



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL CASE NO.69 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

MAXWELL OCHIENG OTIENO.....ACCUSED

RULING

1. The Accused Person is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He was arraigned in Court on 05/08/2016 when he pleaded not guilty. At the time of his plea, Mr. Ombeta and Mr. Bosire requested to be placed on record for the Accused Person. They immediately applied to be supplied with all the relevant documents related to the case. They also requested for bail for the Accused Person. I set the bail hearing for 12/08/2016 and requested for a Pre-bail Report.

2. The Bail Report was filed on 11/08/2016. PC Abdi Ali of the Ruiru CID Division also filed an Affidavit on 12/08/2016 in which he opposed bail.

3. During the Bail hearing Mr. Bosire made submissions on behalf of the Accused Person urging the Court to admit him to bail. He relied on the bail report which he argued was favourable to the release of the Accused Person on bail.

4. I will reverse the order of submissions and begin with the case made by the Prosecution for denial of bail. Ms. Maari argued the case for the Prosecution. She focused on two points.

5. First, Ms. Maari argued that the violent manner in which the Accused Person actively resisted arrest should lead to a conclusion that he should be denied bail. The Accused Person, the Affidavit of PC Abdi detailed, was forcefully violent at the time of his arrest. When he learnt that the Police Officers were outside his apartment, he locked it from the inside and dared anyone who would venture inside with serious consequences. The Affidavit details that the Accused Person threatened to hurt any Officer who would come inside the apartment or to, alternatively, hurt himself. Indeed, when the Officers cut the steel metal door using tools in order to gain entry, the Affidavit narrates, the Accused Person set his sofa set seats on fire in a violent fit of ire. He then, the Affidavit continues, proceeded to stab himself in the stomach to avoid arrest. This conduct, Ms. Maari concludes disentitles the Accused Person to bail. As I understand it, Ms. Maari's argument is that the Accused Person's conduct means that he will likely abscond if he is released on bail.

6. Second, Ms. Maari argues, the behaviour of the Accused Person reveals the conduct of a person who is suicidal and one who should be held in custody to avoid him from harming himself. In other words, bail should be denied and the Accused person held in custody for his own protection.

7. Mr. Bosire made four primary points. First, he reminded the Court that bail is a fundamental right guaranteed by the Constitution. The only time an Accused Person can be denied bail is when there are compelling reasons. Here, Mr. Bosire argued, there are no compelling reasons to deny bail.

8. Mr. Bosire fiercely attacked the two reasons advanced by the Prosecution to deny bail. To his mind, none constitute compelling reasons to deny bail. On the conduct of the Accused Person during arrest, Mr. Bosire made two arguments. First, he argued that the evidence was inappropriate at this stage as amounted to giving evidence which may be part of the criminal trial. Without impugning the veracity of the affidavit, he objected to the affidavit evidence proffered and urged the Court not to consider it.

9. Second, Mr. Bosire argued that, in any event, the conduct of the Accused Person needed to be seen in context. What the Prosecution had not told the Court, he proffered, was that at the time of the arrest, there was a large crowd that had formed outside the Accused Person's apartment. It was thus reasonable, Mr. Bosire argued, for the Accused Person to be apprehensive about his safety. Mr. Bosire felt that in these circumstances, it would be unfair to deny bail on these grounds.

10. On the need to put the Accused Person in protective custody, Mr. Bosire argued that there was no evidence other than the Prosecution's say-so that the Accused Person had mental disorders requiring protective custody. Indeed, the two mental assessments done had revealed that the Accused Person was of sound mind with no major mental issues. In any event, Mr. Bosire argued, the fact that an Accused Person is suicidal is hardly a reason to hold them in protective custody: the proper course of action would be to release the Accused Person to his family who can arrange for the care and protection he would need rather than continue to hold them in custody.

11. Finally, Mr. Bosire argued that the medical situation of the Accused Person provided a further ground for granting bail. It is established that the Accused Person has stab wounds in his stomach. They required extensive stitching and the sutures need special care. They will also need to be removed at the hospital. Since providing appropriate care is a challenge in remand, this should be a reason to tilt in favour of granting bail.

