REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 48 OF 2016

Lesiit, J.

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD DAVID ALDEN.....ACCUSED

RULING.

1. The accused person **RICHARD DAVID ALDEN** is charged with one count of Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

> **"On the 4th day of June, 2016 at House No. 11 along Windy Ridge Road at Karen within Nairobi County murdered GRACE WANGECHI KINYANJUI."**

2. The accused was arraigned in court on the 10th of June 2016. He has been in custody since then.

3. By a **Notice of Motion** dated 16th June of 2016 the accused person now seeks to be released on bail or bond on such reasonable terms as the court may determine. The application has been brought under **section 124** of the **Criminal Procedure Code & Articles 20 (3) & (4), 21(1), 22(3)&(4), 49(1)(h) & 50(2)(a)** of the Constitution.

4. The application is premised on six grounds on the face of the Motion which are that:

> **i) the offence of murder is bailable;**
>
> **ii) the accused has a qualified constitutional right to be released on bond/bail on reasonable conditions;**
>
> **iii) and an unqualified constitutional right to be presumed innocent until the contrary is proved;**
>
> **iv) that the accused will avail himself when required to do so until the matter is concluded;**
>
> **v) and shall abide by any conditions that shall be set by the court and;**

vi) shall not interfere with witnesses in the matter or any investigations should any be carried out.

5. The application is further grounded on a supporting affidavit sworn by the accused of even date. I have considered the averments in the affidavit and I will be referring to it in due course.

6. The State has opposed the application and has filed a replying affidavit sworn by the Investigating Officer of this case, CPL Daniel Mutisya, dated 16th June, 2016. It has several annexure in it. In brief the CPL disposes that at the scene where deceased was injured he collected inter alia several rounds of ammunition, firearm certificate in accused name and spent cartridge and bullet head. He also gathered information in course of investigations which established, one that the accused gave different versions of the events leading to deceased fatal wounds, two, that the entry and exit bullet wounds on the deceased rule out the possibility of suicide; and three, that the bullet which fatally wounded the deceased was from accused gun.

7. The CPL further stated that he found false information in the Civilian Firearms Certificate in accused name to effect the accused is a Kenyan Citizen which information is not correct. The CPL concludes that the accused was in unlawful possession of the firearm which caused deceased death. He avers that the offence the accused is facing carries a death sentence if the accused is convicted and being not a citizen the accused was a flight risk.

8. The I.O. avers that the accused was likely to interfere with the key witnesses who were his employees. He further avers that the accused employment in Kenya had ended and he had obtained another job outside Kenya and that at the time of arrest he had parked his bags to leave the country and so had no fixed abode. He avers that his release may lead to public disorder and lack of public peace.

General Principles on Bail and Bond

9. Mr. Ombetta for the accused has urged the court to consider the provisions of Art.49 (1)(h) of Constitution, which gives an accused a right to be released on bond subject to prosecution if they have compelling reasons. Counsel urged that the Constitution does not define compelling reasons but he relied on Thesaurus and Oxford dictionaries which define compelling reasons as '***compelling – something so grieving, so strong, so convincing and undeniable.'***

10. Counsel urged that Art.49 of Constitution is clear that Rights and Bills of Rights belong to an individual and are not granted by the state. Counsel urged that it is contrary to Art.20 of Constitution for the State to oppose bail as Bill of Right shall be recognized by all arms of the law including the Court, prosecution, police and all other arms. Counsel urged the court to enforce Art.23 of the Constitution which provides that the state shall enforce the Bills of Rights.

11. Mr. Ombetta submitted that once the Bill of Rights is hampered Arts.24 and 28 provide that the right of an individual is inherent not given by the state in maintaining the dignity. He urged that it is not just on the face of it, but denial of rights has repercussions because if an individual comes to court without his rights, it affects his performance and mind and also leads to embarrassment. Counsel urged that the accused is a person of standing and has been working with big organizations. Counsel urged that the accused family was in Court and that having been brought to court in handcuffs his dignity was eroded.

12. Ms. Mwaniki learned Prosecution Counsel appeared for the State and opposed the application for bail. Counsel relied on the affidavit of Daniel Mutisya sworn on 16th June, 2016. Counsel begun by submitting that **Art. 49(1) (h)** which gives bond does not fall under **Art.25** which provides 4 rights and fundamental freedoms which cannot be limited. Learned Prosecution Counsel urged that the Court was bound by the Bail and Bond Policy Guidelines which states what are compelling reasons. Counsel urged that the first was the severity of sentence the accused faces. In instant case accused faced murder and the sentence of offence is death. The second, counsel urged, was the strength of the prosecution case. Counsel urged that the prosecution by annexure DM3 shows how deceased succumbed to fatal injury caused by a gunshot wound. Further that the post mortem shows how the bullet entered the body. Counsel urged that the

prosecution had annexure of the statements of 2 witnesses which was a demonstration that the evidence of the prosecution is strong.

