



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**CRIMINAL CASE NO. 46 OF 2018**

**LESIT, J**

**REPUBLIC .....PROSECUTOR**

**V E R S U S**

**ZACHARIA OKOTH OBADO.....ACCUSED**

**RULING ON BAIL**

1. This is a Notice of Motion application dated 24<sup>th</sup> September, 2018, by the Applicant, **ZACHARIA OKOTH OBADO**, seeking an order of bail/bond pending the hearing of the case. The application was filed under Certificate of Urgency. It is supported by an affidavit sworn by the Applicant. The application is brought under **section 123** of the **Criminal Procedure Code** and **Articles 20(3), (4) and (5); 21(1); 22(3) and (4); 49(1) (h) & 50(2) (a)** of the **Constitution**.

2. The State which is the Respondent has opposed the application through the replying affidavit sworn by No. 236734 I.P. Clement Mwangi, dated 25<sup>th</sup> September, 2018.

3. The application is based on grounds on the face of the Notice of Motion. They were cited by Mr. Ombija for the Applicant in his submissions. These are:

- i. The offence of murder is bailable under Article 49 1(h) of the Constitution of Kenya 2010.**
- ii. The Applicant has a qualified constitutional right to be released on bond/bail on reasonable conditions.**
- iii. The Applicant will avail himself to court as of when required to do so until the matter is concluded.**
- iv. The Applicant shall abide by any condition that shall be set by this Honourable Court as pre-requisite for grant of bond.**
- v. The Applicant shall not interfere with witnesses in this matter and any investigations should any be carried.**
- vi. The Applicant has cooperated with investigations so far.**

4. The replying affidavit raises various grounds to oppose bail. They will be considered later in this ruling as raised by the counsels in their submissions.

**FUNDAMENTAL RIGHTS AND PRINCIPLES**

5. Mr. Ombija for the Applicant invoked **Articles 49(1)(h)** of the **Constitution** and urged that Kenya is a Constitutional democracy governed by the rule of law. He also invoked **Section 123** of the **Criminal Procedure Code** as the procedure which should govern such an application. Learned Counsel also cited **Article 2(5)**, which adopts International Instruments which counsel urged form part of general rules on human rights and are part of our laws.

6. Mr. Ombija urged that Fundamental Freedoms in the Bill of Rights belong to each individual, are now granted by the State and that while applying them the court should adopt an interpretation that most favours the enforcement of the rights.

7. Mr. Ombija outlined the fundamental principles upon which bail is granted, the nature of the bail terms court should grant to ensure the accused enjoys the right of bail.

8. Counsel urged the court not to be carried away by what the Media has been peddling saying most of it was incorrect. In regard to accused being tried and convicted by the Media, Mr. Ondari urged that even though that may be so, the same could not affect the court as it considers evidence placed before it and urged that such a ground was not an argument to support bail.

### **COMPELLING REASONS**

9. Finally, counsel urged that if the prosecution had any compelling reason, it had to place it before the court by way of affidavit. Counsel urged that the affidavit sworn by Inspector of Police Clement Mwangi, did not contain any substantive compelling reasons to deny bail.

10. Mr. Ombetta for the Applicant took over from where Mr. Ombija left off arguing that since the prosecution had failed to provide any strong convincing reasons to support denial of bail which the court cannot ignore, the right to bail had crystallized and become an absolute right. Counsel urged that since the State had no compelling reasons to support its position, it was interfering with the accused individual rights as envisaged under **Article 19**. Counsel urged that under **Article 20**, all are bound by Fundamental rights and had the duty to enforce them as provided under **Article 21**.

11. Regarding to the right of bail being inalienable, Learned Prosecution Counsel Mr. Ondari urged that such submissions were not true. Counsel urged that the unalienable rights were provided under **Article 25** and were four (4) as follows:

- a. Freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- b. Freedom from slavery or servitude;**
- c. The right to a fair trial; and**
- d. The right to an order of Habeas corpus.**

12. Regarding compelling reasons and what constitutes it, Mr. Ondari urged that several courts had dealt with it. Counsel cited the case of **Republic vs. Milton Kabulit & 6 Others [2011] eKLR**, where he urged that the court isolated a number of reasons which it found could lead to a denial of bail.

