded not guilty. By a notice of motion dated 6<sup>th</sup> march 2020 the same sought to be admitted and released on bond or bail on reasonable terms pending trial.
2. The application was supported by an affidavit sworn by his Advocate on record in which she deposed that the accused had been in police custody and detention since April 2019 when he was arrested, yet his trial had not commenced. It was stated that the applicant was the sole bread winner for his family.
3. It was contended that the applicant had no independent source of income from which he could pay cash bail or from which he could continue supporting his relatives. It was stated that unless he was released on bond, his pre-trial detention will constitute or amount to pre-trial punishment which could not be remedied or reversed in any way.
4. The application was opposed through a replying affidavit sworn by **PC PETER MUTISYA** in which it was deposed that the applicant was charged with two counts of murder of his wife and three months old daughter. It was stated that prior to the murder, the accused had separated with the deceased, due to frequent domestic violence and that he lured the deceased in a bid to reconciled and took the opportunity to commit the offense.
5. It was contended that the applicant and the victim's family comes from the same area and should he be released on bail, there was real likelihood that he shall instil fear upon the members of the victim's family. It was stated further that before the commission of the offense the applicant had issued threats to the deceased and some members of her family with a report to that extent being made at Kabete police station vide OB60 /5/4/2018.
6. It was stated that nine of the prosecution witnesses were neighbours, co-workers and watchmen at the estate where the accused used to work and live, and were well known to the accused who were likely to be either influence interfered with or intimidated by the accuse and his unmaned friends. It was finally stated that the accused home is near the Kenya/Uganda boarder which he was likely to cross over in a bid to abscond.
7. At the hearing of the application, Ms Soweto for the accused submitted that bail was a constitutional right of the accused person which could only be denied where there were compelling reasons. It was submitted that no good reason had been presented to court to justify the limitation of the accused fundamental rights. It was submitted that save for the OB number the prosecution had not given any details on the alleged threats.
8. She submitted that the alleged anger issues and the fact that the accused came from Kenya/Uganda boarder were not grounds for denial of bond. She submitted that the pre-bail report had confirmed the accused economic status and therefore he should be released on terms that he makes a periodical report to either the police or the court as he could no raise cash bail or bond.
9. In opposing the application, Mr. Okeyo submitted that the accused was a person of uncontrollable anger and that the murder weapon used on the victims were a knife and a claw, making the accused a dangerous person who should not be released into society. He contended that the deceased the accused had gone ahead and issued threats to other members of her family as confirmed through sms to three members of the family.

10. It was contended that the accused and the deceased comes from the same area who are likely to be interfered with. It was submitted that the accused was a likely flight risk who would easily cross over into Uganda.

11. In a rejoinder, Ms Soweto submitted that the court has to consider the accused innocent at this stage and that the prosecution failed to discharge their duty of placing compelling reasons before the court.

12. In compliance with the Judiciary Bond and Bail Policy Guidelines, the court called for pre-bail report wherein the following were noted: the accused hails from Tranzoia county and was residing at Kangemi at the time of the offense where he was living with the deceased before their separation seven months before the said date. He was working as a caretaker. He had a previous marriage and his family stated that if released on bond, he would reside at his rural home where they can exercise supervision upon him to ensure that he abides by the bond terms.

13. On the victim statement; it was stated that the deceased had three children, two from a previous relationship and one (deceased) with the accused. One child was under the care of the deceased brother. It was stated that the accused was a violent man who had issued threats to the victim's family and that they were living in fear of the accuse whose rural home was next to the victims.

## **DETERMINATION**

14. Bond is a constitutional right of every accused person which under Article 49(1) (h) can only be denied where there are compelling reasons to be advanced by the prosecution on a balance of probability. What constitute compelling reasons has been captured in the Bail and Bond Policy guidelines and in several decisions of the Superior Courts to include: -

***“ a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.***

*Where the charge against the accused person is serious, and the punishment heavy, the courts assume that there are more probabilities and incentives for the accused person to abscond, whereas in case of minor offences there may be no such incentives.*

***b. The strength of the prosecution case.***

*An accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence against the accused person is strong.*

***c. Character and antecedents of the accused person.***

*Although the character and antecedents of the accused person do not by themselves form the basis for denial of bail or bond, they may justify the refusal of bail or bond if they are coupled with other adverse factors.*

***d. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.***

***e. Likelihood of interfering with witnesses.***

*Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and if the court cannot impose conditions to the bail or bond to prevent such interference.*

***f. The need to protect the victim or victims of the crime from the accused person.***

***g. The relationship between the accused person and potential witnesses.***

*If the accused person is either related to the witnesses or stands in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact the accused person might have on the witnesses, if he or she is released pending trial. However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice.*

***h. The accused person is a flight risk.***

*Where the accused person is a foreigner who does not have a fixed abode or hosts in the country and Kenya does not have an extradition treaty with the accused person's country, there is a presumption that he or she is a flight risk and may therefore fail to attend trial if granted bail or bond. The rationale for this presumption is that it would be impossible to prevail upon such a country to return its national to Kenya to be prosecuted should they abscond after being granted bond or bail.*

***i. Public order, peace or security.***

*Pretrial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such*

that the release of the accused person would be likely disturb public order or undermine public peace or security.

**j. Protection of the accused person.**

*Pretrial detention could apply where the accused is threatened with lynching for committing a crime.”*

15. In this matter, the following issues have been raised by the prosecution; - the accused and the deceased were wife and daughter respectively, the intended prosecution witnesses were their neighbors and the accused coworkers. Whereas it had been indicated that the accused would if released on bond go back to his rural home, in view of the fact that his home is next to the home of the deceased and given the fact that there are allegations of an attempt to threaten the family of the victims, it is clear to my mind that should the accused be released on bond at this stage, there is real likelihood of his presence interfering with the course of justice. Interference with witnesses is one of the compelling reasons upon which the accused may be denied his right to bail.

16. In as much as the said threats and interference can be limited through the use of bail terms and conditions, I have taken into account the relationship between the accused and the intended prosecution witnesses and the conduct of the accused as stated in the Replying Affidavit by the Investigating Officer and I am satisfied that the prosecution has placed before me adequate and sufficient compelling reasons to enable me deny the accused the enjoyment of his constitutional rights at this stage until all the prosecution witnesses who are related to the deceased and those who are his coworkers and neighbors have testified at which stage he shall be at liberty to renew his application for bond.

17. In the final analysis the application for bond is denied at this stage.

**Dated, delivered and signed at Nairobi this 16<sup>th</sup> day of September, 2020**

**Through Microsoft Google Teams.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Maulikha for the State*

*Ms njoroge for Ms Soweto for the accused*

*Accused present*

*Court assistant: Karwitha*