



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. E011 OF 2020**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**1. GEOFFREY OKUTO**

**2. AISHA JUMWA ..... RESPONDENTS**

**RULING ON BAIL PENDING TRIAL**

1. On 19<sup>th</sup> October, 2020 the two accused persons appeared in court in obedience to summons issued by this court, following the filing of an information for the offence of murder against them, by the office of the Director of Public Prosecutions.
2. Plea taking was not done on the said date as the accused persons had not been subjected to mental assessment. They were remanded at the Port Police Station to await the said examination and for pre-bail assessment to be undertaken.
3. On 22<sup>nd</sup> October, 2020 the charge of murder was read out to them. They pleaded not guilty. At the stage of plea taking, they were represented by Messers Jared Magolo, Danston Omari, Cliff Ombeta and Shadrack Wambui. Mr. Magolo applied for the release of the accused persons on bail/bond pending trial. He explained that investigations had been ongoing for 1 year and the accused persons had been released on cash bail of Kshs. 500,000/= by the lower court and that they abided by the conditions which had been set by the said court. Mr. Magolo added that when the accused persons were summoned by the High Court, they attended court as required.
4. Mr. Cliff Ombeta submitted that the provisions of Article 49 of the Constitution are very clear that accused persons are entitled to bail/bond unless compelling reasons have been given. He pointed out that such reasons must be forceful and convincing but in this instance, no grounds of opposition had been served on them by the ODPP and no affidavit to oppose the release of the accused persons on bail/bond had been served on them. He submitted that Article 49(1)(h) of the Constitution addresses individual fundamental rights which must be enjoyed by all as per the provisions of Article 21 of the Constitution. He further stated that courts have powers under Article 23 of the Constitution to protect and uphold fundamental rights.
5. It was submitted that the 2<sup>nd</sup> accused person is a politician and a member of parliament (MP) and needs to defend her dignity outside a police cell. That she also needs to do her work as an MP.
6. Mr. Danstan Omari claimed that the State had the intention of detaining the accused persons when they requested them to go for mental assessment because the ODPP did not expressly request them to do so. He indicated that the accused persons had not defied any lawful order from court. Mr. Omari was of the view that the ODPP deliberately withheld the mental assessment report for the 1<sup>st</sup> accused on the date set for plea taking so that the hearing for bail/bond could be deferred. He prayed for the accused persons to be admitted to reasonable bail/bond terms.
7. Mr. Shadrack Wambui Advocate relied in the decisions in **David Muchiri Mangi v Republic** [2018] eKLR and **Danford Kabange Mwangi** [2016] eKLR in buttressing the submissions made by his senior colleagues. He submitted that the accused persons rights in preparing for their defence correlates with their right to admission to bail/bond. He stated that there was no indication that the accused persons were a flight risk or that they were likely to interfere with witnesses. He submitted that they had gone through the pre-bail reports and in his view, they were favourable to the accused persons and recommended their being admitted to bail/bond.
8. Messrs Kemo and Jami appeared for the office of the Director of Public Prosecutions. Mr. Kemo, Senior Assistant DPP submitted that he was opposing the application by the accused persons to be admitted to bail/bond pending trial. He stated that when they appeared before this court on 19<sup>th</sup> October, 2020 he applied for pre-bail assessment to be undertaken for each accused person. He made reference to the paragraph addressing the victim's concerns in the pre-bail report and stated that the relatives of the victim were apprehensive that since the accused persons are influential, they were likely to interfere with witnesses. Mr. Kemo prayed to be given at least 1 hour to file and serve an affidavit

to oppose bail/bond. He explained that the Investigating Officer had travelled from Malindi to Mombasa the day before the plea was taken and that was when they got an opportunity to talk and make a decision to oppose the admission of the accused persons to bail/bond.

