



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CRIMINAL CASE NO. 51 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH KURIA IRUNGU *alias* JOWIE.....1<sup>ST</sup> ACCUSED**

**JACQUELINE WANJIRU MARIBE.....2<sup>ND</sup> ACCUSED**

**RULING ON BAIL**

1. The Applicants **JOSEPH KURIA IRUNGU *alias* JOWIE** and **JACQUELINE WANJIRU MARIBE** are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that on the night of 19<sup>th</sup> September 2018 at unknown time at Lamuria Gardens Apartment Kitale Lane off Dennis Pritt Road in Kilimani area within Nairobi County jointly with others not before the court murdered **MONICAH NYAWIRA KIMANI**.

2. On the 9<sup>th</sup> day of October 2018 they both appeared before Justice Lesiit who deferred their plea taking to the 15<sup>th</sup> day of October 2018 to enable the 2<sup>nd</sup> accused undergo mental assessment. They took their plea on the said date and a plea of not guilty was entered in their favour. The accused persons thereafter made an application to be supplied with witness statements and documents the prosecution wished to rely on together with exhibits. They further prayed to be heard on bail under **Article 49 (1) (h)**.

3. The prosecution in response undertook to supply witness statements excluding those of the witnesses to be placed under witness protection within two weeks and indicated that they will be opposing the application for bail. In the meantime the 1<sup>st</sup> accused had on 9<sup>th</sup> day of October 2018 filed an application under certificate to be admitted to bail supported by an affidavit sworn on the same day.

4. The Judge (Lesiit J.) made the following orders:-

- a) Bail application to be heard before Justice Wakiaga.*
- b) Mention on 17<sup>th</sup> October 2018.*
- c) The State to file and serve affidavit by 2.00 p.m.*
- d) The victim's family to file and serve their affidavit by 16<sup>th</sup> October 2018.*
- e) The defence has leave to file and serve any responses before the hearing date.*

5. When the matter appeared before me for the purpose of fixing a hearing date for the bail application I made the following further orders:-

- a) Leave granted to the 1<sup>st</sup> and 2<sup>nd</sup> accused to file supplementary affidavits.*
- b) The probation officer to prepare and submit to court Pre-bail Report including Victim Impact Statement before the hearing date.*
- c) The 1<sup>st</sup> accused to be treated at Kenyatta National Hospital through reference from the prison clinic.*

*d) The media to guard against what they put in public domain now that the matter is before court.*

6. I have set out the history of this matter at the very outset since it has generated a lot of public interest both in main and social media and it is in the best interest of justice that the record speaks for itself so as to put media speculations to rest.

7. On behalf of the prosecution and in opposition to the release of the accused persons on bail they on 15<sup>th</sup> October 2018 filed an affidavit sworn by **L.P. MAXWELL OTIENO** the investigating officer in which the following issues were raised as being compelling:-

*a) In the course of the investigations, they were able to establish that both accused persons have been adversely mentioned by witnesses and the forensic analysis that placed the 1st accused at the scene of the incident.*

*b) Investigations are still ongoing to apprehend the other suspect who was in the vehicle with the 1st accused after the commission of the offence and to establish any communication with the two accused persons thus if released there is high probability they will interfere with the ongoing investigations.*

*c) The investigation as to the motive of the deceased's killing is ongoing and will cover beyond the Kenyan territory.*

*d) After the commission of the crime the 1st accused person burnt the clothes he was wearing which have been positively identified by witnesses at the 2nd accused's residence and there is a possibility that he will interfere with any evidence that has not been secured.*

*e) Both the residences of the deceased and 2nd accused have been identified as the primary and secondary scene respectively and there is a possibility that if released the accused persons will interfere with the crime scene.*

*f) Forensic analysis is still ongoing including identification of the markings and impressions captured on the sealing tape used to tie both the hands and legs of the deceased.*

*g) The 1st accused has been positively identified as the last person in the company of the deceased and the vehicle of the 2nd accused placed on the scene.*

*h) The 1st accused has been seen in possession of a "big gun" both by witnesses and on his social media platform and therefore likely to inflict fear on potential witnesses.*

*i) The 1st accused has no fixed abode save for the house of the 2nd accused and is a frequent flyer who is likely to abscond should he be released on bail.*

*j) The 2nd accused immediately after the arrest of the 1st accused switched off her phone and left her residence showing a possibility of her absconding should she be released on bond. Being a media personality associated with persons of influence, there is a high possibility of her threatening or intimidating the key prosecution witnesses including her house-help and watchman.*

*k) The accused while in custody had raised the issue that there were persons who had approached them indicating that their lives were in danger and therefore they need protective custody taking into account the fact that the 1st accused had allegedly attempted to commit suicide by shooting himself which issue is still under investigations.*

*l) If released on bond they will disturb public order and undermine public peace on security.*

8. The victim's family in opposing the application filed an affidavit sworn by **GEORGE KIMANI** a brother of the deceased wherein he stated as follows:-

