



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 55 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BRIAN SAVA.....ACCUSED**

**RULING**

Brian Sava, hereinafter called “the accused” is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The information in t this respect is dated 5<sup>th</sup> November 2018. It reads that:

**BRIAN SAVA:** On the night of 31<sup>st</sup> August 2018 at about 11.00pm in Gishagi area in Kangemi, within Nairobi County, jointly with others not before the court murdered James Njoroge.

The accused pleaded not guilty to this charge. Pending the hearing and determination of this case, the accused approached this court seeking to be admitted to bail/bond on reasonable conditions. The application was canvassed his lawyer Ms. Julie Soweto, learned counsel. Ms. Soweto told the court that the accused has a right to bail on reasonable terms and conditions unless there are compelling reasons not to grant him bail/bond. She submitted that the accused is a 21 year old illiterate man who cannot read or write; that he is a father of two young children and the sole bread winner for his family and that these proceedings have an impact on his wellbeing as well as that of his family. It was further submitted that the affidavit sworn by PC Rodgers Nyongesa and the statement by Protus Induswe Musina recorded on 26<sup>th</sup> November 2018 at 14.13hrs attached to that affidavit were prepared after the parties left the court on 26<sup>th</sup> November 2018 and are meant to counter the arguments intimated by Ms. Soweto to the prosecution counsel regarding the deficiencies in the prosecution case. Ms. Soweto submitted that the main argument by the prosecution is that the accused is likely to interfere or intimidate witnesses but the accused has no relation with the witnesses and does not know them. She submitted that it is not enough for the prosecution to say that there is likelihood to interfere with witnesses without proof. She submitted that according to the Bail and Bond Policy in a bail application, courts should consider the strength of the prosecution case; that this is a murder case with singular evidence of a mobile phone alleged to belong to the deceased but there is no single witness who has linked the accused with the mobile phone; that the person found with the mobile phone is Patrick Mwachhi Shitukhu a prosecution witness who is not the accused person and that none of the witnessed identified the accused as the source of the phone.

Ms. Soweto further submitted that the prosecution will argue that the accused confessed to the crime but the alleged confession will be challenged. Counsel pointed out the contradictions in the prosecution case in regard to the place where this crime is alleged to have occurred. She submitted that the alleged crime is said to have occurred in Kangemi while the accused in the extracted confession says that he had been drinking in Kawangware and that only one person was attacked and that on a balance of probabilities the case for the prosecution does not add up and has failed to meet the threshold of compelling reasons to deny the accused bail/bond. Ms. Soweto urged that this court grants the accused bond on reasonable conditions to enable him attend court for the trial.

The application has been opposed by the prosecution. In opposing the application the prosecution has filed an affidavit sworn by PC Rodgers Nyongesa on 27<sup>th</sup> November 2018. To that affidavit is attached a statement by the accused person and a further statement by Protus Induswe Musina dated 26<sup>th</sup> November 2018. In the affidavit in opposition it is deposed that the accused was charged alongside others still at large and that it is feared that the accused person may interfere with investigations and impede the arrest of the persons at large; that the accused has confessed to the crime; that one Protus Induswe who was at the bar together with the deceased is also a victim of the attack by the accused; that the accused is likely to intimidate or interfere with this witness and that investigations are ongoing and therefore the accused may abscond.

The prosecution has submitted that it has exhibited compelling reasons to deny the accused bond by demonstrating that there is a strong case against the accused; that there is an eye witness; that there is a confession by the accused and also that the prosecution will rely on the doctrine of recent possession and identification parade forms. It was also submitted that the accused is facing a capital offence with stiff penalty. The prosecution counsel told the court that the prosecution is in the process of placing one witness on Witness Protection Programme and urged the court to find the prosecution has established compelling reasons and deny the accused bond.

In reply, Ms. Soweto submitted that the statement that the prosecution is preparing to place the witness under protection has been made from the bar and is prejudicial to the accused and that this has denied the defence the opportunity to respond to it. She submitted that this court has not been told what these compelling reasons are. Counsel maintained the submissions that the accused has not been identified by any witness and that the prosecution case is weak and cannot be used as a basis upon which to deny the accused a fundamental right. On the doctrine of recent possession it was submitted that the person arrested with the phone is not the accused for the doctrine of recent possession to apply.

