



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 2 OF 2016

REPUBLICPROSECUTOR

VERSUS

KUNGURU MARTIN OPIYO JUNIORACCUSED

RULING

1. The accused **KUNGURU MARTIN OPIYO JUNIOR** is 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 15th/16th December 2015 at Nyayo Estate Court 782 House No. 44 in Embakasi within Nairobi County murdered **CHARITY MUKAMI WACHIRA**
2. He pleaded not guilty to the said charge and in exercising his Constitutional Rights under the provisions of **Article 49(1) (h)** sought to be released on bond/bail pending trial and determination of this case. In opposing the said application the prosecution on 3/2/2016 filed an affidavit sworn by PC STEPHEN KILELE in which it was deponed that on the night of 22/12/2015 they received information of a suspected scene of murder at Nyayo Estate Court 782/44.
3. Upon responding to the said information the decomposing body of the deceased was found in the said house covered with a blanket while beddings in the room blood soaked and the wall blood stained. It was upon inquiry established that the accused was the current tenant of the house which was confirmed by an annexed copy of the Tenancy agreement allegedly signed by the accused and the deceased indicated therein as a wife.
4. It was deponed further that the postmortem conducted on the body of the deceased established that her death was due to chest, neck and abdominal injuries due a penetrating sharp force trauma with about five stab wounds and multiple contusions. It was stated that further inquiries established that the deceased did not return to her parents' house on 15th December, 2015 and that when her mother called the accused who was known to her as her boyfriend, the same informed her that they had parted ways on 16/2/2015 and thereafter the same switched off his cell phone and disappeared causing the deceased family to make appeals through the media.
5. It was further stated that the accused on 5/1/2016 surrendered himself to the DCIO Kitale and was arrested and escorted to DCIO Embakasi whereupon arrival the same allegedly in the presence of his Advocate and brother made a confession and admitted having committed the offence on 16/12/15.
6. It was deponed that the accused is now aware of the key prosecution witnesses and evidence they will tender having been supplied with the prosecution witnesses' statements and that most of these witnesses being the accused mother, the deceased person's parents and relatives, the taxi driver and the watchmen at the gate of his court are closely related to the accused and there is high possibility that they will be in real fear and intimidation if the accused is released on bond.
7. It was further stated that by his conduct and taking note of the fact that he is charged with a very

- serious offence, there is a high possibility that the same will abscond from the trial process and is therefore a flight risk.
8. In support of his application the accused on 29/2/2016 filed an affidavit in which it was deponed that immediately when he became aware that he was being sought for the alleged commission of the offence herein while in Kitale, he voluntarily surrendered himself to the DCIO Kitale before going to the DCIO Embakasi and that he did not run away to anywhere. It was stated that he had been in gainful employment for the last fifteen years until September, 2015 when he voluntarily resigned from the East Africa Breweries Ltd as a Regional Sales Coordinator.
 9. It was further stated that he comes from a stable family with his father being a retired senior government officer and mother retired senior nurse enjoying their retirement at Mujur village Bukhayo in Busia County and that if released on bond he intends to seek alternative employment to continue his career as he attends court. It was deponed that for the better part of his life he has been suffering from an asthmatic condition which has required continuous medical care and attention which condition had grown serious as a result of his detention in remand.
 10. He further denied having confessed to the commission of the offence herein and that he did not have any power and intention to intimidate or interfere with the prosecution witnesses nor did he intend to abscond from the jurisdiction of the Honourable Court since he was innocent, having taken steps to present himself to the nearest police station immediately he realized that he was being suspected of having committed murder.
 11. The State on 28/4/2016 filed a further affidavit sworn by D.T Peter Kanagi in which he confirmed that the letter from Kenyatta National Hospital used by the accused in support of his application herein was not genuine.

SUBMISSION

12. When the application came up for hearing before me Mr. Namada appeared with Mr. Amolo for the accused in support of the application while Miss Mwaniki appeared for the prosecution and opposed the application. It was submitted on behalf of the accused that the same is not a flight risk since he has a family which can be traced to his rural village. It was submitted that the same was aware of the nature of the offence he faces and that he voluntarily availed himself to the nearest police station some 400 km away from Nairobi. It was submitted that bail is now a constitutional right of all accused persons under **Article 49(1)(h)** of the Constitution and that the State did not supply any compelling reason to deny the accused bail since the prosecution had only raised fear that the accused is likely to interfere with prosecution witnesses.
13. It was further submitted that the court ought to take judicial notice that if released on bond the accused is unlikely to go to a place where he is likely to compromise his security and that the weight of prosecution evidence is only relevant where the trial has commenced and not as in the present case. In support of these submissions the following cases were submitted:-
 1. **REPUBLIC v JAMES KIPROTICH BORE** High Court of Kenya at Eldoret Criminal Case No.67 of 2012 in which Justice Ngenye-Macharia defined what compelling reasons are.
 2. **REPUBLIC v JOSEPH LENTRIX WASWA** High Court of Kenya at **Bungoma Cr. Case No. 34 of 2014** on whether to consider the allegation that the accused had ran away in denying him bail.
 3. **REPUBLIC v DWIGHT SAGARAY & 4 OTHERS** High Court at **Nairobi Cr. Case No. 61 of 2012** on conditions to consider when one is a flight risk.
14. On behalf of the prosecution it was submitted by Miss Mwaniki that the court ought to consider the seriousness of the offence since if proved guilty the sentence will be death and that by his conduct the accused person after the commission of the offence disappeared from his rental property and switched off his cell phone and that since the evidence against the accused is strong there is a possibility that the accused will either disappear or interfere with witnesses. It was further submitted that the family of the victim have a lot of reservation against the accused person being released on bond since some of his intended witnesses are his friends.
15. It was submitted that the accused medical condition has not been confirmed since the medical report produced allegedly from Kenyatta is disputed and therefore there is no evidence of his ill

