



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 18 OF 2017

(MURDER)

(CORAM: J.A. MAKAU – J.)

CHARLES PATRICK OOKO ONYANGO.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant **CHARLES PATRICK OOKO ONYANGO** is facing a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence as per charge sheet are that on the night of 25th August 2017, at around 10:00pm at Kodero village, Dienya East Sub-location, West Gem location. Wagai Division, Gem District, murdered **Ruth Awino Ooko**. The plea was taken on 28th September 2017 and a plea of not guilty was accordingly entered but the case is yet to be set down for hearing as the Court is engaged with Election petitions away from the station.

2. The Applicant through a Notice of Motion dated 28th September 2017 pursuant to **Article 40(1), 50(2)A, 159(1) and (2), 165(1)(d) and 258 of the Constitution of Kenya 2010 and Sections 123, 124, 125, 126, 362 and 364 of the Criminal Procedure Code** seeks that he be admitted to bail pending trial. The application is premised on the grounds on the face of the application interalia: -

(a) That the accused was arrested on 25th August 2017. He has been in custody for over one (1) month. This is in violation of the statutory fourteen (14) days prescribed and a violation of his Constitutional rights as are enshrined under Article 49(i)(h) of the Constitution of Kenya 2010.

(b) That the accused person's health has seriously deteriorated since his arrest and illegal incarceration. He is now suffering from several ailments and he needs urgent medical attention.

(c) The accused is ready and willing to abide by reasonable bail/bond terms as may be imposed by the Honourable Court.

(d) Bail/Bond is a fundamental constitution right guaranteed to accused persons charged with the offence of murder.

(e) The accused has since the investigations in this instant case were commenced been cooperative with the Investigating Officer's.

(f) The accused is a man of known fixed abode in Kodero Village, Siaya County.

(g) The accused is not a flight risk and there are no compelling reasons why the accused should not be admitted to bail/bond.

(h) The accused will not interfere with investigations or prosecution's witnesses.

(i) It is in interest of justice that the accused be released on reasonable bail / bond terms.

3. The application is further supported by affidavit of Anthony Onyango Okumu, father to the accused / applicant, in which he has stated the history regarding the progress made since the arrest of the accused on 25th August 2017 till this Court took plea on 28th September 2017. He depones the accused was held in custody for 30 days without taking plea in violation of the law and constitutional provisions. He is otherwise repeating the grounds set out on the face of the application in his affidavit in support of the applicant's application.

4. Mr. Wagara, Learned Advocate appearing for the applicant urged that the applicant's application is based on **Article 49(1)(b) of the Constitution of Kenya 2010**, and urged bail/bond is an accused's constitutional right which can only be denied if there are compelling reasons to do so. He submitted that the state did not file a replying affidavit setting out factual facts, pointing out that the matters raised in the affidavit in support of the application have not been controverted. He urged that the accused is not a flight risk and that the application is supported by Probation Officer's Bail Assessment Report, in which he stated the Report indicates there is no record of the accused having jumped bail and that the Complainant has no problem with the accused being released on bond as he has a fixed abode and is a businessman within the County and in the village. He urged the accused is not likely to interfere with the Prosecution witnesses.

5. The application on the other hand is opposed. The state relies on its grounds of opposition dated 3rd October 2017 being as follows: -

(i) That the application lacks merit.

(ii) That the applicant is likely to interfere with prosecution witnesses and or investigation.

(iii) That the applicant has access to medical facilities offered at the Prisons and that there is no evidence of his alleged deteriorating health.

(iv) That the applicant's Right under Article 49(1)(h) has not be violated as alleged.

(v) That the applicants Rights as enshrined in the Constitution of Kenya under Article 49 are not absolute.

