



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 15 OF 2019[MURDER]**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**EMMANUEL OTIENO PAMBA.....ACCUSED**

**RULING ON WHETHER ACCUSED HAS A CASE TO ANSWER**

1. The accused person, **EMMANUEL OTIENO PAMBA** is charged with the offence of Murder contrary to section 203 as read with section 204 of the **Penal Code** (Cap 63) Laws of Kenya for which a plea of not guilty was entered on 8/10/2019. His advocate Mr. Oduol orally applied for a pre bail assessment report from the Siaya County Probation Officer which report was filed on 22nd October 2019. In the said report, the probation officer states that the victims of the offence are the accused person's paternal aunt and her son. The accused is therefore closely related to the victims by blood. He is married to two wives and four children. He never attended any school. He does not suffer from any known illness. He was raised by his grandmother after he was neglected by his father but his deceased victim aunt brought him home so that he could claim his portion of land from his father despite the opposition from his paternal uncle. He is aged 33 years. He comes from Busia County whereas the victims are from Siaya County. That after the alleged murder, his homestead was raced down thereby leaving the family homeless.
2. The advocate for the accused person prayed that the accused be released on bail pending trial as bail is a constitutional right and that there are no compelling reasons for denying him bail as he is not a flight risk.
3. The Prosecution filed an affidavit sworn by the investigating officer No. **98050 PC Moses Bett** deposing that the accused is feared to be a violent unruly drug trafficker who had turned into the lord of impunity in the locality and has close ties with the local administration and police; that the motive for the murder was a dispute over a piece of land and that he killed the victims in order to enjoy exclusive rights over the said land.
4. That the accused has no abode as the house he occupied belonged to his grandmother, the deceased **Pamela Adhiambo Ogola's** mother who rescued him from wandering from place to place.
5. The officer alleges that witnesses expressed their fears that if the accused was released he would harm them as he threatened them and warned them to desist from assisting the family of the deceased in her quest to reclaim the disputed land. That prior to the alleged murder, the accused had threatened to cut the deceased and that she had reported to Busia Police Station and recorded her statement to that effect. That therefore the fear is that he will intimidate witnesses and make them fear to come to court to testify in this case.
6. That his close relatives reside in Uganda hence he might not attend court and that residents expressed fear if he was released on bond. Further, that he expressed hopelessness following the incident including the option of taking his own life had it not been for his children hence it is in his own best interest that he remains in custody.
7. The deponent stated that bail as a constitutional right is not absolute and urged the court to find that there are compelling reasons to deny the accused person bail pending trial as he is a flight risk and is likely to interfere with prosecution witnesses besides risking to be harmed by angry citizens.

**DETERMINATION**

8. I have considered the oral application, the pre bail assessment report and affidavit sworn by the investigating officer in this case.
9. Article 49(1)(h) of the Constitution provides that:-

***“An accused person has the right ...***

*(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”*

10. It follows that the right to bail is not absolute and where there are compelling reasons, that right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail.

11. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial.

12. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. Therefore the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice.

13. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Thus, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. See *S v Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017). In that case the Court held that:

*“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question...the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S v Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S v Hudson* 1980 (4) SA 145 (D) 146 in the following terms;*

*“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”*

*In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken v AG* 1992 (2) ZLR 249 and *Norman Mapfumo vs. The State* HH 63/2008... The other relevant factor to be considered is the relative strength of the state’s case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case.”*

14. The magnitude of the offence as a consideration was appreciated by Mbogholi Msagha, J in *Cr Appl. No. 319 of 2002 Priscilla Jemutai Kolonge v Republic* (unreported) at page 3, wherein the learned Judge held:

*“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”*

15. In *Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria* S.C. 20A/2006 the Nigerian Supreme Court held:

*“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-*

*(i) The nature of the charges;*

- (ii) *The strength of the evidence which supports the charge;*
- (iii) *The gravity of the punishment in the event of conviction;*
- (iv) *The previous criminal record of the accused if any;*
- (v) *The probability that the accused may not surrender himself for trial;*
- (vi) *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;*
- (vii) *The likelihood of further charges being brought against the accused;*
- (viii) *The probability of guilty;*
- (ix) *Detention for the protection of the accused;*
- (x) *The necessity to procure medical or social report pending final disposal of the case.”*

