



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 13 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

EVANS MASAKU KASYOKI ALIAS KIDERO.....ACCUSED

RULING

1. The accused, **Evans Masaku Kasyoki Alias Kidero**, faces the charge 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. The particulars of the charge were that on the night of 14th and 15th March, 2014 at Kikambuani Village, Kikambuani Sub-Location in Kanzala Location within Kangundo Sub-County in Machakos County, the accused murdered **Erick Makau Musyoka**.
2. By a Notice of Motion dated 6th September, 2018, the accused through his Learned Counsel, **Mr Kariuki**, made an application that the accused be admitted to bond/bail pending trial on reasonable and/or favourable terms.
3. According to the accused, on or about the month of July, 2014 he was summoned among other family members to Kangundo Police Station to record a statement in respect of the murder of **Eric Makau Musyoka** on the night of 14th and 15th March, 2014. He was again summoned in or about the month of March, 2016 to the same police station where the investigations were going on but was not required to take any action or respond to any inquiries.
4. The accused averred that on or about 26th July, 2018 at around 1600 hours, he met one **Matilda Mbesa**, a sister of the deceased accompanied by other persons whom he learnt were journalists in Nairobi Central Business District along Kenyatta Avenue and when the said person saw him, she started screaming that the accused had killed her brother and ran away. As a result, the accused was almost lynched.
5. According to the accused due to the imminent threat of being attacked by members of the public, he requested that they proceed to Central Police Station where the police contacted the police at Kangundo who requested that he be taken to Kangundo for inquiry whereby he was given a cash bail of Kshs 50,000.00 and was ordered to return the police station on 3rd August, 2018 on which date his bond was extended to 10th August, 2018. However on 10th August, 2018, he informed that a public inquiry had been opened at Kangundo Magistrate's Court and he was told to report on 22nd August, 2018.
6. The accused averred that on 12th August, 2018 Citizen Television ran a story in which it was alleged that he was behind the murder of **Eric Makau Musyoka** and in his view, due to the public pressure arising from the said item, he was arrested on 14th August, 2018 at Kasarani and arraigned before this Court on 15th August, 2018. According to the accused prior to his arrest and arraignment in court, he was at all material times cooperating with the police in the course of their investigations and was employed by ICEA Lion Life Assurance Company having been appointed vide a letter dated 30th November, 015 and did not at any time escape, hide or avoid any legal process.
7. The accused averred that he was innocent in this matter and was determined to prove his innocence hence would attend the trial of his case to its final conclusion as he had no intention to escape, hide or flee from the jurisdiction of this Court to avoid facing the trial. He however contended that his continued incarceration in custody would lead to untold hardship to his young family that depends on him for maintenance. He disclosed that he was conversant with the consequences of failure to attend court and undertook to abide by the terms set by this Court in granting him bail and/or bond.
8. To him the intended witnesses are unknown to him and he undertook not to interfere with any of them and would comply with all the requirements that the court would demand of him if granted bail. He further averred that he was ready and willing to cooperate with the police and all judicial and state officers in charge of the conduct of this matter during the trial until final determination of the matter. In his view there was no compelling reason that would necessitate his continued incarceration in remand.
9. In his submissions, **Mr Kariuki** contended that there was no evidence that the accused had at any one point tried to flee since the alleged

offence, 4 years ago. According to him, under Article 50(2)(f) of the Constitution, the accused was entitled to be supplied with witness statements hence the mere fact that the accused was in possession of the same cannot amount to a compelling reason for the denial of his release on bond.

10. With respect to the severity of the offence it was submitted that capital offences are bailable and that the drafters of the Constitution were aware of this fact when they allowed all accused persons to be benefit from the right to bail. As regards public interest it was submitted that the same must be balanced with the need to administer justice to all parties and it is upon the State to demonstrate that the release of the accused may undermine public order, peace and security. However there was no such evidence in this case.

11. A replying affidavit sworn by **Police Constable Kibet Langat** was filed on 17th September, 2018 in opposition to the application for bail. According to the said affidavit, the application for bond was opposed mainly on the ground that the applicant was a flight risk in view of the nature of the offence and the amount of public interest that the matter had drawn hence the likelihood of his absconding once release on bail.

