



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. E011 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

ADAN IBRAHIM SALAT.....1ST ACCUSED

ABDIRAHMAN ROBLE SAMOW.....2ND ACCUSED

RULING

1. The Applicants were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in respect of the murder of **ADEN ABDI MADHOBE** and **MUDHIDIN ADEN MUDHOW** on 25th day of July, 2020 at Soko Ngombe Area of Garissa Township within Garissa County.
2. They both pleaded not guilty to the said charges and by an application dated 5/8/2020 the 1st Applicant sought to be released on bond/bail pending the hearing and determination of this case. The application was supported by his affidavit in which he deponed that he was aged over forty years married with two (2) wives and seven (7) children of whom he was their sole bread winner.
3. He stated that he was a police officer serving at the Garissa County Directorate of Criminal Investigations Department and that the offences occurred when he was executing his duties, when he went to arrest an individual suspected of committing murder at Soko Ngombe area, when a mob attempted to free the said suspect forcing them to use the firearm in an attempt to disperse the crowd. He stated that he was mistakenly arrested thereafter and detained before being charged with the offence herein.
4. The second applicant by an application dated 13/8/2020 also sought to be admitted to bail/bond pending the hearing and determination of the case and supported his application by an affidavit sworn on the same date, in which he stated that he was in severe pain having been diagnosed with acute appendicitis for which he was due for appendectomy surgery on 14/8/2020 having been and recently admitted in Jocham Hospital in the month of May.
5. It was contended that upon undergoing the surgery, he would require to recuperate over a period of several weeks under conditions which may not be consistent with an incarnation environment.
6. He deponed further that due to his training as a police officer, he was well oriented with discipline, obedience to law and compliance with orders including conditions which the court may grant.
7. The application was opposed by the State through a replying affidavit sworn by CI Paul Mwita, wherein he deposed that the accused persons being police officers were well trained in the use of reasonable force, safe use of guns and keeping order and therefore their action leading to the incidence herein was symptomatic of a premeditation on their part towards the deceased persons. It was contended that the release of the accused persons on bond would disturb public order or undermine public peace or security.
8. It was stated further that being police officers based within the area where the incidence occurred, they were likely to get into contact with the prosecution witnesses who are based in the same area, and therefore there was a high likelihood of intimidating the said witnesses.
9. It was contended that at the time of the arrest of the applicants, there were riots, demonstrations and a lot of animosity towards the police and it would therefore be in the public interest that they be denied bail and bond taking into account the manner in which the death of the deceased persons were caused.
10. The 1st Applicant through his Advocate on record filed written submissions which he relied upon and in which it was submitted that there were no compelling reasons advanced to enable the court deny him the enjoyment of his constitutional right to bail. It was contended that the

police must have completed their investigations and there was no evidence that he had in any way interfered with potential witnesses or purported to obstruct investigations.

11. In support of the submissions reliance was placed on the Malawian High Court case of **CLIVE MACHOLEWA v REPUBLIC 171 OF 2004 (2004) MWHC 53** to the effect that:-

“The practice should rather be to require the state to prove to the satisfaction of the court that the circumstances of the case, the interest of justice require that the accused be deprived of his right to be released from detention.”

12. It was contended that the Applicant had a place of abode whose conduct and character was good and not a threat to the prosecution evidence on ongoing investigation. Reliance was placed upon the following High Court decisions: -

- a) R v ZACHARIA OKOTH OBADO [2018] eKLR Lesiit J
- b) R v DAVID MUCHIRI MWANGI [2018] eKLR Wakiaga J
- c) R v SARAH WAIRIMU KAMOTHO [2019] eKLR Mutuku J
- d) R v ROBERT ZIPPOR NZILU [2018] eKLR Odunga J
- e) R v FRANKLIN MBITHI MUYANGA & 2 OTHERS [2020] eKLR Odunga J

13. On behalf of the 2nd Applicant it was submitted that bail was a constitutional right of every accused person whose right to liberty should not be denied, as he was at this stage presumed to be innocent until proved guilty. It was contended that there were no compelling reasons advanced, as the purpose of bond was only to secure the attendance of the accused at his trial. It was submitted that the 2nd Applicant had a medical condition which would not be managed while in prison, coupled with the ongoing Covid-19 pandemic, which would expose the same to the virus due to his pre-existing conditions.

14. In compliance with the provisions of Bond/Bail Policy Guidelines, the court called for pre-bail reports on the applicants, which were duly filed and which confirmed the applicants' background with the only issue raised being that the victims' family and the area chief felt that the environment in Garissa had been volatile following the incidence and was not conducive for the return of the accused persons, who were capable of interfering with witnesses and further that there was a high likelihood of them being lynched by the residents.

15. Mr. Odhiambo watching brief for the families of the victims, supported the submissions by the State and stated that the victim's concerns were highlighted in the pre-bail reports.

16. I have taken into account the affidavits filed in support and against the application herein, the pre-bail report, the submissions by the Advocates and the authorities in support thereof which I have had the advantage of reading. Bond as stated in the said authorities is a constitutional right of every accused person under Article 49(1)(h) of the Constitution of Kenya 2010, which may only be denied where there are compelling reasons advanced by the prosecution to the satisfaction of the court on a balance of probability.

