



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 28 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM KIPKORIR CHIRCHIR.....1ST ACCUSED

GODFREY KIPNG'ETICH KIRUI.....2ND ACCUSED

RULING

William Kipkorir Chirchir and Godfrey Kipng'etich Kirui are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 20th May 2018 at about 10.30 hours at City Park, Parklands in Westlands Sub-County within Nairobi County they jointly murdered Janet Wangui Waiyaki. The two accused persons were arraigned in court on 11th June 2018 when the charges were read and explained to them. They individually denied committing the offence. On the same day when the plea was taken Mr. Lagat, advocate, appearing for both accused persons informed the court that the accused persons would be seeking to be admitted to bail pending the hearing and determination of the case. Ms Mwaniki, appearing for the Director of Public Prosecutions, told the court that the State would be opposing admission to bail of the two accused persons.

The court, Wakiaga J, granted the prosecution five days to file and serve the defense with the affidavit and the defense to file and serve responses to the prosecution within three days from the date of service. The prosecution applied for and the court allowed the filing of a pre-bail probation reports for both accused persons. The affidavit by the prosecution is deposed by PC Lawrence Irungu a Police Constable who describes himself as one of the investigating officers. It is dated 18th June 2018 and was filed on the same date. Each of the accused persons has filed a Replying Affidavit both dated 29th June 2018 and filed on 3rd July 2018. Mr. George Kirubi Gathima, husband to the deceased has also filed an affidavit dated 26th July 2018 and filed in court on 30th July 2018. The pre-bail probation reports in respect of each accused persons were filed on 31st July 2018.

In the course of the proceedings for bail, counsel for the accused persons Mr. Lagat sought to cross examine PC Lawrence Irungu and Mr. George Kirubi Gathima in respect of their depositions contained in their respective affidavits. This court however declined to allow the cross examination of the deponents for reasons that the issues arising from their respective affidavits are responded to in the replying affidavits and covered in the submissions in court.

In his submissions in support of the application for bail, Mr. Lagat told the court that bail is a right anchored in Article 49 (1) (h) of the constitution and that murder is a bailable offence unless there exists compelling reasons. He submitted that PC Irungu has not shown any compelling reasons and that the affidavit raises mere allegations and matters of evidence that is yet to be tested in court. He submitted that the prosecution must show the court that there is real threat that the accused persons have interfered with witnesses. Counsel took issue with the affidavit of PC Irungu which he submitted attempts to introduce another charge sheet for attempted murder against the accused persons and that it would amount to double jeopardy to subject the accused persons to another charge.

Mr. Lagat submitted that the accused persons are police officers with fixed abode and that all their particulars are known and that they have cooperated with the police in the investigations. Mr. Lagat referred this court to various decisions both from the High Court and Court of Appeal to support this application. Counsel also referred to the replying affidavits of the accused persons. In the Replying Affidavit of William Kipkorir Chirchir, the 1st accused, it is deposed that the offence of murder is bailable and that bail cannot be denied to an accused person facing murder charge unless the state establishes compelling reasons; that PC Lawrence Irungu has introduced matters of evidence in this application which has not been tested through cross-examination. It is deposed that PC Irungu is a stranger to this case and that he purports to introduce another charge sheet in his affidavit (annexure LI-4 and LI-5) of a matter that is not before this court and that the prosecution has not established any compelling reasons to persuade this court to decline the application for bail/bond. He deposes that he has cooperated with the investigators; that he has a young family who depend on him fully and that he will abide by the terms and conditions which this court will set.

Godfrey Kirui Kipng'etich, the 2nd accused, in his Replying Affidavit supports the deposition of his co-accused and states that most of the witnesses are police officers who are not likely to be compromised or interfered with by the accused. He deposes that he is a Kenyan citizen,

holds no passport and is not likely to abscond; that he will abide by the terms and conditions set by the court and that the prosecution has failed to establish compelling reasons.

PC Irungu in his affidavit gives the reasons relied on by the prosecution to support their opposition to the application for bail/bond. He deposes that the prosecution has a strong case supported by strong evidence and therefore there is a high probability that the accused persons may abscond. He deposes that the accused persons may intimidate and interfere with prosecution witnesses if released on bond/bail because they have been served with witness statements and therefore they know the identities of all the witnesses. He deposes that the accused persons are people in authority and therefore they may threaten key prosecution witnesses and that the right to bail is not absolute.

Ms Mwaniki for the prosecution submitted in support of the opposition to granting of bail/bond to the accused persons maintaining that the prosecution has proved compelling reasons on a balance of probability. She submitted that the state wishes to secure all the evidence of their key witnesses first and that this can only be done by creating an enabling environment for witnesses to testify without fear. She urged the court to give a nearer date for hearing of this matter to allow the witnesses to testify as soon as possible. She urged the court to decline the application to admit the accused persons on bail. In respect of the authorities cited by the defense in support of their application, Ms Mwaniki told the court that these authorities are not relevant to this application because the facts of those cases are not similar to the matter before the court.