13. The Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set out under **section 123A of the Criminal Procedure Code**. These general considerations are: **the nature of the offence; strength prosecution case; character accused and antecedents; failure by the accused to observe previous bail or bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is a child offender; whether the accused is a flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person.**

14. Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include **the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims**.

15. It is therefore now very clear to courts what it is that should guide in the considerations of bail and bond, unlike the situation as it was at the time the Constitution was promulgated and the court found itself at a loss as to how to enforce the rights particularly those under **Art. 49(1) (h).**

Interference with witnesses

16. In this case the prosecution has opposed bail on the ground that there is a likelihood that the accused may interfere with the two witnesses who were his employees at his residence where the incident occurred. Mr. Ombetta responded to the replying affidavit sworn by CPL Daniel Mutisya in that regard and urged that none of the witnesses listed by the prosecution had complained of accused interference. Counsel cited the case of **Rep Vs. Dwight Sagaray & others High Court Criminal Case No. 61 of 2012, Milimani.** In that case R. Korir, J. stated what the prosecution needed to adduce in order to persuade the court that the accused was likely to interfere with witnesses thus:

> **"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 show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others…, at least some facts must be placed before court otherwise it is asking the court to speculate."**

17. Ms. Mwaniki relied on statements of DM 9 and 10 who were employees of accused, and urged that there was a likelihood the accused will interfere with them if he is released and further that his release could lead to apprehension and legitimate apprehension by these witnesses.

18. In regard to the **Sagaray case**, supra, Ms. Mwaniki submitted that the Court found that the 1st accused had been stripped off his diplomatic status and relieved of his duties and so could not influence witnesses. Counsel sought to distinguish the cited case from the instant case and urged that in the cited case the witnesses had no relationship with 1st accused, while in the instant case there is a master/servant relationship.

19. I have decisions of other colleagues which are persuasive where the question of what may constitute interference has been discussed. In **Republic Vs. Joktan Manyende & others [2012] eKLR,** where Gikonyo, J. stated as follows:

> **"Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where the person is a witness, it suffices to prove that the accused did act(s)**

tending or intended to interfere with a witness. The court is then *entitled, if not bound, to infer that the intention of the accused in accosting the witness had been to dissuade the witness from giving evidence*. Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice. For greater understanding of this position of the law see the case of R V KELLET [1975] 3 All ER 468.

All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.

20. It is clear from the two cases of **Joktan**, supra and **Sagaray**, supra that the circumstances which may be inferred as proof of interference with witnesses are not only varied but include both direct and indirect interference.

21. In this case what the prosecution has placed on the table as proof of interference is the relationship of employer/employee between the accused and two of their witnesses. Mere relationship, especially one which is not filial is not sufficient to prove likelihood of interference. There is need of further proof that would demonstrate a real existence of a likelihood that the witnesses have or are likely to be interfered with. For instance the evidence that the two witnesses will remain in accused employment. What the Prosecution has presented in court is that the accused was on his way out of the country having ended his employment locally and that he already has another job abroad.

22. I have looked at the affidavit sworn by the accused and he does not disclose his intended place of abode if he is released on bail. However I have looked at his statement under inquiry which was given by him to the police and it is clear from it that the house in Karen where the incident occurred was rented and that he had had the lease terminated. There is therefore no likelihood he will return to his house in Karen, and unlikely the two witnesses will continue in his employment. The prosecution has not, in the circumstances adduced any evidence from which this court can be persuaded that the accused is likely to interfere with the two witnesses.

Accused being a flight risk and having no place of aboard

23. Regarding accused being a flight risk and having no fixed abode Mr. Ombetta submitted that the prosecution had not proved that point. Counsel relied on the case of **REPUBLIC Vs DWIGHT SAGARAY & OTHERS Cr.C. No. 61 of 2012** for the proposition that the answer to lack of abode is to give stringent terms of release on bail. He urged that since the State had the passport of the accused; and since the accused had promised that he will abide by court terms, therefore the lack of a fixed abode is cured. Counsel urged that nowhere does the constitution say a foreigner cannot be granted bond.