health. It was submitted that the authorities submitted by the accused are distinguishable from the present case in that in most of these cases, the parents of the victim were not opposed to the accused being released on bond and that the State had in this case indicated witnesses likely to be interfered with as the guards at the gate, taxi driver, parents of the victim and mother of the accused.

DETERMINATION

16. Bond is now a Constitutional right of every accused person under

Article 49(1) (h) which can only be limited where there are compelling reasons, which reasons must be proved by the prosecution on a balance of probability. Whereas the Constitution has not defined what compelling reasons are, courts have, in exercising the discretion given by the Constitution, been guided by the following considerations:-

- a. The likelihood of the accused interfering with witnesses
- b. The likelihood of the accused absconding from trial. This may be precipitated by the nature of the penalty likely to be handed upon conviction.
- c. Security of the accused and witnesses.
- d. The weight of evidence against the accused person. See the case of **REPUBLIC v JAMES KIPROTICH BORE** [supra].
- e. Whether the release of the accused will jeopardize the security of the community.
- f. Safety and protection of the accused if released on bond see **REPUBLIC v PASCAL OCHIENG LAWRENCE**.
- g. The likelihood of the accused suppressing any evidence that may incriminate him.
- h. The likelihood of further charges being brought against the accused person.
- i. The probability of guilt.
- j. The necessity to procure medical or social “support” pending final disposal of the case. See **REPUBLIC v DWIGHT SAGARAY & 4 OTHERS** (supra)

17. In this matter before me the State has submitted that the accused is a flight risk, likely to interfere with main witnesses and should be detained for his own safety, whereas the accused has submitted that he is unwell and needs medical attention which illness has been disputed by the prosecution and further that he will attend court during the period of trial.

18. The following facts emerge from the material presented before the court:- That the Accused and the deceased had a romantic relationship, which relationship was known by both parents with the accused considering the deceased as his wife as evidenced by the Lease Agreement for the property wherein the body of the deceased was found. That the members of the family of both the accused and the deceased knew each other as seen in the telephone communication between the accused mother and the mother of the deceased. That the last time the deceased was seen alive was on the 15th of December, 2015 and when the mother of the deceased called the accused on his cell phone he indicated that they parted ways on 16th December, 2015 the last day the accused was seen at the court and thereafter he switched off his cell phone.

19. Whereas the accused person is at this stage considered innocent until proved guilty beyond reasonable doubt and whereas the same is entitled to the enjoyment of his constitutional right to bail, based on the material presented before the court I am satisfied that the State has provided enough compelling reasons to enable me deny the accused his Constitutional Right to bail at this stage these compelling reasons being:-

- a. The relationship between most of the prosecution witnesses and the accused. There is a real possibility of there being contact between the accused and potential prosecution witnesses and this may lead to interference of those witnesses.

20. In the case of **REPUBLIC v CHRISTOPHER MULEI MUTUA Nairobi Criminal Case No. 7 of 2016** I had this to say:-

“Given the close relationship between the accused person and the possible prosecution witnesses it is clear to my mind that if released on bond the accused will be in contact with the said witnesses either physically or emotionally and having taken into account the provisions of Section 10(1)(b) of the Victim Protection Act 2014 I am satisfied that there are adequate compelling reasons advanced by the state.....”

21. The other compelling reasons advanced are the conduct of the accused person immediately upon the alleged commission of offence which depicted the same as a flight risk. There is also the issue of the security and the safety of the accused person and whereas the State is under a duty to protect all the citizens of the Republic of Kenya, I have noted that this matter has generated adverse media publicity since the accused was charged with this offence and it would not be in the best interest of public order and safety if the accused is released on bond at the time when the emotions generated by the said media coverage is still high.
22. I have further taken into account that the accused person presented to court disputed medical documents in support of his ill health while in remand custody showing that the accused person is predisposed to interfering with administration of justice.
23. Taking into account the material presented before court including the pre-bail report and the authorities submitted herein, I am satisfied that there are adequate compelling reasons advanced by the State and would at this stage deny the accused the right to bail. The accused shall remain in custody pending trial and it is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 26th day of May, 2016.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Magoma for the state

Mr. Juma for Amolo/Namada for the accused person

Accused person present

Tabitha court clerk