9. When Mr. Magolo rose to respond to the issues raised by Mr. Kemo, it became apparent that he was responding to factual issues which had been raised orally. This court gave both the ODPP and the defence Counsel 2 hours within which to file the requisite affidavits and annexures to support their rival positions. The ODPP filed an affidavit to oppose the release of the accused persons on bail/bond through Sergeant Joseph Yator. Mr. Magolo filed a replying affidavit in respect to the 2 accused persons. Each of the accused persons also filed individual replying affidavits.

10. The filing of an affidavit by Sergeant Yator gave the ODPP a launch pad of opposing the application for admission of the accused persons to bail/bond pending trial. Mr. Kemo submitted that the 2<sup>nd</sup> accused person is a person of influence in Malindi Constituency which she represents in parliament. He further stated that her work involves assisting members of her constituency and can easily influence witnesses. It was indicated that the Investigating Officer (Sergeant Yator) spoke to a witness by the name Alfred Jola Kahindi who informed him that the 2<sup>nd</sup> accused person is likely to interfere with witnesses. Mr. Kemo stated that the said reason was strong enough to convince this court to decline to release the accused persons on bail/bond. He relied on the pre-bail report of the 2<sup>nd</sup> accused person which he said captures the concern they had raised.

11. In making reference to paragraph 5 of the affidavit sworn by Sergeant Joseph Yator, Mr. Kemo stated that some people lined up to adduce evidence, namely, Alfred Jola Kahindi, Michael Fredrick Furaha and Vincent Safari Katana are expected to testify on circumstances surrounding the deceased's death. He further stated that since they hail from the 2<sup>nd</sup> accused person's community, they may be intimidated and fail to come to court to testify if the 2<sup>nd</sup> accused person is released on bail/bond. He also submitted that the seriousness of the offence can tempt her to compromise witnesses due to her immense influence.

12. It was submitted that the 1<sup>st</sup> accused person has no fixed abode because he was said to reside at Embakasi, while at other times he resides in Malindi and Lavington. Mr. Kemo said that the pre-bail report indicated that the 1<sup>st</sup> accused person had not paid rent for the house in Embakasi for 3 months. It was asserted that lack of a fixed abode was a compelling reason for this court to deny him bail/bond.

13. Mr. Jami cited the case of **Republic v Martin Oluoch Okusako and Others** [2015] eKLR, where the court stated that the views of the victims should be put into consideration together with other factors. He said that the affidavit the ODPP had filed and the pre-bail report may not be raising the issue of actual interference of witnesses but what the prosecution was stating was that there was reasonable apprehension on the part of the witnesses and the Investigating Officer due to the influence the 2<sup>nd</sup> accused wields in her community. He was of the view that the prosecution would not have a fair trial if the witnesses were to be interfered with.

14. Mr. Danstan Omari when responding to the DPP's submissions indicated that in the authority cited by Mr. Jami, the Judge therein stated that the victim's family had not filed an affidavit to express the apprehension they had.

15. In making reference to the pre-bail report of the 1<sup>st</sup> accused person, Mr. Omari stated that he was a private bodyguard of the 2<sup>nd</sup> accused person. He explained that due to her political leanings, she hired private bodyguards after the Government withdrew the ones who had been assigned to her. Mr. Omari further explained that failure by the 1<sup>st</sup> accused to pay rent was due to the outbreak of the covid-19 pandemic which had affected many people financially all over the world.

16. Mr. Magolo submitted that the only reasons given by Sergeant Joseph Yator for the court not to grant bail/bond to the accused persons were based on mere speculation. He stated that the 2<sup>nd</sup> accused person has been a member of parliament for 6 years. He further stated that investigations had been ongoing for 1 year and if she had not tried to interfere with witnesses during that period, she would not do it now. He placed reliance on the part of the victim's concern in the pre-bail report, which disclosed that the 2<sup>nd</sup> accused person had not tried to initiate reconciliation. Mr. Magolo also indicated that as per the said report, the Chief of Ganda location had stated that the 2<sup>nd</sup> accused person had been attending funerals and other social gatherings in the said location and no evidence of witness interference had been given.