17. What constitutes compelling reasons have now been settled in Kenya through judicial pronouncements and the Bail and Bond Policy Guidelines 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."

18. In this matter the state has raised the issue of the situation in Garissa which it has been submitted is volatile and that if the accused person goes back to Garissa there will be unrest thereby affecting public peace. It was further contended that given the status of the applicants as police officers who carried a lot of respect, there was a likelihood of them interfering with witnesses in order to weaken the prosecution case. It was contended that the accused persons were also flight risk.

19. It must be stated in no clear terms that the purpose of bond has always been and remains that of securing the attendance of the accused persons at his trial if and when called upon as per the provisions of Section 123 of the Criminal Procedure Code and as was stated by Chesoni, J in the case of **NGANGA v REPUBLIC [1985] KLR 451** as follows:-

"Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions ... generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless there are substantial grounds for believing that;

a) the accused will fail to turn up at the trial or to surrender to custody or;

b) the accused may commit further offences; or

c) he will obstruct the course of justice.

The primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time. I would therefore agree with Mr. Karana that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial."

20. The court will only deny the accused the enjoyment of his constitutional right to bail where there are compelling reasons to show that his release will compromise the integrity of the trial and that those compelling reasons may not be mitigated for or ring-fence by appropriate bond and bail terms.

21. As regards the issue of the volatile nature of Garissa it is not in dispute that the applicants have now been charged in Nairobi and not in Garissa where the offence is alleged to have occurred, they have provided an alternative places of abode during their trial which is not within Garissa and there is no evidence tendered by the prosecution to show that they have attempted to make any contact with any of the intended prosecution witnesses. There is no evidence placed before the court that the applicants have attempted to interfere with the course of justice in the matter before their arrest.

22. The mere fact that the appellant are police officers in itself cannot be a ground to deny them bail, unless it is shown to the satisfaction of the court that they had attempted to use their position to interfere with the prosecution case. As regards interference with witnesses Justice Korir in the case of **REPUBLIC v DWIGHT SAGARAY & OTHERS High Court Criminal Case No. 61 of 2012** had this to say: -

“For the prosecution to succeed in persuading the court on this criteria however, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others.”

23. The above holding finds support in the decisions by Justice Mutuku in **REPUBLIC v WILLIAM KIPKORIR KIPCHIRCHIR & ANOTHER [2018] eKLR** thus:-

“intimidation, interference and threatening of witnesses are serious matters and are compelling reasons where evidence of such intimidation, interference or threats is provided to the trial court. I have carefully considered the evidence placed before me to support the allegations that the accused persons may interfere, intimidate and threaten witnesses and in my view and in the absence of evidence to support the same, these are just suspicions and fears harboured by the prosecution that this may be the case. I have not at all downplayed the seriousness of the allegations by George Kirubi and the incidences he has cited to the court. The problem I have is that there is no evidence pointing to the accused as the persons who perpetrated those acts. Besides, during all the dates he alleges these incidences occurred and which he thinks are not mere coincidences, the two accused persons were in custody. How then would they have perpetrated these acts if they were not free to carry them out?”

24. The prosecution has not named any witness likely to be interfered with should the accused persons be released on bail. There is no evidence tendered to show that the Applicants intended to go back to Garissa now that they have been charged in Nairobi and are likely to be interdicted from the police force pending trial and that they will violate any condition issued by court.

25. I am therefore persuaded and hold that the prosecution has failed to provide compelling reasons on a balance of probability to enable me deny the accused therein constitutional right to bond and further that the fears by the prosecution cannot be adequately ring fenced by adequate terms and conditions. I have further taken into account the medical condition of the 2nd applicant looked at against his constitutional right to health under Article 43(1)(a) of the constitution and is of the view that the balance of scale weighs in favour of him being granted bond.

26. Having taken into account the nature of the offence and the status of the applicants as police officers, I hereby grant each of them bond/bail the following terms and conditions: -

- a) Each shall be released on a bond of Kenya shillings one million (Kshs. 1,000,000/-) with two sureties of similar amount.*
- b) In the alternative they may be released on cash bail of Kenya shilling five hundred thousand (Kshs. 500,000/-) with three sureties of similar amount.*
- c) They shall not during the period of their trial set foot in Garrisa County for any purpose of whatever nature unless the same is allowed by the Deputy Registrar of this court, the reasons for which must be recorded in the court file.*
- d) They shall report to the officer in charge of investigations at Kilimani police station once after every thirty days at dates to be fixed by the said officer with the first such report being when they are being released from custody.*
- e) They shall not contact or intimidate, either directly or indirectly any of the intended prosecution witnesses including but not limited to their former colleagues at the Garrisa police station.*
- f) If they hold any passport, the same must be deposited with the Investigating Officer in this matter before they are released from custody.*
- g) In violation of any of the terms herein, the bond shall stand cancelled without any further court order.*

Dated, Signed and Delivered at Nairobi This 28th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Mr. Okeyo for the State

Mutemi for Nzili for the 1st accused

Ms Akoko for the 2nd accused

Accused present