24. Mr. Ombetta relied on **NGETICH. & 2 OTHERS Vs. REPUBLIC [2011] eKLR ; GEORGE ANYONA VERSUS REPUBLIC 1990 WLR12** and **REPUBLIC. Vs. MUNEER HARRON ISMAEL & OTHERS [2010] eKLR**. for the proposition that if the state wished to rely on any ground, it must be supported by credible evidence. He urged that no evidence is relied upon in their Affidavit. Counsel urged that the State needed to show that the accused tried to go away; or made arrangements to go away; or has bought travel tickets. Counsel urged the court to enforce Art 50 and release the accused on bail in order to give him an opportunity to prepare his defence.

25. Regarding flight risk, Ms. Mwaniki urged that if the accused could get fake license and book and card, he could obtain a fake travel document. Ms. Mwaniki submitted that in his statement DM1, the accused stated that he is gainfully employed abroad and that on the day of incident he was travelling to leave the country. Counsel urged that the accused had therefore no fixed abode and was a flight risk.

26. Ms. Mwaniki further urged that the conduct of the accused after the incident to the time of his arrest demonstrates why the accused should not be granted bail. She urged that when the accused took the deceased to Karen Hospital, he told the hospital that the deceased shot herself. She said that the statement is contained in the annexed affidavit by the hospital staff. Counsel urged that the accused contradicted himself later to the police and said that he was in another room when the incident occurred. Further that he made other false statements about his residence and had a firearm without being a licensed Firearm holder and therefore had unlawful possession of the firearm all go to prove that the accused cannot be trusted.

27. What the prosecution has placed before the court in an attempt to prove that the accused was a flight risk and had no fixed abode is that primarily that the accused is a British Citizen. Secondly the state relies on what is contained in the accused own statement under inquiry and the statement of the two employees of the accused at the time of this incident. The third ground advanced in Ms. Mwaniki's submission is what I consider conjecture, in which the court has been asked to find that since the accused had made a false statement in the certificates the state recovered from him, and which are before court that therefore he cannot be trusted, and further that obtaining fake travel documents and tickets would be child's play to the accused.

28. I agree that a paramount issue for determination, in considering an application for bail is whether the accused person will avail himself for trial if admitted to bail. I also agree that an accused not being a citizen poses a special challenge to the court, but that is not to say that non-citizens cannot enjoy the rights to be released on bail as enshrined in our Constitution. Art. 49 (1) (h) is not of limited application and the only condition set there under is a proof of compelling reasons to deny bail. The mere fact the accused is not a Kenyan is not *per se* a ground to deny bail.

29. In the case of **Ahmad Abolafathi Mohammad [2013]eKLR,** Achode J. considered the issue of accused persons being a flight risk and having been dishonest about their identities and observed as follows:

> ***"The probability that the respondents may not surrender themselves for trial:***
>
> **In** Daniel Dela Amega vs Republic [2006] eKLR, **to which I was referred by learned counsel, Mr. Wandugi, Makhandia J, held that if there is merited fear, that the respondents may abscond if granted bail, then the court would ordinarily refuse to admit such an accused person to bail. In the matter before me it is observed that the respondents are Iranian nationals. While there can be no discrimination against them on grounds of their being foreigners it is a matter of fact that Kenya has not signed an extradition treaty with Iran, and it would therefore, be impossible to prevail upon Iran, to return to its nationals to Kenya to be prosecuted should they abscond and return to Iran."**

30. In the case of **Sagary**, supra the judge appeared to have been persuaded that indeed the 1st accused, a Venezuelan national was a flight risk given her holding that the cure for the issue of flight risk is stringent bond terms. In **Ahmad Mohamad**, supra, where the accused faced terrorism related charges, the court went further to consider whether extradition proceedings could be instituted if the accused fled the country. For the latter case, I agree with the judge that that consideration was necessary given the nature of the cases facing the accused persons. In the **Sagaray** case, the accused faced a murder charge and the judge was not persuaded that mere flight risk was sufficient to deny bail.

31. In the instant case we have the statements of the two key witnesses stating that the accused was leaving the country on the same day of this incident. There is also the statement under inquiry by the accused which shows that the accused had a home in Nanyuki where he intended to make frequent visits.

More importantly is his statement that he was going to take up a job abroad. The fact he had a job abroad is not proof accused was fleeing the country. Neither can it be used as evidence of an intention to absent himself from court's jurisdiction for purposes of the trial. That said, I do consider that the issue of being a flight risk is pertinent. However, like my sister R. Korir, J. it is a matter that can be addresses by other means when settling the terms and conditions of bail/bond, if the court is inclined to grant the same to the accused.