17. Mr. Magolo made reference to the replying affidavit sworn by himself and the letter dated 1<sup>st</sup> September, 2020 annexed thereto in which he had asked the ODPP about the progress of the case. He also said that he had informed the said office that his clients were ready to avail themselves when required. He referred to a letter addressed to the Inspector General of Police at Malindi (sic) by the ODPP and copied to him which showed that the accused persons were required to go for mental assessment on 5<sup>th</sup> October, 2020 to enable them to take plea.

18. In referring to the case cited by the ODPP, Mr. Magolo submitted that the Judge in that case gave conditions to the accused persons when he released them on bail/bond to the effect that they should not interfere with witnesses or threaten them. This court was urged to admit the accused persons to bail/ bond but issue conditions that they should not interfere with or threaten witnesses. He submitted that in the said case, the Judge was of the view that there should be action taken to execute the threat or actual evidence of interference with witnesses.

19. Mr. Magolo stated that the pre-bail report indicates that the 1<sup>st</sup> accused person has a fixed abode and had given his home particulars and that his wife knows where he lives. It was pointed out that his family lives in Embakasi whereas he lives at the 2<sup>nd</sup> accused person's place in either Lavington or Malindi.

20. Mr. Magolo submitted that both accused persons bought air tickets to come to court as required after being summoned to do so. In regard to the case in the Mombasa Chief Magistrates Court, namely, Criminal Case No. 6 of 2020, it was stated that the 2<sup>nd</sup> accused was granted bond and has been coming to the Trial Court as required.

21. Mr. Ombeta submitted that Article 49(1)(h) of the Constitution does not distinguish between serious and non-serious offences, as all offences are bailable. In addition, he submitted that the antecedents of the accused persons indicate that they attended court on 19<sup>th</sup> October,

2020. He indicated that the use of the word “likely” by the DPP, when they submitted that the accused persons “were likely” to interfere with witnesses showed that the prosecution was relying on speculation that the witnesses who will be called to testify, have reasonable apprehension.

22. In regard to the 1<sup>st</sup> accused person who was said not to have a fixed abode, Mr. Ombeta said that the prosecution had not stated that he would abscond.

## **ANALYSIS AND DETERMINATION**

**The issue for determination is if the 2 accused persons should be admitted to bail/bond pending trial.**

23. Article 49(1)(h) of the Constitution provides that an arrested person has the 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.

24. Section 123(3) of the Criminal Procedure Code (CPC) provides that the High Court may in any case direct that accused persons be admitted to bail or that bail required by a subordinate court or police officer be reduced.

25. Section 123A(1) of the CPC on the other hand provides as follows-

***“Subject to Article 49(1)(h) of the Constitution and notwithstanding Section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular –***

***(a) The nature or seriousness of the offence;***

***(b) The character, antecedents, associations and community ties of the accused person;***

***(c) The defendant’s record in fulfillment of obligations under previous grants of bail; and***

***(d) The strength of the evidence of having committed the offence.”***

26. In this case the ODPP represented by Mr. Kemo, Senior Assistant Deputy Director of Public Prosecutions and Mr. Jami, Prosecution Counsel opposed the admission of the accused persons on bail/bond for the reasons that-

(i) The 1<sup>st</sup> accused person has no fixed abode as the pre-bail report indicates that his family lives at Embakasi but at times he is either at Lavington or Malindi;

(ii) The 2<sup>nd</sup> accused is likely to interfere with witnesses or intimidate them as she wields a lot of power and influence as a Member of Parliament for Malindi Constituency.