6. M/s Maurine Odumba, Learned State Counsel, submitted before this Court, that the Probation Officer's Assessment Report is not binding on the Court but can be used as a guide. On the interference with the witnesses she urged some of the witnesses are biological children of the accused and the deceased and the accused's shamba boy and due to the influence, the accused may have on them, due to family ties, the accused should not be released at this stage as the weight of the case depends on the said witnesses and urged that is a compelling reason not to release the accused on bond. On the issue of the accused being not a flight risk, she urged the accused had not been on trial before and due to the seriousness of the offence, it is likely the accused once released on bail may abscond. On failure to file a Replying Affidavit, the State Counsel urged that such a failure do not negate the fact that the State is opposed to the bail. She concluded by urging the Court not grant bail at this stage but reconsidered the same upon receiving the evidence of the key witnesses being the biological children of the accused and the shamba boy.

7. The applicant in support of the application relied on the case of **Republic V Mohammed Abdirahman**

& Abdi Ali Farah, HCRC No. 1 of 2012 (Garissa) in which Hon. Justice Stella N. Mutuku partly stated as follows: -

“In an earlier application for bail pending trial, I did define the word “compel” from various online dictionaries and the Thesaurus as “a reason that is convincing, that is forceful, that is persuasive, and that tends to persuade by its forcefulness or that which makes one feel certain that something is true.” (See Republic v Osman Hansi Hussein & another, Cr. Case No. 3 of 2012). From this definition therefore, it is my belief that “a compelling reason would be such a reason that is forcefully convincing as to persuade this court to believe something is true”

8. In **Job Kenyanya Musoni V Republic Criminal Application 399 of 2012 (Nairobi)**, Hon. Justice C. W. Githua stated: -

“Let me state at this point that it has been held in numerous decisions of this court that in deciding whether or not to admit an accused person to bail, the main or primary consideration that a court must have in mind is whether or not the accused will voluntarily and readily attend his trial and that he will not abscond. If the prosecution is able to demonstrate to the satisfaction of the court that if released on bail, there is a real danger or risk that an accused person will jump bail and fail to turn up for his trial, then the prosecution will have established the existence of a compelling reason to justify denial of bail. Similarly, if there is proof that if admitted to bail, an accused person will interfere with witnesses, denial of bond/bail would in my view be justified.”

9. In **Antony Gachoki Muguongo V Republic, HMC No.8 of 2013(Kerugoya)**, Hon. Justice R.K. Limo stated: -

“This Court further finds that what constitutes compelling reason as contemplated from the wording of the aforesaid constitutional provision is both subjective and objective. On one hand it is objective in the sense that a standard has been set as to what can constitute compelling reason (which has been interpreted by many courts to be below the standard of beyond reasonable doubt and slightly above the standard in a balance of probabilities)and on the other hand, it is subjective in the sense that different parameters do apply at times as what is compelling in one set of circumstances or a place or region may not necessarily be compelling in a different set place or region. That is why each case must be decided on its own merit as it is difficult to find one magic bullet or pill that applies uniformly in all cases.”

10. It is of great significant to note that the question of bail pending trial for persons facing a charge of murder has been dealt with in myriads of cases in courts after the new **Constitution 2010** came into force. The new Constitution allows release on bail pending trial of persons facing an offence of murder and other serious crimes, however, such release I have to point out it is not absolute as such release on bail on reasonable conditions is subject to their being no compelling reason. It is trite law that a party alleging the existence of certain facts has the burden of proving that such facts do indeed exist. **Section 107 of the Evidence Act** provides he who alleges must prove. In the instant case, the prosecution is opposed to release of the accused person on bail on grounds that there are compelling reasons to justify denial of bail, it is therefore the duty of the Prosecution to prove on balance of probabilities that such compelling reasons do infact exist to warrant the Court exercise its discretion against an accused person by denying him his constitutional right to bail. This burden lies with the Prosecution and not the accused.

11. It has in numerous decision of the Court been held that in deciding whether or not to admit an accused person to bail, the main or primary consideration is that a Court must have in mind whether or not the accused will voluntarily and readily attend his trial and that he will not abscond. That if it is demonstrated to the Court that there is real danger or risk that the accused person will jump bail and fail to turn up for his trial, then the prosecution will have established the existence of a compelling reason to justify denial of bail. Similarly, if there is proof that if admitted to bail, an accused person will interfere or is likely to interfere with witnesses, denial of bond /bail would similarly be justified to be denied. It should be born in mind that enjoyment of fundamental rights and freedom is subject to the rights of others, and in matters

of crime in society, the right to bail must be enjoyed subject to the interest of justice, bearing in mind court's primary role is to do justice to all in accordance with the law and without undue regard to technicalities.