13. Mr. Ondari urged that right to bail was not absolute and urged that factors exist which could justify limit of the right. He relied on the **Milton case**, supra, where the court cited a Nigerian case in which the Supreme Court of Nigeria set out compelling reasons for declining bail as including:

- i. nature of the offence,**
- ii. 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 applicant,**
- v. the probability that the accused may not present or surrender himself for trial,**
- vi. the likelihood of further charges being brought against the accused,**
- vii. the likelihood of the accused interfering with the witnesses or may suppress any evidence that may incriminate him,**
- viii. the probability of finding the applicant guilty as charged,**
- ix. the detention for the protection of the accused,**
- x. the necessity to procure medical or social report pending final disposal of the case.**

14. Mr. Sagana for the Applicant gave concluding submissions in answer to submissions by the State and by the advocate to the victims of the offence. Counsel emphasized on the need to have forceful and powerful reasons to deny bail. Counsel reminded the court that all offences were bailable including capital offences cited by the State as grounds to deny bail.

15. In the recently launched **Criminal Procedure Bench Book, paragraph 105** has been dedicated to outlining compelling reasons as stated in various cases, policy guidelines and others. These are; *likelihood accused may fail to attend court; may commit or abet the commission of a serious offence; endanger the safety of victims; interfere with witnesses or evidence; endanger national security or public safety; and protection of the accused person*. That list is however not exhaustive. I will get back to this later.

### **RIGHT TO PRESUMPTION OF INNOCENCE UNTIL PROVED GUILTY**

16. Mr. Ombetta urged that under **Article 50** of the **Constitution**, the accused had the right to be presumed innocent and that consequently his life had to go on; that he had the right to prepare for his trial in a free atmosphere and be able to consult his lawyers.

17. In regard to presumption of innocence being violated, Learned Prosecution Counsel Mr. Ondari urged that mere opposition to grant of bail to an accused was not a violation of the presumption of innocence as it had nothing to do with bail. Counsel urged that **Article 50** provided for fair trial and denial of bail did not amount to denial of a fair trial.

18. This court recognizes the importance of **Article 50** that an accused person should be presumed innocent until proved guilty. The accused person should be released on bail or bond whenever possible. Those are the words from the Bail and Bond Policy Guidelines [BBPG]. Opposition to granting of bail is not a violation of that right. That is why the Constitution used the words '*unless there are compelling reasons.*' That puts a duty on the prosecution to place before court any evidence they may have on compelling reasons for consideration by the court. It is the prosecution which has the onus and burden to prove presence of compelling reasons to deny bail. It is also the reason the victims are given an opportunity to be heard before bail is considered, and a mention made of the requirement for Victim Impact Statement in the Criminal Procedure Code.

19. Indeed, in this application, the victims were represented by counsel and did make submissions at the bail hearing. To argue then that any opposition to a release of an accused person on bail is a violation of that right is erroneous.

### **DIGNITY**

20. Mr. Ombetta urged that the accused had an inherent dignity under **Article 28** but submitted that he had lost it and his spirit killed having been tried by the public. Counsel decried the fact the accused had been handcuffed, and escorted by men in uniform and urged therefore that he had lost dignity. He urged the court to allow his application so that he can come from his home having taken a shower, eaten and prayed in order to restore his dignity.

21. In regard to dignity, Mr. Ondari urged that it was not a matter of dignity as such an argument would mean the poor in society and people in custody do not deserve dignity.

22. I do not wish to define the word dignity. However, I think it has nothing to do with what Mr. Ombetta urged or what Mr. Ondari thought it could mean. Dignity has to do with treatment of an accused, not his status. The binding constitutional principle of right to equal treatment before the law abides here. There cannot be equal treatment before the law based on the status or lack of it of an accused person. I look at dignity in terms set out under the **International Convention on Civic and Political Rights [ICCPR]** quoted by none other than Mr. Ombija, the lead counsel for the accused. That instrument provides that '*accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.*'

23. Having stated that, I just wish to state that the segregation referred to here does not mean that it can only be realized by the release of the accused from remand. It means the physical segregation within the place of detention. No complaint has been raised in that regard. If raised it can be dealt with at any stage of the proceedings.

### **COMPLEXITY AND STRENGTH OF THE PROSECUTION CASE**

24. Mr. Ombetta then analyzed the replying affidavit filed by the investigating officer. In regard to paragraph 10 which raised the issue of the case being complex and involving multiple suspects, Mr. Ombetta urged the court to find that the same was not a compelling reason. In regard to paragraph 11 that the State had a strong case, Mr. Ombetta reminded the court that the accused had denied the charge, therefore, negating the presence of a strong case. Counsel urged the court to ignore the allegation and instead invoke **Article 21** and grant to the accused what favours him.

25. I have noted that the prosecution is yet to provide witness statements, documentary and other evidence they intend to rely on at the trial. Failure to provide them cannot be interpreted to mean that the prosecution has no case at all, unless good grounds exist which could lead to such a conclusion.

### **CAPITAL CHARGE AND BAIL**

26. Regarding the offence being a capital offence, Mr. Ombetta urged the court to find it an obvious fact which needed not to be mentioned. He submitted that all suspects and or accused persons had a right to bail under **Article 49**.