27. The prosecution relied on the affidavit sworn by Sergeant Joseph Yator in which he stated that the deceased’s family spokesman, Rueben Mwamure Katana, the deceased’s nephew and a witness in this case had expressed apprehension that should the accused persons be released on bond, they were likely to influence witnesses thereby interfering with fair administration of justice. Sergeant Yator also relied on the pre-bail report which he stated captured the apprehension that the deceased’s family had expressed for their safety as the accused persons had been charged in court. The said police officer also referred to 3 witnesses who hail from the 2<sup>nd</sup> accused person’s community who are expected to give evidence surrounding the commission of the offence. Sergeant Yator deposed in his affidavit that the 3 witnesses may be prevented from testifying if they develop apprehension as the victim’s family had.

28. The decision in **Republic v Martin Oluoch Okusako** (supra) illustrates that in considering an application for the admission of an accused person to bail/bond, the views of the victim’s family should be considered.

29. The Counsel for the accused persons were of a divergent view from that taken by the representatives of the DPP. Messrs Magolo, Omari, Ombeta and Wambui were categorical that the ODPP had failed to disclose any compelling reason which should persuade this court to decline to grant the accused persons their prayer for being released on bail/bond pending trial.

30. Mr. Jared Magolo Advocate deposed in his replying affidavit that as early as 1<sup>st</sup> September, 2020 he had been informed that a decision to charge the accused persons with the offence of murder had been reached and he wrote to the ODPP informing them of the accused persons’ preparedness to cooperate to the extent of presenting themselves for medical assessment.

31. He further deposed that on 4<sup>th</sup> October, 2020 he received a copy of a letter from the ODPP instructing the Inspector General to make arrangements for the accused persons to undergo mental assessment. The said Advocate averred that at the time the charge was being registered in court, the accused persons were in Nairobi and only came from the said place directly to court on 19<sup>th</sup> October, 2020.

32. Mr. Magolo concluded his depositions by stating that since the decision to charge the accused persons was made, they had not attempted to contact the victim’s family or any witnesses or interfere in the investigations in any manner, as had been confirmed by the Probation Officer.