*a) Since the investigations are ongoing the family is apprehensive that the accused persons are likely to interfere with the investigations and eventually defeat the end of justice.*

*b) The fact that the motive of the murder of the deceased is unknown poses a greater danger to them since they are not sure whether it was against the family with the deceased being the first victim.*

*c) The intended prosecution witnesses are well known to the accused persons including family members known to them who are likely to be intimidated noting that the 1st accused is known to the deceased family and knows the residence of the deponent making him apprehensive that if released he might pose serious threat to him.*

*d) The manner and style in which the deceased was murdered shows that the people who did it are meticulously organized and dangerous individuals whom if given a chance are capable of ensuring that the entire case collapses.*

*e) The accused persons tried to conceal some of the evidence before their arrest and that the police are still searching for one other person who was allegedly with the 1st accused, the murder weapon, the deceased house and car keys and if released on bond they will interfere with the ongoing investigations.*

9. The 1<sup>st</sup> accused in his supporting and supplementary affidavit raised the following issues:-

- a) *He has co-operated fully with the police since his arrest.*
- b) *He has a wound on his left shoulder which needs specialized medical attention and is ready to deposit his passport in court to confirm that he is not a flight risk.*
- c) *The information given by the investigator on him are factual and matter of evidence which have not been tested.*
- d) *Whereas the 2nd accused residence was their home should the court direct otherwise, he is willing to obey those orders and will through the help of his siblings and parents organize for an alternative place of residence.*
- e) *That he does not own any gun and is therefore not capable of inflicting fear on potential witnesses.*
- f) *The bullet wound on his arm was unfortunate and not related to the case.*

10. The 2<sup>nd</sup> accused in her lengthy replying affidavit raised the following issues:-

- a) *She is only standing trial because she was in a love relationship with the person the prosecution is interested in whom she allowed to come and live in her house and use her car and she was not in control of where he went, the people he hosted, and the use of the said car and that she was only an innocent lover.*
- b) *She is not a flight risk and the strength of the evidence against her is weak and circumstantial since there is no material either forensic or witnesses to associate her directly and or indirectly with the offence.*
- c) *She is not a flight risk and has co-operated and readily availed herself to the investigators.*
- d) *The 1<sup>st</sup> accused being her fiancé, she definitely communicated with him and that she was not there when the same allegedly burned evidential material in her house which she surrendered to the investigators since 22<sup>nd</sup> September 2018 with no intention of interfering with the same unless authorized by the court.*
- e) *She never switched off her phone as alleged and voluntarily went to Kilimani Police Station with her advocate on record and was interviewed before being detained on 29<sup>th</sup> September 2018.*
- f) *Her personal standing as a media personality and association with people of influence should not be used to discriminate against her in contravention of her rights under Article 27 of the Constitution.*
- g) *That while in custody at Gigiri Police Station one Kenneth Omondi was booked thereat who asked her questions of what she knew about the murder and that he knew her house at Royal park and based on his conduct she believed he was placed by the investigator to extract information from her.*
- h) *She will not interfere with investigations and being a well known T.V. Journalist having worked at various stations, she is easily spotted thereby making it hard to jump bail or a flight risk.*
- i) *She is a single mother of a child aged four (4) years who solely depends on her for social and financial upkeep who will deeply suffer if she remains in custody during the trial.*
- j) *She has a supportive family and is willing to deposit her passport with the court.*
- k) *She further swore an affidavit in support of her community and social ties in which she annexed a letter from her employer and from the Office of the Senator of Nairobi confirming having know her for close to ten (10) years.*

11. On 19<sup>th</sup> October 2018 an affidavit was filed in this matter sworn by one **JOSIAH MURIGU** the chairperson of Empowering Africa Through Media a Non-governmental Organization which sought participation in this matter which was objected to by Ms. Mwaniki for the State and I upheld the objection and expunged the said affidavit from the record through a ruling on **24/10/2018** and shall therefore not comment on its contents.

#### **SUBMISSIONS**

12. When the matter came before me for hearing Ms. Mwaniki appeared for the prosecution and submitted that if found guilty the accused persons will receive death penalty which should be taken into account. She stated that since investigations are ongoing there was real possibility of the accused person interfering with investigations as evident through the conduct of the 1<sup>st</sup> accused in burning clothings which the prosecution intended to use. It was submitted that key prosecution witnesses had not been placed under protection and the 1<sup>st</sup> accused having been seen with a big gun for which he has not produced a licence, is likely to cause fear on the witnesses.

13. That the 1<sup>st</sup> accused travels out of the country in the course of his work and therefore if released on bond is likely to leave the country

while the 2<sup>nd</sup> accused being associated with the media is likely to threaten key prosecution witnesses. The 1<sup>st</sup> accused shot himself and therefore if released on bail is likely to harm himself or others. He needs to remain in close supervision while undergoing medical attention and care.