12. It was averred that since the applicant had been supplied with witness statements, he was aware of the witnesses and the evidence against him as well as the weight of the prosecution's case hence the deponent was apprehensive that there was a likelihood and temptation by the applicant to tamper with the witnesses and the evidence which would therefore prejudice the prosecution's case.

13. According to the deponent, in the event of a conviction, the applicant was likely to face death penalty and this on its own was an incentive for him to abscond. It was therefore deposed that considering the serious nature of the offence, the severity of the possible sentence, this Court should find that there are compelling reasons as to why the applicant should not be granted bond.

14. In her submissions, **Ms Mogoi**, Learned State Council averred that while the prosecution was aware of the rights of the accused, the Constitution also alive to the rights of the victim and the complainants. While appreciating that capital offences are bailable, Learned State Council submitted that there is fear on the part of the public and the family of the deceased that the accused is likely to abscond once granted bail. She therefore urged the Court to deny the accused bail.

15. However in the event that the Court found it fit to grant the bond, the Court was urged to impose sufficient conditions to ensure that the accused attends the Court in light of the fact that the matter had drawn public interest so as to not only ensure that justice is done but is also seen to have been done.

16. On her part **Ms Momanyi** who was watching brief for the family associated herself with the position taken by the Prosecution and averred that the victims were living in fear and were apprehensive that justice would not be served since the witnesses might fear coming to Court. It was Learned Counsel's submission that the accused may manipulate the witnesses. She therefore applied that the Court makes a witness protection order to the victims and calls for the bail assessment report. In her view, apart from interference the accused was a flight risk.

17. I have considered the application, the affidavits in support thereof, the replying affidavit and the submissions made.

18. 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.

19. It follows that the right to bail is not absolute and where there are compelling reasons the said 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. 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 therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. 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. It is therefore my view that 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. 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. Put differently, 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 vs. 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 jeopardise 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.”

20. Gravity of the offence as a consideration was appreciated by **Mboghli Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

“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.”

21. It is true that if found guilty the accused is liable to be sentenced to death. However, he is yet to be found guilty. Secondly, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it is no longer mandatory that those found guilty of murder must be sentenced to death.

22. The Nigerian Supreme Court (**Justice Ibrahim Tanko Muhammad J.S.C.**) set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

“...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.**

23. 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.”

24. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the *Criminal Procedure Code* gives the parameters for the grant of the right to bail as follows:

(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.

25. 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.”

26. 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 as follows:

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.

27. I associate myself with the view expressed by Muriithi, J in *Kelly Kases Bunjika vs. Republic* (supra) that:

“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."

28. 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. Therefore the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. 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. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution.

29. In this case the opposition to the accused person's release on bond is that firstly he is a flight risk. However there is no evidence adduced to show that the accused is a flight risk. The offence in question, it is alleged, was committed on the night of 14th and 15th March, 2014, more than four years ago. It has not been deposed that he has in the interim period attempted to flee. According to him, and this is not controverted, the first time he was summoned by the police in respect of the said offence was in July, 2014. Therefore he must have been aware that he was under investigations for the said offence and no evidence has been placed before me that he attempted to flee. Dealing with a similar matter, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** referred to the decision of **Ibrahim, J** (as he then was) in **Republic vs. Danson Mgunya & Another, (MSA) H.C. Cr. Case No. 26 of 2008**, where bail was granted and held that:

"It is my understanding that he did so because of the special circumstances in the said case. Apart from the fact that one was a chief and the other an Administration Police Officer, both accused persons were senior citizens, who were approaching retirement age. Secondly, they had continued working, uninterrupted, for 2½ years, between the time when the victim was killed, until they were arrested. During that period of time, the two did not run away, or move away from the jurisdiction of the courts. The court expressed itself thus;

'For now, the said facts and conduct do not tend to show the accused are the type of people to abscond. If they were worried by the possibility of being charged with murder, why did they not run away after the incident? Why continue with their lives and duties? To me, this shows that they have no fear of being charged or facing the same, and they are unlikely to run away.'"