33. In a replying affidavit filed by the 1<sup>st</sup> accused on 22<sup>nd</sup> October, 2020 he deposed that on 17<sup>th</sup> October, 2020 at 1650 hrs, he and the 2<sup>nd</sup> accused person received a soft copy of summons dated 15<sup>th</sup> October, 2020 through the office of the Director of Criminal Investigations, Malindi Sub-County. He stated that on that day they were attending a political gathering in Meru but made arrangements to attend court on 19<sup>th</sup> October, 2020 to be charged with the offence of murder.
34. In the said affidavit, the 1<sup>st</sup> accused person described himself as a businessman with various interests within the Republic of Kenya. He therefore indicated that he was not a flight risk.
35. In regard to the deposition made by Sergeant Yator that the accused persons were likely to interfere with witnesses, he stated that he was not aware of the witnesses that the prosecution intends to call in this matter and was thus unable to interfere with their testimony. He further deposed that the respondent could invoke the Victim Protection Act to protect the witnesses if they felt that they may be at any risk, which in the present case would be out of excess caution as he did not pose any danger to witnesses, who were not known to him.
36. The 2<sup>nd</sup> accused person also filed an affidavit on 22<sup>nd</sup> October, 2020. The depositions in her affidavit are almost similar to those made by the 1<sup>st</sup> accused person save that she described herself as the Member of Parliament for Malindi Constituency and a former Women Representative for Kilifi County. She described the 1<sup>st</sup> accused as her very close associate and that they have been working closely and jointly for many years before and during her lustrous and promising political career. She deposed that their activities are tied at the hip and they are almost always together.
37. She deposed that apart from this case she is presently facing anti-corruption charges in Anti-corruption Case No. 6 of 2020 before the Chief Magistrate's Court in Mombasa, where she was released on a cash bail of Kshs. 2 Million.
38. The 2<sup>nd</sup> accused further deposed that since her conditional release on bail on 31<sup>st</sup> August, 2020 she had religiously and faithfully attended all court sessions when she was required to do so.
39. The 2<sup>nd</sup> accused just like the 1<sup>st</sup> accused deposed that this case was designed to settle political scores and their collaboration with the investigators and voluntary attendance of this court when they were required, demonstrated their seriousness to voluntarily attend court.
40. In their separate affidavits, each accused person stated that no compelling reasons had been advanced to deny them bail/bond pending trial. They undertook to abide by any conditions set by this court.
41. The 2<sup>nd</sup> accused deposed that if she was to be incarcerated pending trial, the people of Malindi Constituency would lack their representative in the National Assembly on the basis of serious allegations that were conspicuously aimed at frustrating her fast growing career and nationwide influence and traction.
42. In considering the application before me, the depositions made by Sergeant Joseph Yator, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons must be juxtaposed against the victim's family's concerns captured on the pre-bail reports. The said reports indicate that the victim's family and relatives expressed bitterness and anger. According to Hon. Reuben Mwamure Katana, the Member of the County Assembly of Ganda Ward, the victim's family spokesman and a nephew to the deceased, the death of the victim was sudden and traumatic to the family.
43. He also indicated that the victim's family was afraid and apprehensive that the 2<sup>nd</sup> accused person may use her influence to interfere with prosecution witnesses. For the said reason, the victim's family was strongly opposed to the accused persons being released on bail/bond pending trial. The pre-bail report also indicates that the victims' family informed the probation officer that the 2<sup>nd</sup> accused person had not made any efforts to initiate any reconciliation process.
44. The pre-bail reports for both the accused persons state that the victim's family however noted that the offence was committed over a year ago and considered their risk of re-victimization or retaliation as low.
45. In addition, the Chief of Ganda location, Mr. Batholomew Kitunga indicated that he did not foresee any threat to peace and security should the accused persons be released on bail/bond. He said that the 2<sup>nd</sup> accused person had been attending funerals and other social gatherings in the victim's village with no incident. In concluding the victim's family's concerns, the pre-bail reports indicate that none of the deceased's relatives expressed any need for seclusion orders.
46. They however expressed the need for the Honourable court to consider issuing an order that the accused persons should not attempt to either directly or indirectly interfere with prosecution witnesses. The victim's family's concerns against the 1<sup>st</sup> accused are almost similar to those of the 2<sup>nd</sup> accused.
47. Going back to the affidavit sworn by the Investigating officer, he expressed apprehension that the accused persons would interfere with witnesses. This court notes that the offence the accused persons were charged with occurred on 15<sup>th</sup> October, 2019. A year has elapsed between then and the time the accused persons appeared in court on 19<sup>th</sup> October, 2020. The accused persons had not been in custody as investigations had not been completed. This court is of the view that if the accused persons had any intention of interfering with witnesses or intimidating them, the 2<sup>nd</sup> accused person would have wielded what the prosecution regarded as her immense power and influence to find out the identities of prosecution witnesses.
48. If she had the intention of threatening, intimidating or interfering with witnesses, she would have done so during the duration of 1 year when investigations were ongoing. The victim's family's concerns captured in the pre-bail reports indicate that the 2<sup>nd</sup> accused person has been going to the village where the offence occurred for funerals and other social gatherings. The victim's family did not indicate that she at

any time attempted to use her influence to intimidate them. If anything, they said that the accused person had not made any efforts to initiate reconciliation, which means that she has kept off the victim's family.

49. In the case of **R v Danford Kabage Mwangi** (supra) the court stated as follows in an application for bail pending trial-

***“Mere allegations or possibility is not enough. Bail cannot be refused simply because the accused has been charged with a very serious offence, but the seriousness of the offence can be taken into consideration as a factor in determining if one of the grounds for refusing bail exists.”***

50. From the pre-bail report, the 2<sup>nd</sup> accused person steadily rose from a Member of a County Assembly to the Women Representative of Kilifi County before vying for the elective post of Member of Parliament for Malindi Constituency, which she is currently serving. Being a lawmaker, she well understands the consequences of witness interference. It is this court's finding that the 2<sup>nd</sup> accused person should not be denied bail because she wields immense power and influence due to the political office she holds. If that was to be the case, it would run contrary to the provisions of Article 49(1)(h) of the Constitution as she would be discriminated against on the basis of her status as a Member of Parliament.