14. It was submitted by Ms. Onunga that the court should take into account the nature of the offence for which the case of **REPUBLIC v MILTON KABULIT & 6 OTHERS [2011] eKLR** was tendered in support. Further that each case should be decided on its merit and in support **WATORO v REPUBLIC [1991] eKLR** was submitted.

15. The court was urged to balance the liberty of the accused persons against the interest of the deceased and the public who should not lose faith in the criminal justice system while granting bail for which the Indian case of **MASSOR v STATE OF UP & AN CR. APPEAL NO. 838 OF 2009** was tendered and **REPUBLIC v JAKTAN MANYANDE & 3 OTHERS [2012] eKLR** to support the proposition that interference with witnesses is a compelling reason.

16. Mr. Omiti for the family of the victim submitted that the right to bail is not absolute and the court has to balance the rights of the accused with those of the victim and the public. It was submitted that the rights of the family of the victim must also be protected and having expressed their fear that any of them might be next on line, their protection is necessary before the accused are released on bond. It was submitted that the process of putting witnesses including the victim's family members was ongoing and therefore it is premature to release the accused on bail. He submitted that the matter has attracted media attention due to the fact that the 2<sup>nd</sup> accused is a prominent media personality.

17. Mr. Ombeta for the 1<sup>st</sup> accused stated that it is the prosecution's proposition that justice can only be done if the accused persons are denied bail. He submitted further that nature of the offence is not a compelling reason for denial of bail. He stated that if the investigations are ongoing then the accused person should not have been arraigned in court. He submitted that the 1<sup>st</sup> accused had not been given committal bundles so did not know the witnesses to be called. He submitted that the prosecution had not shown the means of the accused person who is not a flight risk as his passport had been taken by the investigation office.

18. On the issue of the accused having shot himself, he submitted that the same has not been charged with the offence or with having illegal weapon. It was stated that the accused had not sought protective custody as he is not in any danger. He submitted that the evidence must be so strong that the court cannot ignore it so as to amount to compelling reason. He submitted that the rights under **Article 19** of the Constitution belongs to individuals and are enforceable under **Article 22**. The accused is entitled to the right to dignity under **Article 28** as he needs further medical attention.

19. Mr. Laichena submitted that the probation report confirmed that the 1<sup>st</sup> accused needed specialized treatment which he would not get in remand. On the 1<sup>st</sup> accused not being a flight risk, he submitted that the 1<sup>st</sup> accused has only one passport and the court can issue conditions so as to deter him from absconding for which the case of **REPUBLIC v IRENE MBITHE KIMUNYU & ANOTHER [2006] eKLR** was tendered. He submitted that in the case of **REPUBLIC v DWIGHT SAGARAY & 4 OTHERS [2013] eKLR** the court determined what constituted flight risk and interference with witnesses and in **REPUBLIC v RICHARD DAVID ALDEN [2016] eKLR** the court set out conditions for grant of bail.

20. Mr. Ayieko distinguished the authorities by the prosecution and submitted that **REPUBLIC v MILTON KABULIT & 6 OTHERS [2011] eKLR** (supra) was decided after the trial had started and the accused knew the weight of the evidence while in **WATORO v REPUBLIC** (supra) the Court of Appeal only faulted the trial court's holding on the basis that since the 2<sup>nd</sup> accused therein had been released on bail the 1<sup>st</sup> accused should also be released. In **MASSOR v STATE** (supra) it was allowed since the court did not give reason for denial of bail.

21. Mr. Katwa for the 2<sup>nd</sup> accused submitted that the interest of the court is to ensure that the accused availed herself to stand trial and that the proceedings have integrity. He submitted that as per the Bail and Bond Policy Guidelines, the court must balance the rights of the accused to take part in the planning of her defence. He submitted that the court has to weigh whether what had been said against the 2<sup>nd</sup> accused was compelling enough as was stated in the case of **REPUBLIC v RICHARD DAVID ALDEN [2016] eKLR**.

22. On the issue of interference with witnesses, he submitted that material must be placed before court to show that the accused had attempted to contact witnesses and the communication must be incriminating for which the case of **REPUBLIC v WILLIAM GITONGA NTOMARIO [2015] eKLR** was tendered. He submitted that the 2<sup>nd</sup> accused was arrested on 29<sup>th</sup> September 2018 while the murder took place on 19<sup>th</sup> October so she had a ten (10) day window to interfere with witnesses but she did not and **REPUBLIC v JAKTAN MANYENDE** (supra) was tendered. It was stated that the prosecution must place material which demonstrates actual and perceived interference so that the court does not speculate as per the case of **REPUBLIC v DWIGHT SAGARAY** (supra).

23. On the issue of the 2<sup>nd</sup> accused being an influential media personality it was submitted that as per the Policy Guidelines the 2<sup>nd</sup> accused should have the fabric of her life intact including her right of employment, family and community ties. It was submitted that the love between the accused and her child cannot be substituted by the accused's supporting family on her protection. It was submitted that she is more insecure in the hands of the prosecution.