16. Concurring with Justice Ibrahim Tanko Muhammad’s judgement, Justice Niki Tobi stated:

*“The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria. The Working Party on bail procedure in Magistrate’s Courts in the United Kingdom said in paragraph 22 of the Report:-*

*‘There are a number of other considerations to be taken account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicators of the likelihood or otherwise of the defendant’s appearance.’*

*As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this is not invariably true. For instance, an accused charged with a capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital and non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to the qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This however does not apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison term of life.”*

17. However in **Republic vs. Danson Mgunya & Another [2010] eKLR**, the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

*“...criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence.”*

18. That decision was made prior to the policy on bail-bond. Therefore, in interpreting the right to bail, section 123A of the **Criminal Procedure Code** gives the parameters for the grant of the right to bail which are:

*“(1) 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 respect of the fulfilment of obligations under previous grants of bail; and;*
- (d) *the strength of the evidence of his having committed the offence;*

*(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—*

- (a) *has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;*
- (b) *should be kept in custody for his own protection.”*

19. In **Kelly Kases Bunjika vs. Republic** [2017] eKLR, Muriithi, J was of the view that:

***“The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused ‘if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody’...Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court’s mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case.”***

17. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary’s **Bail and Bond Policy Guidelines, March 2015** at p. 25 which sets out judicial policy on bail thus:

***“The following procedures should apply to the bail hearing:***

***(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:***

***a. That the accused person is likely to fail to attend court proceedings; or***

***b. That the accused person is likely to commit, or abet the commission of, a serious offence; or***

***c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or***

***d. That the accused person is likely to endanger the safety of victims, individuals or the public; or***

***e. That the accused person is likely to interfere with witnesses or evidence; or***

***f. That the accused person is likely to endanger national security; or***

***g. That it is in the public interest to detain the accused person in custody.”***

20. The court in the above **Kelly Kases Bunjika vs. Republic** case further stated:

***“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”***

21. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. The burden to prove the existence of the said compelling reasons falls squarely on the prosecution. In **Clive Macholewe vs. Republic 171 of 2004 (2004) MWHC 53, the Malawi High Court (Justice J. Katsala)** stated:

***“In my judgement the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires that the accused be deprived of his right to release from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If he state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order.”***

22. The primary objective of release on bond is the attendance at Court by the accused person. In this case, the pre bail assessment report is not clear as to who would stand surety for the accused person and ensure his attendance. The report is also contradictory because it says that he is an orphan and had issues with his uncle while on the other hand it states that his family which is not disclosed is willing to stand surety for him. The social inquiry report, by the probation officer unlike the affidavit of the investigating officer, is not made on oath.

23. The investigating officer has in my view demonstrated that the accused person is likely to interfere with witnesses if released on bond at this stage and that as he is now homeless, a fact which was not contested, he is likely to be a flight risk. The two deceased persons are his close relatives.

24. Whereas the accused person retains his innocence throughout the trial, the court must balance out the interests of the accused and those of the public to ensure proper administration of justice.

25. The accused person in my humble view can be released on bail at any stage of these proceedings, and not necessarily before the hearing

commences. This court is determined to reduce time spent by accused persons in remand and subject to the diary of the court, can hear this case on a daily basis and conclude it expeditiously, if witnesses can be bonded to attend court. In the premises the application for release of the accused person **EMMANUEL OTIENO PAMBA at this stage** on bail pending trial is declined and rejected. The accused to remain in custody but he may reapply for bail after key witnesses have testified.

**Dated, Signed and Delivered at Siaya this 28<sup>th</sup> Day of October 2019.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr. Okachi Senior Principal Prosecution Counsel for the State

Mr. Oduol Advocate for the accused

Accused present

CA: Brenda and Modestar.