30. I am therefore not satisfied, based on the material placed before me that the accused is a flight risk. It must however be appreciated that there is always a risk that an accused may abscond in any matter. In fact it is not unknown that even in minor offences, the accused persons sometime do abscond. Our Constitution has however taken a calculated risk of granting the right to be admitted bail to **all** accused persons save where there are compelling reasons shown to exist by the prosecution. It is therefore upon the prosecution to prove that the temptation for the accused to flee in a particular matter, based on convincing reasons is so high that it amounts to compelling reason. Those circumstances cannot however be based on mere fear and speculation and each case must be considered on its own peculiar circumstances since each person whether accused or even a convicted criminal has the right to dignity of the person. Therefore the decision whether or not to admit the accused to bail depends on the circumstances prevailing at the time when the application is made and may be subject to review depending on whether there are changes in the circumstances which warrant such review.

31. As regards the issue whether the accused is likely to interfere with the witnesses, it is trite that where bond is opposed on the ground that the accused is likely to interfere with witnesses, there ought to be a basis for forming such a belief. In this case there is no evidence that there have been any such attempts during the four years when the matter was under investigations.

32. While I appreciate that the offence with which the accused is charged may carry death penalty, the accused person is however presumed innocent till proven guilty. I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & other High Court Criminal Case No. 61 of 2012** that:

"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate."

33. It was submitted that public interest in this case dictates that the accused should not be released on bond pending trial. Dealing with that issue, In **Republic vs. Muneer Harron Ismail & 4 Others, H.C. Criminal Revision No. 51 of 2009**, Warsame, J (as he then was) stated as follows:

"In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public."

35. In **Republic vs. Ahmad Abolafathi Mohamed & Another [2013] eKLR**, Achode, J observed:

"The respondents have a right to enjoy their fundamental rights and freedoms, but it is my humble view that Kenyans and aliens of good will also have a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life or limb, and without being placed in harm's way."

I have looked at other jurisdictions on the issue of public interest. In South Africa, Section 60(4) of the Criminal Procedure Act lists the grounds on which it would not be in the ‘interests of justice’ to grant an accused person bail. These are that the accused person, if released on bail, would:

- a. Endanger the safety of the public, or any person, or will commit a certain specified offence;
- b. Attempt to evade trial;
- c. Attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- d. Undermine or jeopardize the objectives or the proper functioning of the criminal justice system, or,
- e. Where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security.”

34. There was no material placed before me apart from bare allegations that the accused’s release on bond is likely to jeopardise public interest. The mere fact that a case has received wide publicity in the media does not *ipso facto* amount to compelling reasons to justify the denial of bail.

35. It is also my view that even in cases where limitations contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. The Court is for example obliged to consider whether the invocation of the provisions of the *Witness Protection Act* where allegations of threats to the lives and safety of witnesses is the ground for denial of bail may be a less restrictive measure as opposed to denial of bail. In this case the application for placing certain witness under the witness protection was withdrawn before the Court could rule thereon.

36. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word “compelling” according to *Thesaurus English Dictionary* is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons.

37. In the circumstances of this case, balancing the interests of the accused, the public, the victim and the complainant, I order that the accused be released on bond pending his trial in the following terms:

- a. **The accused shall not leave the jurisdiction of this court without court’s prior permission.**
- b. **The accused shall be released on a bond of Kshs. 3 Million with two sureties of the like sum. The said sureties to be approved by the Deputy Registrar of this Court.**
- c. **The accused shall not threaten harm or interfere with the case/witnesses and shall attend court without fail whenever required to do so. If there is credible evidence presented before this court of any attempts to either interfere with the case or the witnesses, actions which in themselves, if proved, amount to a commission of another criminal offence, the accused’s bond shall stand cancelled and the accused shall be remanded in custody till the conclusion of his trial.**
- d. **During the pendency of this case, or until further orders of the court, the accused shall appear for the mention of his case once every 30 (thirty) days and in default of any one appearance without justifiable cause, the bond shall stand cancelled and sureties called to account.**

38. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos 25th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Kariuki for the accused

Ms Mogoi for the State

Ms Momanyi for the family

CA Geoffrey