24. The 2<sup>nd</sup> accused finally submitted the court treats each of the accused persons separately and personally as per **Article 27** of the Constitution of Kenya and should receive equal treatment under the law.

25. In response Miss Mwaniki submitted that the prosecution is only required to prove compelling reasons on a balance of probability. She submitted that the fact that the 1<sup>st</sup> accused had handed over his passport is not guarantee that he cannot leave the country. She submitted that the accused persons are charged jointly and should the court grant the 2<sup>nd</sup> accused bond then her role in the media should be defined so that

she does not appear on television.

26. The court in compliance with the Bail and Bond Policy Guidelines called for pre-bail reports on both accused persons which have been filed and which I have perused and the following silent points stands out in respect to each accused:-

### 1<sup>st</sup> ACCUSED

- i. His family lives in Nakuru and are willing to take responsibility for his appearance in court.
- ii. The accused flew out of the country to Dubai before completing two courses which he had registered for after his secondary education where he worked in a hotel before enrolling for a Security course offered by Dubai Police Academy and pursued other security related courses tailor made to empower his skills as a private security officer.
- iii. It is noted that he moved schools during his school days and would transfer to school even after one year for unexplained reasons.
- iv. In Dubai he worked as a waiter and security officer for prominent business persons in Middle East and travelled to a number of countries in the Middle East including Iran, Iraq, Saudi Arabia, Afghanistan and Syria. He came back to Kenya early last year and offered security to some prominent politicians including former Taita Taveta Senator. He was in the course of registering his own security company at the time of his arrest.
- v. He is single but was in a relationship with the 2<sup>nd</sup> accused who he intended to introduce to his family having been in previous relationship one M.K. who resides in Buruburu which relationship could not be sustained since he was out of the country.
- vi. On his health it is stated that he was in good health until some few days before his arrest when he suffered gunshot wounds which needs an urgent specialized treatment.
- vii. He confirmed knowing the brother of the deceased who was his college mate at Kenya Polytechnic and confirmed not having any suicidal thoughts.
- viii. On victim impact it was stated that the deceased was aged 27 years an holder of a Diploma in International Relations from Kenya Polytechnic. She did her internship in Kenyan Embassy in Juba South Sudan and was at the time of her death managing her father's company MililePaul General Trading Company. She was the financial pillar of the family. Her brother blames himself for connecting her with the 1<sup>st</sup> accused person. They oppose the accused being released on bond.

### 2<sup>ND</sup> ACCUSED

- i. Both parents live in Buruburu. The accused pursued a Degree in Mass Communication at the University School of Journalism and was thereafter employed in several media houses with her current employer being Royal Media where she anchors the Friday Prime Time news on Citizen TV.
- ii. She is a single mother of one who is currently with her mother and is reported to be suffering psychologically in her absence. She has no relatives outside the country and has only travelled out on work related assignment except on two occasions when she visited the 1<sup>st</sup> accused in Dubai. Her job is the main source of her livelihood.
- iii. The prosecution feels that while before her arrest she had not made attempts to interfere with witnesses, her status her since changed and might now do so in order to save herself. They consider her untrustworthy based upon her statements. They believed that she will influence some witnesses who were her employees who should testify first or be placed on witness protection before she is released.
- iv. On the Victim Impact Statement the family fears that seeing the release of the suspects from custody and their subsequent celebration of freedom is likely to open the wounds afresh.

### ANALYSIS AND DETERMINATION

#### General principles for grant of bail

27. The principles upon which the court may grant or deny bail are now well settled in Kenya. **Article 49 (1) (h)** of the Constitution of Kenya 2010 only expanded the rights which were in existence under **Sections 123 – 133** of the **Criminal Procedure Code** by making bail available irrespective of the nature of the offence charged and elevating it to the level of rights under the Bill of Rights section of the Constitution which can only be limited where there exists compelling reasons advanced by the prosecution. Under **Article 49 (1) (h) (2)** a person shall not be remanded in custody for an offence punishable by a fine only or by imprisonment for not more than six (6) months.

28. In Kenya the Legislature in its wisdom have not enacted bail legislation to determine how the issues of bail and bond should be dealt with and to cure for this gap the Judiciary has formulated as a guide Bail and Bond Policy Guidelines so as to bring uniformity on the grant of bail with the primary factor being whether the accused person will appear for trial if granted bail as stated in **Section 124** of the **Criminal Procedure Code**.

29. There being no definition of what constitutes compelling reasons under the Constitution, the Policy Guidelines at **Section 4.9** sets out what the court have stated constitutes compelling reasons as follows:-

- a) *The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.*
- b) *The strength of the prosecution case.*
- c) *The character and antecedents of the accused person.*
- d) *The failure of the accused person to observe bail or bond terms.*
- e) *The likelihood of interfering with witnesses.*
- f) *The need to protect the victim or victims of the crime.*
- g) *The relationship between the accused person and the potential witnesses.*
- h) *The best interest of child offenders.*
- i) *The accused person is a flight risk.*
- j) *Whether the accused person is gainfully employed.*
- k) *Public order, peace and security.*
- l) *Protection of the accused persons.*

30. To this list I would add that the court ought to look at the impact which the grant of bail might have upon the conduct of the case and the need to further balance between the liberty and interest of the accused and the interest of the society in denying bail.