27. In regard to right to bail under **Article 49(1)(h)**, Mr. Ondari urged that that right was not absolute and could be denied if there were compelling reasons. The Learned Prosecution Counsel urged that even though what amounts to a compelling reason has not been defined in law, the same has been settled in a number of authorities in the High Court and others.

28. Regarding the submission that right to bail was a self-activating right, counsel urged that contrary to submission by the defence, interpretation of law terms cannot be found in Oxford or other Dictionaries.

29. Regarding the submission that the State was trying to limit the right to bail which was a violation of the right, Mr. Ondari denied that and urged that it was not correct to say limiting the right to bail amounted to a termination of the right.

30. Mr. Ondari decried what he said was diminishing of factors limiting grant of bail by the defence in their submissions by use of words "so what?" in their submissions. Counsel urged that gravity of punishment was a serious factor as the case had a death penalty. Counsel urged that there was the likelihood of other charges being preferred against the accused. Counsel urged same should be considered.

31. Mr. Awora for victims of the crime urged the court to balance the rights of the accused and rights to life. Counsel urged court to consider the fact that justice should not only be done but be seen to be done. Counsel reminded court that right of accused to bail was not absolute.

32. On this issue, the seriousness of a charge and severity of the sentence to be meted out is a major consideration on issues of bail. It is however considered alongside other factors and cannot, standing on there own be a ground to deny bail.

### **INVESTIGATIONS STILL UNDER WAY**

33. Regarding paragraph 14 where the officer averred that investigations were not complete, Mr. Ombetta submitted that the State acted under pressure and ought not to arrest the accused as yet. Regarding the abductors still at large, Mr. Ombetta argued that the State had not shown the connection between them and the accused.

34. The averment that investigations are still underway cannot be wished away. It is evident that investigations are incomplete given the fact that other persons have been brought subsequently to the accused in this case, facing the same charge.

### **STATUS OF ACCUSED AND LIKELIHOOD TO INFLUENCE THE CASE**

35. Regarding the averment that the accused had great support and influence in Migori, Mr. Ombetta urged that the same was political and had nothing to do with the case before court. Mr. Ombetta submitted that what the prosecution needed to show is in what way the alleged influence would affect the case.

36. Mr. Ombetta cited the case of **Republic vs. Richard David Alden, Criminal Case No. 48 of 2016, [2016] eKLR, Republic vs. Rodgers Nzioka & Others, ACEC Misc. Application Nos. 13 to 18 of 2018** and **Republic vs. Dwight Sagaray & Others, Criminal Case No. 61 of 2012, [2013] eKLR**, in support of the proposition that the prosecution is required to prove influence and to show how it will affect the case and not just make the above allegation.

37. Mr. Ombetta urged that the police have been investigating the case for three (3) weeks prior to arresting the accused yet he did not run away.

38. Regarding the prosecution having failed to provide evidence that the accused was a person of influence, Mr. Ondari submitted that such argument cannot be taken seriously since every “*Tom, Dick and Harry*” know the status of the accused.

39. Mr. Muteti, Learned Prosecution Counsel handled the response to the cases cited by the defence and their relevance to the instant case.

40. Mr. Muteti submitted that the court in **Sagaray case**, supra, held that it was the duty of the prosecution to prove that the accused was such a public figure that arresting him could lead to chaos in the county. Counsel urged that the said case was distinguishable. Counsel urged that in **Sagaray case**, supra, the likelihood of interference of witnesses for being employees of the accused was an issue, and that the court held that proof of interference of witnesses was valid. Mr. Muteti urged that the court ruled that there was need for formal proof through evidence to show that witnesses will remain in accused employment. Counsel urged that as deposed in the replying affidavit, paragraphs 14(i) and (ii), some of the witnesses in this case fell under that category.

41. Mr. Alex Muteti urged that the cases of **Republic vs. Wanderi** and **Danson Ngunya**, supra, were distinguishable as was the **Sagaray case**, supra. Counsel urged that in the **Sagaray case**, ten (10) witnesses had testified and court when granting bail observed that all ordinary wananchi witnesses had testified and there was no more threat.

42. It is not enough for the defence to say that the accused influence is of a political nature and had nothing to do with the case before court. When a person is elected as a leader or a representative, he/she commands a lot of power both within the confines of that particular area they represent and also even outside of it. There are measures the court can apply to ensure such power does not affect the case, for instance, by imposing strict terms.

### **LIKELIHOOD OF INTERFERENCE WITH INVESTIGATIONS, WITNESSES, THREATS AND INTIMIDATION**

43. Regarding likelihood of interference with investigations and witnesses, counsel urged that material needed to be placed before court to show actual attempts at interference.