Mr. Kamau for George Kirubi Gathima, the husband to the deceased, in his submissions that is supported by the affidavit of George Kirubi Gathima raised two issues in respect of the two accused persons for consideration by this court: likelihood of their interfering with witnesses and absconding. Counsel, while referring to the affidavit sworn by George Kirubi, referred to four incidences that occurred after the death of the deceased which the deponent claims are not mere coincidences but calculated to intimidate him to stop pursuing this case. He referred to the delay by the Chiromo Mortuary to serve the family of the deceased first on 31/5/2018; a shooting from the roof of the house the deponent lived in aiming at his bedroom on 17th June 2018; an incident on 20th June 2018 when the deponent claimed his car was pushed off Jogoo Road by a mysterious vehicle and finally a fire that occurred at his business premises at Gloria Hotel on 23rd June 2018. The deponent further states that the accused persons are trained police officers and that they have access to the evidence and witnesses in this case and therefore they may interfere with both the evidence and the witnesses. Mr. Kamau urged the court to decline granting this application.

In response Mr. Lagat applied to cross examine George Kirubi on his affidavit and the allegations contained therein. He submitted that the allegations raised by George Kirubi occurred when the accused persons were in custody and that he has not produced proof of the events alleged to have occurred.

I have considered the application, the various affidavits for and against the applications, submissions by all the counsels and cited authorities. I have appreciated all the cited authorities, namely: **Jayendra Khimji Malde & 2 others v Republic [2011] eKLR, Republic v Danford Kabage Mwangi [2016] eKLR, Republic v Fredrick Muriuki Gikunju [2016] eKLR, Republic v Richard David Alden [2016] eKLR and Republic v Godfrey Madegwa & 6 others [2016] eKLR.** I agree with these cases on the matters of law and the reasoning behind granting of bail to accused persons. Right to bail is anchored in the supreme law of Kenya, the Constitution. Under Article 49 (1) (h) 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. It is clear from the wording of this article that the right to bail is not an absolute right. Where compelling reasons are advanced and the court is persuaded by these reasons, the right to bail or bond is curtailed. As stated by Mativo J in **Republic v Danford Kabage Mwangi** case (supra)

“The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”

Various reasons are normally advanced to support an opposition to an application for bail/bond. These include the following:

- (i) *The nature of the charge.*
- (ii) *The strength of the evidence.*
- (iii) *The gravity of punishment in the event of a conviction.*
- (iv) *The previous criminal record of the accused, if any.*
- (v) *The probability that the accused may abscond.*
- (vi) *The likelihood of interference and intimidation of witnesses or evidence.*
- (vii) *The likelihood of other charges being brought against an accused.*

There are two main reasons advanced in this matter. These are, firstly, that the accused persons may flee given that the prosecution case and the evidence against the accused is strong and that the accused persons are likely to intimidate, interfere and threaten witnesses given that they are persons in authority as police officers who know all the witnesses and the evidence against them. I have considered these grounds in support of the opposition to this application. A murder charge is a serious offence. Anyone charged with murder knows that if this charge is proved against them, the optimum penalty is death. The framers of the constitution of Kenya did not qualify the accused persons who should be allowed bond/bail and those who should not in stating that “an arrested person has the right to be released on bond or bail, on reasonable conditions....” The only reason advanced for the denial of bail or bond being the existence of compelling reasons. It is then left to the trial court to invoke its discretion in determining what amounts to a compelling reason. In so determining this issue, the trial court must consider

the material placed before it.

In my view the likelihood that an accused person may abscond because of the seriousness of the offence and the strong evidence against him is a compelling reason when there is evidence to proof that the accused has attempted to flee the jurisdiction of the court or has been in hiding. Likewise, 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?

I am alive to the fact that the paramount consideration in determining whether to grant or deny bail/bond to an accused person is whether the accused person will avail himself for the trial. This position has been considered by the courts in many cases where bail/bond has been sought. See *Watoro v Republic (1991) eKLR*, and *Republic v Richard David Alden [2016] eKLR* on this point. The reason for this becomes apparent in that if an accused person flees the jurisdiction, he is not available for the trial and this eventually compromises a fair trial and the balance that must be struck to ensure both the victim and the accused are accorded justice.

I have considered the grounds in support of this application and those in the opposition. I appreciate the apprehension by the prosecution that the accused persons may interfere with witnesses or abscond. It is my considered view that this apprehension is not backed by persuasive evidence to lead me to a finding that there are compelling reasons against the grant of this application. I am also appreciative of the fact that the rights of the victim must be taken into account by ensuring that an accused person faces the trial for the acts he is alleged to have done so that the trial court can determine whether he is guilty or not and make appropriate orders to ensure justice is done. For these reasons I will and do hereby allow this application in the following terms and conditions:

- (i) That each accused shall execute a bond of Kenya Shillings Two Million (Kshs 2,000,000) with two sureties of Kenya Shillings One Million (Kshs 1,000,000) each.
- (ii) In the alternative each accused may deposit cash bail of Kenya Shillings Seven Hundred Thousand (Kshs 700,000) with the Registrar of this court.
- (iii) Each accused is cautioned against doing certain acts that may interfere, intimidate or threaten the witnesses or in any manner compromise a fair trial.
- (iv) Each accused shall attend court at all times when required to do so until this case is heard full and determined.
- (v) This case shall be mentioned before Justice Lesiit on 19th September 2018 for re-allocation and giving of early hearing dates before another court if possible. This court is not able to hear the case as scheduled on 20th, 21st and 22nd November 2018 due to another long matter earlier fixed on those dates and running for the entire week.

Orders shall issue accordingly.

Delivered, dated and signed this 8th day of August 2018.

S. N. Mutuku

Judge