31. Once the prosecution shows on a balance of probability that there are compelling reasons, the burden then shifts to the accused to rebutt those compelling reasons or to show that there are exceptional circumstances to warrant his release on bail and the court should always grant bail where possible and will lean in favour of and not against the liberty of the subject provided that it is clear that the interest of justice will not be prejudicial thereby.

32. The above principle is captured well in the South African case of **S v ESSACK [1965] 2SAR.161** where Miller J. stated:-

*“It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade his trial, there should be some evidence or some indication which touches the applicant or accused person in regard to such likelihood. In dealing with an application of this nature (i.e. an application for bail), it is necessary to strike a balance as far as can be done between protecting the liberty of the individual and safeguarding and ensuring the proper administration of Justice . . . If there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court will be fully justified in refusing to allow him bail.”*

33. The Supreme Court of India in **GUDIKANTI NARASIMHULU v PUBLIC PROSECUTOR [1978] 1 SCC 240** on the proposition that the basic principle of jurisprudence is that during the pendency of a trial of an accused the bail is the rule and the jail is only an exception as stated as follows:-

*“The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process . . . After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right.”*

34. A human attitude is required to be adopted by a Judge while dealing with an application for remanding a suspect or an accused person in custody. There are several reasons for this including maintaining the dignity of an accused person however poor or rich that person might be since the grant or refusal of bail is entirely within the discretion of the Judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. See Supreme Court of India **CRIMINAL APPEAL NO. 227/2018 DATARAM SINGH v STATE OF UTTAR PRADESH & ANOTHER.**

35. All the authorities I have been referred to by both the prosecution and defence supports the above proposition and have read the same. I shall not reproduce them herein save to say that there being no legislation the scope of compelling reasons is not a term of art and shall continue to expand as courts deals with each and every circumstances of the cases presented before it.

36. The next issue that needs a resolution at the threshold is how should the accused person be treated while dealing with the application for bail? Mr. Katwa for the 2<sup>nd</sup> accused submitted that each of the accused persons be treated individually and separately as under **Article 27 (1)** of the Constitution every person is equal before the law and has the right to equal protection and equal benefit of the law. While the 1<sup>st</sup>

accused is silent on this point, Miss Mwaniki for the prosecution submitted that the accused persons are jointly charged and must be treated as such.

**37. Article 49 (1)** talks of the right an arrested person and therefore while dealing with the rights under **Article 49 (1) (h)** each and every accused person must be treated individually. This position is further justified by the provisions of **Article 50 (2)** the right to fair hearing which also talks of every accused person has the right to a fair trial which includes right:-

*(a) to be presumed innocent until the contrary is proved,*

*(f) to be present when being tried,*

*(k) to adduce and challenge evidence,*

*(l) to refuse to give self-incriminating evidence.*

**38.** In the eye of the law whereas the accused persons are jointly charged each accused person is independent of each other and can choose to testify against each other and must therefore be treated as such since the evidence which is likely to be tendered against them will not be uniform but based on the level of their involvement in the commission of the offence. They must therefore be treated as such as the court is here dealing with a matter that requires great sensitivity since at the time of the alleged commission of the offence and their subsequent arrest they were living together.

**39.** The stage is now appropriate for the court to look at each accused person's application against the material placed before me under each sub-heading of compelling reasons identified by the prosecution in their affidavit and rebutted by each accused persons in their affidavits.

### **1<sup>ST</sup> ACCUSED**

#### **(a) Is he a flight risk who is likely to abscond the jurisdiction of the court?**

**40.** The picture that emerges from the prosecution's affidavit as set out herein above and the pre-bail report of the 1<sup>st</sup> accused is that of a male version of "slay queen" which for lack of better terminology I shall call a "woman eater". He is painted to had been living in the house of the 2<sup>nd</sup> accused, driving the second accused car and with no known source of income since 2017 when he provided security to some known Jubilee politicians. His last known employment as per his affidavit was in Dubai where he had been living between 2012 - 2017. It is in Dubai where he seems to have strong social ties as while there he managed to secure employment for three named persons including his brother and a brother of his former girlfriend who he was living in Buruburu before he left for Dubai.

**41.** He is extensively travelled in the Middle East where he had been living and working as per his affidavit and therefore can easily find support thereat. The 2<sup>nd</sup> accused in her affidavit states that she does not intend to go back to the house where they were living unless ordered by court at and whereas the 1<sup>st</sup> accused has indicated that his siblings are likely to find him an alternative accommodation there is no evidence placed before the court to support the said preposition. The accused has no known assets in the country save for an intention to set up a private security firm and therefore find him to be with no fixed abode, lacking any deep emotional, occupation or economic ties in the country and is likely to abscond should an opportunity arise. The mere fact that he is willing to surrender his passport is no guarantee that he cannot leave the country.