51. In the case of **Republic v Zacharia Okoth Obando and 2 Others** [2018] eKLR, the 1<sup>st</sup> respondent who is the current Governor of Migori County was charged with the offence of Murder contrary to Section 203 as read with 204 of the Penal Code. He was released on bail/bond and given conditions to abide by. This court takes judicial notice that a Governor of a County wields more power and influence over a wider geographical region as compared to a Member of Parliament, whose jurisdiction is a constituency. Although the 2<sup>nd</sup> accused in her previous political position as the Women Representative of Kilifi County carried on her work over a wide geographical region, it has not been proved that she has used her political networks to infiltrate the victim's family or the prosecution witnesses the ODPP intends to call in support of its case.

52. In regard to the 1<sup>st</sup> accused, Mr. Kemo submitted that he has no fixed abode and for that reason he should be denied bail/bond. The pre-bail report given in respect to the 1<sup>st</sup> accused explains that he has served in various capacities for different politicians. The said report indicates that for 6 years now he has been serving as a Personal Assistant and doubling as the Security Manager for the 2<sup>nd</sup> accused. His wife and 2 children are said to be living in Embakasi Estate in Nairobi, where he has been paying rent. He has however defaulted for 3 months and his family risks being evicted. His pre-bail report indicates that while the 2<sup>nd</sup> accused is in Malindi, he lives at her house and when she is in Nairobi he lives at her house in Lavington. It is further stated that he has been living with the 2<sup>nd</sup> accused for 6 years. He also has a 3 acre piece of land in Homabay. This court does not think that the 1<sup>st</sup> accused person fits the bill of a man with no fixed abode. If he has been living with the 2<sup>nd</sup> accused for 6 years, then the 1<sup>st</sup> accused person is either to be found in Malindi or Lavington.

53. The impression given by the prosecution is that the 1<sup>st</sup> accused should be denied bail because he lives in the 2<sup>nd</sup> accused person's houses in Malindi and Lavington. Since the 1<sup>st</sup> accused person is said to have resided in the two places, for 6 years, it would not be difficult to trace him if he fails to attend court. The pre-bail reports for the two accused persons were comprehensive and have enabled this court to arrive at an informed decision. The prosecution and the defence Counsel must also be commended for filing and serving their affidavits within the one hour requested for, by Mr. Kemo for the prosecution and the additional hour given to the defence Counsel.

54. The result is that there are no compelling reasons which have been advanced by the Prosecution to persuade this court to deny the accused persons bail/bond. They shall therefore be released on meeting the following terms-

- (i) The 1<sup>st</sup> accused person may be released on execution of a bond in the sum of Kshs. 1,000,000/= with a surety of a similar amount or to cash bail of Kshs. 1,500,000/= and 1 surety of a similar amount;
- (ii) The 2<sup>nd</sup> accused person may be released on execution of a bond in the sum of Kshs. 3,000,000/= and a surety of a similar amount or to cash bail in the sum of Kshs. 4,000,000/= with a surety of a similar amount;
- (iii) The accused persons shall deposit their Kenyan passports and any other passports they may hold in court during the hearing of the case against them. They will however be at liberty to apply for temporary release of the same should need arise for them to travel out of the country. Such requests shall be accompanied by supporting documents to establish the purpose of their exit from Kenya. The request shall disclose their return date to the country;
- (iv) The accused persons are warned not to interfere or intimidate witnesses; and
- (v) They will be expected to attend court when required for mentions and hearing of the case they have been charged with, unless otherwise excused by the Trial Court.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of October, 2020.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Accused persons

Messrs Danstan Omari, Wycliffe Ombeta and Shadrack Wambui for the accused persons

Mr. Kemo, Senior ADPP - for the DPP

Mr. Oliver Musundi- Court Assistant.