I have considered the application and the grounds in support of the same. I have also considered the grounds advanced by the prosecution in opposition to the application. The starting point to consider is that bail/bond is a right that is guaranteed by the law. Article 49 (1) (h) of the Constitution provides that **an arrested person has the right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.** This right is not absolute. It can be denied where compelling reasons exist. It is the mandate of the prosecution to establish compelling reasons on a balance of probabilities. According to the Bail and Bond Policy Guidelines, in determining bail/bond applications, courts are guided by the following principles:

- a. The right of accused person to be presumed innocent.**
- b. Accused Person's Right to liberty.**
- c. Accused's obligation to attend trial.**
- d. Right to Reasonable Bail and Bond terms.**
- e. Bail determination must balance the rights of the accused persons and the interest of justice and also consider the rights of victims.**

It is therefore the duty of the trial court to balance the rights of the accused and the rights of the victims. The paramount consideration in bail/bond applications has been held to be whether the accused person will attend trial. Failure of an accused person to attend court to face the trial is a subversion of justice. It deprives the court the power to decide whether the charges brought against such an accused person have been proved or not for the sake of justice to the victim and also denies the victim his fundamental rights. Failure to attend court is an affront to justice. It would not be in the best interest to the accused himself/herself, the victim and the course of justice. In determining whether the prosecution has placed before it compelling reasons to deny bail/bond to an accused person, the trial court must consider certain factors including the following:

- 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. Character and antecedents of the accused person.**
- d. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.**
- e. Likelihood of interfering with witnesses.**
- f. The need to protect the victim or victims of the crime from the accused person.**
- g. The relationship between the accused person and potential witnesses.**
- h. The accused person is a flight risk.**
- i. Public order, peace or security.**

To my understanding the prosecution's opposition to this application is based on the claims that the investigations are still on-going; that they have a strong case against the accused person; that the accused is facing a serious offence; that he is likely to intimidate or interfere with witnesses and that there are other suspects who are still at large. I have had the opportunity to read the statements contained in the committal bundle. Murder is a serious offence with stiff penalty. That fact alone does not warrant denial of bail/bond because all accused persons facing any offence have a right to bail. The strength or otherwise of the prosecution case can only be tested after the evidence has been presented in court and its veracity tested through cross-examination. It is true that this court has been informed that the accused is charged with others not before the court. I am aware that some cases with a charge like this one are heard and concluded before "the others not before the court" have been arrested and arraigned in court. This does not translate into denying an accused person or even the victim of an offence their rights under the law. I have considered all the grounds relied on by the prosecution in opposing this application and I have appreciated them. The witness identified as the one likely to be intimidate is one by the name of Protus Induswe. In his further statement recorded on 26<sup>th</sup> November 2018 at 14.13hrs, Protus states that:

**"I do wish to state that my life will be in danger when the accused person Brian Sava is released on bond. I was with the deceased when we were attacked with the said accused person (sic). I fear for my life as it will be in danger as I do suspect that he knows where I stay and also suspect he knows my family."**

I have compared this statement with the earlier statement by this witness. For fear of prejudicing this trial, I do not wish to discuss these two statements but in my view the fears expressed by Protus may just be unfounded or he may have reason to think his life would be in danger if the accused is released on bond. This court does not however downplay those fears. To strike a balance in this matter, it is my view that in order to address the fears expressed by the prosecution through Protus Induswe, and to avoid keeping the accused in remand for unnecessarily long time pending the hearing and determination of this case, this court is willing to receive the evidence of Protus Induswe on a date convenient to the court and the parties before I can consider granting bail to the accused person. I note that the case is fixed for hearing in May 2019. To accommodate the court and the parties, I direct that a date be taken in the new term to receive the evidence of Protus Induswe ahead of the hearing dates in May 2019. After receiving his evidence I will proceed to conclude this ruling by setting bail terms for the accused. I make orders accordingly.

**Delivered, signed and dated this 18<sup>th</sup> December 2018.**

**S. N. Mutuku**

**Judge**