#### **(b) Would he interfere with witnesses?**

**42.** There is material placed before the court though of factual nature that there are ongoing investigations and arrests to be made of a suspect who was allegedly with the 1<sup>st</sup> accused at the scene of crime at the recovery of the murder weapon and some items from the house of the deceased. There is a material placed before the court to the effect that after the commission of the offence, the 1<sup>st</sup> accused destroyed or attempted to destroy material evidence including an alleged piece of clothing which he had worn on the material day. The 1<sup>st</sup> accused is silent on this material.

**43.** The 1<sup>st</sup> accused is known to the family of the victim including her brother who has sworn an affidavit confirming that he is the one who introduced the 1<sup>st</sup> accused to the deceased. There is an allegation once again of factual nature not yet tested by way of cross-examination that the 1<sup>st</sup> accused has been positively placed at the scene by way of an identification parade and since the 1<sup>st</sup> accused allegedly knows the scene of crime well there is a possibility that he now knows the identity of those witnesses and there is a possibility of the same interfering with them now that he has been charged.

**44.** The 1<sup>st</sup> accused has been portrayed by the prosecution and in public domain as a lover of guns and with access to firearms. Having undergone specialized security training and acted as a private security officer in Middle East and during 2017 General Elections there is a real likelihood that if released on bail that would create fear and intimidation to the potential prosecution witnesses as it would appear to them that a man with a gun or access to the same whom they intend to testify against is outside there. In this holding, I find support in the decision by Ochieng J. in **REPUBLIC v AHMED MOHAMMED OMAR & OTHERS HIGH COURT OF KENYA AT NAIROBI CRIMINAL CASE NO. 14 Of 2010** where the judge had this to say:-

*"I would only add that potential witnesses in murder case is similarly susceptible to humanity. He knows that it is the evidence he tenders that might lead the trial court to convict the accused person. He also knows that if he did not testify there were chances that this would lead to acquittal of the accused. Therefore he is fully aware that if the accused could ensure that he (the*

witness) did not testify he might be tempted to do so, in order to enhance his self preservation.

*If the accused was granted bail and had access to a gun, the potential witness might prefer to preserve his life by keeping away from giving evidence.*

*By so doing I am not saying that the applicant would necessarily go out to threaten the witnesses whilst that is a possibility I am also saying that the witnesses could become genuinely apprehensive about giving evidence against a person who had access to a gun and who was moving around freely.”*

The picture that emerges of the accused is that he is of such a character that his presence at large would intimidate witnesses and use his liberty to tamper with evidence. The family of the deceased has expressed this fear.

**(c) Whether the 1<sup>st</sup> accused needs protective custody**

45. The 1<sup>st</sup> accused is currently nursing a gunshot wound which according to the prosecution is self inflicted in an attempt to commit suicide which according to the accused is unfortunate incidence when he was shot at. Whichever way you look at it, what comes out is that the accused person is someone under threat of danger either to himself or by some other persons and whereas the same has submitted that he would be able to provide for his own security, I find favour in the prosecution submission that he is a man in need of close supervision and protection which can only be achieved under protective custody where effective policing is possible.

**(d) Whether the accused need for specialized medical attention is an exceptional condition to enable the court grant bail?**

46. Whereas the accused submitted that he is in need of specialized medical attention, in fulfillment of his constitutional right under **Article 43 (1) (c)** to the highest attainable standard of health, there is no material placed before the court to show that he is unable to obtain specialized medical attention while in remand custody. I further find that the need for medical attention can be remedied by an appropriate order by the court should need arise.

47. Having taken into account the material placed before the court, the submission by the Advocates for the 1<sup>st</sup> accused, the family and the state, and the authorities in support of the said submissions which I have looked at in detail, I am satisfied and find that the prosecution has placed before the court strong and adequate compelling reasons to enable me deny the 1<sup>st</sup> accused the enjoyment of his constitutional right to bail which I hereby do. The same shall remain in custody during the period of his trial.

48. Having noted the health condition of the 1<sup>st</sup> accused, I order that the same be treated at Kenyatta National Hospital through reference from the remand prison clinic and to confirm that the said treatment has been accorded to the satisfaction of the court, the 1<sup>st</sup> accused shall attend mention before the Deputy Registrar of this court once after every twenty one (21) days at which dates the medical officer treating him same shall file a report on his progress and challenges if any.

**2<sup>ND</sup> ACCUSED**

49. The prosecution raised only two issues against the 2<sup>nd</sup> accused, that is to say:- **(a)** she is an influential media personality who is likely to intimidate witnesses and influence the nature of the case. **(b)** Her house is now a secondary crime scene and some potential prosecution witnesses are her employees whom she has authority over.