44. In regard to threats to the family of the deceased, Mr. Ombetta urged that the investigating officer needed to quote the OB No. where such threats were reported and also provide the names of those threatened with details of how, when and where it happened.

45. Mr. Ondari urged that the likelihood of interference was a serious factor as some of the witnesses were employees of the County of Migori where the accused was Governor.

46. Mr. Ondari urged that the investigating officer had averred that there were threats and intimidation which may scare away witnesses.

47. Regarding the accused status, Mr. Sagana urged that it was not sufficient to demonstrate that he was a Governor. Counsel urged that what has been said that he had done or attempted to do, that is, interference with investigations and or witnesses, no evidence was brought to prove the same.

48. Regarding threats to the family of the deceased, Mr. Sagana urged that accused was not implicated in any way and further, that the allegation had not been substantiated. Mr. Sagana urged the court to invoke **Article 159(2)(a)** of the **Constitution** and grant justice to the accused irrespective of status.

49. On the whole question of the likelihood of interference with the case, investigations and witnesses, I find it difficult to address that point at this stage. The nature of the case has been changing and more and more additional persons are being brought and charged with the same offence. Interference with the case is not constructively by meddling with the witnesses in a case, it can also be indirect say by releasing some facing the same charge while others are being arrested.

#### **WITNESS PROTECTION**

50. In regard to vulnerable witnesses, Mr. Ombetta urged that if such existed then they needed to be placed under Witness Protection.

51. In regard to protection of witnesses, Mr. Muteti urged that Witness Protection was not intended to uproot ordinary law-abiding citizens from their homes to witness protection houses, merely because a person wanted to enjoy his liberty.

#### **CONFESSION AND BAIL**

52. In regard to the police having been given a confession, Mr. Ombetta urged that it was the defence position that such a confession if it existed held no water.

53. Mr. Ondari relied on the case of **Republic vs. Rev. Fr. Dr. Guyo Waqo Malley & 5 Others [2012] eKLR**, where the court denied bail on account of severity of sentence and the fact that confessions had been made.

54. Issue of confession is a matter for trial as it is not before the court.

55. In regard to the averment that releasing the accused could compromise co-accused, Mr. Ombetta urged that the so-called co-accused were not before this court.

56. I find the issue of safety of co-accused not a matter the court can decide at this stage as there are no co-accused in the information before court as yet.

#### **PUBLIC INTEREST, ORDER AND SECURITY**

57. In regard to the danger of an outrage from persons supporting the accused, Mr. Ombetta urged that those were accused supporters. Counsel trashed the averment that there had been an outrage or that the accused was at the risk of attack if released.

58. Mr. Ombetta invoked the case of **Nicholas Kipsigei Ngetich & Others vs. Republic, Criminal Case No. 123 of 2010**, for the proposition that it cannot be heard from the State that a person is only safe while in custody. Mr. Ombetta urged that after all, the accused had his own security.

59. In reference to the **Ngetich case**, supra, Mr. Muteti submitted that it may be well that one cannot say a State cannot secure the public. Counsel urged however, that it was the duty of the court to protect the public and not close its eyes to apparent danger.

60. Mr. Ondari urged the court to consider the balance between individual rights and public interest. He relied on the case of **Republic vs. Diana Suleiman Said & Another, Misc. Criminal Application No. 55 of 2014**, for that proposition.

61. Mr. Ondari cautioned that heinous crimes of murder were becoming current in the country and outlined recent trends of murder including the current incident, the incident of the Magistrates daughter in Meru, the baby in Machakos and just this weekend's murder of a lady in Kilimani.

62. Mr. Muteti urged that in the **Sagaray case**, supra, addressed the issue of the safety of witnesses [paragraph 35(a) and (e)]. Mr. Muteti urged that in paragraph 3 of the replying affidavit, the investigating officer deposed that releasing the accused on bail may destabilize public order and security. Counsel urged that at paragraph 21, the investigating officer further deposed that the situation in Migori town was explosive. Counsel urged that the defence did not rebut that averment and in the circumstances, the court ought to treat it as a truth.

63. The issue of public safety and security is another the parties in this case cannot comment on for lack of material to form a basis for an argument either way. The only material before the court is the affidavit by I.P. Mwangi. It contains averments that security may be destabilized. The court is however aware of threat to security in the area the offence took place and that is what informed the arraignment of this case here in Nairobi. Security is an issue. However, I find it difficult to draw a conclusive finding at this stage.

#### **CONCLUSION**

64. The application cannot be determined before witness statements and other evidence are availed to all the parties. That is the only way that this court can fully exercise its discretion, applying factors for consideration in determining whether or not a compelling reason exists to deny bail. The application is therefore disallowed at this stage.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2018.**

**LESIT, J**

JUDGE