Public order, peace and public interest

32. Mr. Ombetta raised issue with what CPL Mutisya stated that if accused is released on bond due to public interest, the public shall cause a disturbance. Mr. Ombetta urged that nothing was further from the truth. As since accused arrest on 4th June 2016, sixteen days later nothing had happened outside in the public to show that there will be unrest or disturbance. Counsel urged that CPL Mutisya's did not disclose the source of his information.

33. Ms. Mwaniki for the State urged that the case had generated public interest because of being widely reported in the local media. The issues of public peace, order and security have come under scrutiny by several courts and therefore there is a lot of material to refer to.

34. In **Republic vs Muneer Harron Ismail & 4 others, H.C. Criminal Revision No. 51 of 2009**, Warsame J. 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 **Ahmad Abolafathi Mohammad**, supra the court 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**."**

36. As I have stated herein above there are many cases to quote from on the issue of public security but I need not go through all of them. It is quite clear even from the few I have quoted what the prosecution needs to place before the court in order to persuade the court to find that releasing the accused may endanger public security.

37. The prosecution has stated that because the case was widely publicized in the local media, then it would cause a breach of public peace and order to grant the accused bail. That is hardly a ground to consider in relation to public order and security. I have not followed the publicity. If the prosecution was aware of instances where there was unrest due to this case it was its duty to place tangible evidence before the court to demonstrate this. Whose limb has the accused threatened, or how has the accused endangered public safety, or how has he attempted or intends to disrupt the criminal justice system; or is he such a public figure that arresting him may lead to chaos anywhere in Kenya?

38. I ask the prosecution in this case to note the serious issues which courts have to consider on this question of public order and security and how they weigh on the very administration of justice and be advised that such an allegation is so grave that it ought not to be "dropped" as a ground to deny. Of course this ground has not been proved.

39. Ms. Mwaniki urged the court not to release the accused on bond as he was likely to face other charges. The issue of other charges as a ground to deny bail was considered in **Ahmad Abolafathi Mohammad,** supra and the court observed as follows:

> ***"The likelihood of further charges being brought against the respondents, and the probability of guilt:***

I will not speculate on the likelihood of further charges being brought against the respondents or on the probability of guilt of the respondents, since the law presumes them innocent until proved guilty. The applicant is not barred from preferring other charges against the respondent."

40. I associate myself with this observation. The possibility of multiplicity of charges being brought against an accused person cannot be a ground to deny bail. However once preferred then the prosecution may apply to court to cancel bail for this reason. Cancellation would not be automatic as the court has to consider several issues. If for instance it is shown that the offences are more serious, or they change the nature of the offence the accused now faces or that there is new evidence to prove that the factors the court found not to exist in the earlier consideration for bail/bond are now a reality. This is of course not an exhaustive list.

41. I have considered that the prosecution has given an indication that the other charges intended to be preferred against the accused have to do with the possession of firearm and ammunition. In terms of seriousness, these are less serious compared to the charge the accused now faces. In addition the offences were discovered on the same day the accused was arrested for this offence. In addition they are bailable offences. Unless there are other relevant factors that would militate against the accused release, this has not been placed before me and I cannot speculate.

42. Having considered the application for bail before me, the submissions by both counsels, the law and precedence, and the evidence placed before me I am convinced that there are no compelling reasons to deny the accused bail. It is the court's duty to grant bail/bond on reasonable terms and conditions in order to enforce **Art. 49 (1) (h) of the Constitution** and in compliance to the **Bail and Bond Policy Guidelines**.

43. I will grant the accused person bail/bond on the following terms which the accused is expected to strictly comply with. The accused may be released on bail and bond:

> **1. Upon payment of cash bail in the sum of Kshs. 2,000,000/-.**
>
> **2. Upon providing two Kenyan sureties for Kshs. 2,000,000/- each.**
>
> **3. Upon depositing with the court his passport.**
>
> **4. The accused should, upon release report every two weeks to the OCS Karen Police Station. If Karen Police Station will not be convenient the accused to provide to the court for sanction**

the name of the Police Station that will be reasonable to report to.

5. The accused must swear an affidavit and disclose where he will be residing once released on bail/bond.

6. The accused should not leave the jurisdiction of this court without the express permission of the court to be obtained upon request in person and or through counsel.

7. The hearing dates for the case will be given today.

Those are the orders of the court.

DATED AT NAIROBI, THIS 30TH DAY OF JUNE, 2016.

LESIIT, J.

JUDGE.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE 2016

LESIIT, J

JUDGE