50. The following facts emerge from the affidavits by the prosecution and the 2<sup>nd</sup> accused person. She is a well known media personality with influential friends as confirmed by the letter attached to her affidavit from the Senator for Nairobi. Her employer is very supportive of her as confirmed by a letter attached to the pre-bail report. She is a mother of one with very supportive family and friends. The fact that she was in love with the 1<sup>st</sup> accused is not disputed as confirmed by her affidavit.

**(a) Would she interfere with witnesses and or evidence?**

51. The only witness named is the 2<sup>nd</sup> accused's house help and to my mind her evidence is related to what the prosecution calls secondary crime, whatever that means. As submitted by Mr. Katwa, the accused was arrested ten (10) days after the commission of the offence and there is no indication by the prosecution that the 2<sup>nd</sup> accused interfered or attempted to interfere with the witnesses and or the ongoing investigations which seems to be only related to the 1<sup>st</sup> accused. There is complete absence of any allegation of attempted intimidation or undue influence on the part of the 2<sup>nd</sup> accused alleged influential friends. There is also no evidence that the same has attempted to influence the prosecution witnesses prior to or after her arrest. The second accused has fully co-operated with the prosecution since her arrest including giving out DNA samples and the materials needed by the investigators. The prosecution has only made vague allegations that the accused may tamper with evidence or witnesses.

**(b) Whether the 2<sup>nd</sup> accused is a flight risk?**

52. The prosecution has portrayed the 2<sup>nd</sup> accused to be a media person with very influential friends a stated herein above. She is currently employed and her employer has indicated that upon her release she would resume her job. She has a strong social support who would not let her abscond unless they are part of “*the others not before the court.*” She does not have any contacts outside the country. The accused is a single mother of one child who now more than ever before needs her presence noting that should she be convicted, one of the sentences available is death and or long period of imprisonment. She needs to be with her child during the period of trial so as to inculcate to him values and memories which will make him a better citizen tomorrow. I would therefore dismiss the prosecution's contention that her

supportive family would step in to take care of the child as **Article 53 (1) (e)** places parental care and protection upon the mother and father of the child, and further that a child's best interests are of paramount importance in every matter concerning the child. It is therefore clear that the 2<sup>nd</sup> accused is deeply rooted in the country and might not be a flight risk.

**(c) Whether the 2<sup>nd</sup> accused needs protective custody?**

53. The prosecution submitted that having raised concern about her security and safety while in police custody she is better off being placed in protective custody. To this the 2<sup>nd</sup> accused has submitted that she is more safer outside than while in remand custody. There is no indication that she is at risk. It is noted that her fear is based upon what happened to her while in police custody and might not benefit from protective custody. At this point in time the accused is still considered innocent and the court can only restrict her movement if there is enough evidence placed before it to support the contention by the prosecution on the need for her safe custody which the prosecution has failed to do. There is no evidence tendered to show that she is under any threat of whatsoever nature and therefore find this contention devoid of factual support and is mere speculative.

**(d) Whether being a media personality is a ground to deny the accused bail?**

54. This court has had to deal with a similar situation where the allegations were raised that the accused should be denied bail because he was a man of means in the case of **REPUBLIC v DAVID MUCHIRI MWANGI [2018] eKLR** to which the court had this to say:-

*“For the accused to had been charged the investigations must have been completed and even if there is still pending investigation that in itself is not compelling reason enough to deny the accused his constitutional right to bail. The fact that an accused person is a man of means (read influence) in itself cannot be a ground for denial of bond unless it is proved to the satisfaction of the court that he is using the same means (influence) to defeat the course of justice which is not the case herein.”*

55. Save for the fact that the 2<sup>nd</sup> accused is alleged to be an influential media personality, no material has been placed before the court to show how she is likely to use her media presence or influence to defeat the course of justice. While the influence of an accused person may be a ground to deny bail, the State must place before the court enough material to support that contention. The accused is still presumed innocent till the time guilt is proved and as per the Bail and Bond Policy Guidelines she has all the rights to maintain her social fabrics and networks.

56. Mr. Mwaniki for the prosecution urged the court to put restrictions on the 2<sup>nd</sup> accused and in particular to her appearance on television screen. I have noted that this is novel point which has not been tested in our jurisdiction and from the submissions before me I note that this is a complex and substantial matter which needed full bail hearing so as to test whether or not the presence of the accused on the screen would intimidate or interfere with witnesses so as to affect the administration of justice. At this stage, however it must be noted that the accused is still presumed innocent and the court must guard against making orders which might be perceived to be confirming that she is guilty in the eyes of the public.

57. The Bail Policy Guidelines under the general principles 3.1. (3) states that the accused should be allowed to keep the fabric of his or her life intact by maintaining employment, family and community ties and any order which the court makes in this regards ought not to be so strict so as to be incapable of compliance thereby making the grant of bail illusory. It is for the judge to introspect what is the right thing to do always based on the facts but without leaving behind compassion. I shall therefore comment on this further while setting out bail terms for the accused.