12. In the instance case, the applicant did not swear an affidavit himself in support of the application but his father did nor did his father state he had been authorized by the applicant to swear the affidavit on his behalf. He did not state that the accused had told him the things he would not do or he would do nor was this court informed why the accused could not personally have deponed the affidavit. The State Counsel opposed the application on two major limbs; one that the key witnesses are biological children of the accused as per witnesses statements already supplied to the Defence Counsel and the accused's shamba boy; and if accused is released on bail/bond, there is likelihood of interfering or exerting influence on the said key witnesses and secondly the offence is serious and the accused may abscond.

13. For the state to satisfy the court the reason for denying bond/bail are compelling reason; it is their duty, to show the reasons are not mere allegations or mere suspicion. The reason must be candid. In this case, the state has raised the issue of interference and/or influence of witnesses or likelihood of interference with the witnesses being close relatives of the accused and to whom he can easily exerts some influence. The accused has not denied that he is the biological father to the potential prosecution witnesses and an employer of the shamba boy. The likelihood of interference or exerting influence on the said prosecution witnesses is a very serious matter that can lead to subversion of justice and no Court should take that lightly. The reason is no doubt obvious; as the reason for interfering with witnesses is always aimed at influencing them or compromising them or threatening them to either, not to give evidence against the accused or give false evidence, which no doubt can lead to a serious miscarriage of justice, affect public confidence with the Judiciary and lead to breakdown of law and order. I find that is why interference with the witnesses is potent ground to deny or restrict the liberty of the accused.

14. In **R V Lucy Waweru & 3 Others (2013) eKLR (Nairobi)**, Hon. Justice F. N. Muchemi, declined accused persons bail on the grounds that the accused persons were likely to interfere with key witnesses and they were also at risk of harm from close family members of the deceased. In the instant case, the Probation Officer's Assessment Report heavily relied upon by the accused, has not captured the views of the deceased's children who are also children of the accused. The parents of the deceased are opposed to bail as they are not happy with the accused because they suspect he killed their daughter. The report is favourable to a certain extent; however, this court is not bound by the Probation Officer's Report, which merely acts as a guide to the Court in discharging of its duty of administration of justice. On the issue of the State having not filed affidavit in opposition to this application, I find that it is indeed so, as no replying affidavit was filed by the state but the State filed grounds of opposition. That failure however, does not affect greatly the prosecution's opposition of the application as grounds of opposition case do, depending on the nature of the case. I have noted and commented that the application for bail/bond is not supported by an affidavit deponed upon by the accused but by an affidavit of the accused father, who did in his affidavit stated that he had been authorized by the accused to make the affidavit nor did he state that the accused had informed him on the matter he stated in his affidavit. Be as it may, this Court in dealing with this application is not out to mainly determine the same base on technicalities but out to do substantive justice.

15. Having considered the application wholly, I have come to the conclusion that though the Probation Officer's Report is favourable to the accused's application for bail/bond, the same cannot be considered in isolation of other factors, such as the likelihood of the accused's interference with his biological children and the shamba boy, who are potential witnesses in this case. I find the likelihood of interference with the said witnesses outweighs the contents of the Probation Officer's Assessment Report. I find the circumstances laid down by the Prosecution and in particular the relationship of the accused with the key witnesses, being his children and a shamba boy, compelling enough to deny the accused's application for bail/bond pending hearing of the said witnesses. The State can bring the said 4 witnesses on hearing date to be obtained before this Court immediately after this ruling, for them to testify, after which the applicant can renew his application to be released on bond. For the above reasons the application dated 28th September 2015 for the accused to be released on bail/bond pending hearing is denied.

DATED AND SIGNED AT SIAYA THIS 13TH DAY OF OCTOBER 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Mr. Wagara: for Applicant

M/s M. Odumba: for State

Court Assistants:

1. Laban Odhiambo

2. Atika Leonidah

J.A. MAKAU

JUDGE