58. Whereas at this stage the court is not required to go into a detailed analysis of the prosecution case which has not been presented before the same, the court must look at the material placed before it by the prosecution and from the affidavit of the investigating officer it comes out that the role of the 2<sup>nd</sup> accused relates to what allegedly took place at her house which is termed as a secondary scene or after the commission of the offence. The 2<sup>nd</sup> accused on the other hand is so sure of her innocence that she might only be convicted of the offence of being in love which is not a known offence under our law though I take cognizance of the fact that love can make you do some very strange things as I am told that in the bible one Adam knowing very well the law of God and the punishment for eating the forbidden fruit, for the love of his wife Adam went ahead and ate the same so that they can die together if they must. I find that her belief in her innocence will not allow her to interfere with the court process.

59. I think I have said enough on the issue of the suitability of the 2<sup>nd</sup> accused to be granted bail as the decision to grant or refuse bail is only based on probabilities and not certainties and since our courts are not gambling halls but forums for the discovery of truth based upon the relevant materials both sides have laboured to place before me and the authorities in support and against and I am unable to agree with the prosecution that the factors presented individually or cumulatively raised a probability that the 2<sup>nd</sup> accused would abscond, interfere with witnesses or evidence, influence the nature of the prosecution case against or and or act in any manner prejudicial to her attending trial should she be released on bail.

60. I therefore find and hold that the prosecution has not placed before the court compelling reason to enable me deny the 2<sup>nd</sup> accused the enjoyment of her constitutional right to bail and those advanced can be adequately accommodated by relevant bail conditions and order that the 2<sup>nd</sup> accused be released on bond pending trial and determination.

**BAIL TERMS AND CONDITIONS**

61. What now remains is to set out bond terms and conditions. The starting point being the constitutional injunction that the terms must be reasonable. On behalf of the 2<sup>nd</sup> accused, she deposed that a sum of Kshs.350,000/= cash bail with one or two sureties of similar amount would be reasonable taking into account the humble circumstances of herself, family and relatives. The State and the family of the victim

were silent on what would be reasonable terms. The constitution is silent too on what amount to reasonable bail terms but the court must take into account the nature of the offence, the likely punishment on conviction and likelihood of the accused in honoring bails terms if granted by appearing at her trial.

62. In this matter the life of a young Kenyan girl was lost and the offence has pricked the heart of the nation on how it was committed and has attracted wide media coverage this cannot be washed away taking into account the fear of her family. The paramount obligation is to issue bail terms which will make it necessary for the 2<sup>nd</sup> accused to attend her trial if and when the case is fixed for hearing noting as stated herein that one of the punishments upon conviction is death sentence and the bail terms must make it hard for the 2<sup>nd</sup> accused to abscond her trial. Guided by the principles set out by this court in **REPUBLIC v DAVID MUCHIRI MWANGI [2018] eKLR** I am of the considered opinion and hold that a bond of **Kshs.2,000,000/=** (Kenya shillings two million) will be very reasonable.

63. I therefore order that the 2<sup>nd</sup> accused be released on the following terms:-

*a) Bond of Kshs.2,000,000/= (Kenya shillings two million) with one (1) surety of similar amount.*

*b) In the alternative cash bail of Kshs.1,000,000/= (Kenya shillings one million) with three (3) sureties of similar amount.*

*c) The 2<sup>nd</sup> accused shall not make contact with any of the prosecution witnesses either directly or indirectly until final determination of this case.*

*d) The accused upon released on bond shall in the presence of her Advocate accompany the Investigating Officer to her residence where the said investigating officer shall if not yet done take inventory of any evidential material thereat, including taking photographs and graphs before being allowed to exclusive access thereto.*

64. Finally on the issue raised by Miss Mwaniki and having stated herein that it is a novel area, and taking into account the fact that the 2<sup>nd</sup> accused had the misfortune of reading the news in respect of the deceased's death, I am of the considered view and hold that some limited restriction is reasonable and justifiable. I therefore direct as follows:-

*a) The accused shall not read news, comment and participate in any interview directly or indirectly related to this case.*

*b) The accused shall not read news during the period this matter is fixed for hearing.*

*c) The accused shall not interview any parties directly or indirectly connected with this case including the victim's family, her Advocate, defence Advocate, the prosecutors and any prosecution witnesses and the trial judge.*

*d) This order is subject to review by the court from time to time.*

It is so ordered.

Dated, delivered and signed at Nairobi this 30<sup>th</sup> day of October, 2018.

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Mwaniki/Nyamosi/Onunga/Wegulu for the State*

*Mr. Nyaberi/Laichena for the 1<sup>st</sup> Accused*

*Mr. Njuguna/Katwa/Thuku for the 2<sup>nd</sup> Accused*

*Mr. Omiti for the family of the victim*

*1<sup>st</sup> Accused person - present*

*2<sup>nd</sup> Accused person - present*

*Court assistant - Karwitha*