12. It is well established that bail is a constitutional right absent compelling reasons for denying it. The singular question presented here is whether the two reasons presented by the Prosecution constitute compelling reasons for denying bail in the circumstances of this case.

13. It helps to begin with the general principles applicable. First, in some cases, pre-trial detention is necessary to protect the Accused Person (see *R vs Pascal Ochieng Lawrence [2014] eKLR*). However, this applies when, on balance, it is not possible to ensure the safety of the Accused Person due to the generalized hostility from the community in circumstances where the State's duty to protect the physical safety of the Accused Person can only meaningfully be satisfied by keeping the Accused Person in custody. This may also be applicable in certain cases of mental illness where the admission of the Accused Person to bail might not be in his best interests. This is anticipated, for example, by section 162 of the Criminal Procedure Code. However, the Court resorts to this course of action only when bail may not be taken in a case (see section 162(4)) for other reasons. In cases where the Accused Person can safely be released to his family or other loved ones who can take care of him, this is not an appropriate course of action. In any event, as Mr. Bosire rightfully argued, this course of action can only be resorted to when the Court is of the reasonable opinion that the Accused Person suffers from some serious mental condition which could lead to him injuring himself. Here, while the undisputed conduct of the Accused Person during his arrest might, singly, lead to a deduction that the Accused Person is suicidal, that evidence must be seen against the circumstances of the arrest as well as two mental assessment reports by qualified medical doctors who concluded that the Accused Person is of sound mind and without lingering mental conditions that could lead to apprehension that he might harm himself. There is, therefore, no good reason to conclude that the Accused person should continue to be held in custody for his own protection.

14. That leaves us with the second issue: does the violent and forcible resistance to arrest by the Accused Person constitute compelling reason to deny bail? I begin with a finding, on a balance of probabilities,

that the Accused Person did resist arrest and acted violently during his arrest. The affidavit evidence on record clearly demonstrates that and, in my view, that evidence was unchallenged. I further hold that there is nothing improper in adducing this evidence provided it is limited to the purpose of establishing the conduct of the Accused Person during arrest for purposes of evaluating whether bail should be granted and on what terms.

15. I believe the general principle is that the conduct of the Accused Person during his arrest (as well as his antecedents) can lead to a conclusion that there are compelling reasons to deny him bail. This is true, for example, where the conduct of the Accused Person could be treated as a bellwether of the likelihood to threaten public order and security or that the Accused Person is a flight risk. The specific question presented in the present case is whether the forcible resistance to arrest by the Accused Person, without more, constitutes a compelling reason to deny him bail. I believe that the correct position of the law is that resisting arrest, without more, is not a *per se* reason to deny bail. The circumstances of the resistance must be evaluated to determine if such forcible resistance can be treated as credible proxy for concluding that the Accused Person is a flight risk or that the Accused Person will disturb public order or undermine public peace or security upon his release.

16. Do the circumstances here predict a likelihood that the Accused Person might abscond or that his release would lead to disturbance of public order or security? The Prosecution has provided no such evidence. Indeed, in evaluating whether the conduct of the Accused Person is a reliable predictor that he is a flight risk, it is important to pay attention to two crucial pieces of evidence. First, one must pay attention to the circumstances of the arrest. Second, the antecedents and social context in which the Accused Person was operating must be considered.

17. Regarding the first inquiry, while as established above, it is my finding that the Accused Person forcibly resisted arrest, I also find that the circumstances of the arrest do not irresistibly lead to a conclusion that the Accused Person is likely to abscond if released on bail. The arrest took place shortly after the incident that led to the death of the deceased with whose death the Accused is charged. The incident took place in an apartment. There were dozens of neighbours milling around the apartment by the time the Police Officers arrived. The Accused Person was, no doubt, still in the heat of the moment. It would be unfair to make conclusions about his possible future behaviour based only on what happened in that once incident.

18. What is more, is that the Bail Report prepared by Mr. Kepha Ong'era as requested by the Court establishes that the antecedents of the Accused Person do not establish him as a flight risk. Indeed, there is little in his antecedents that predict violent proclivities. Indeed, the Bail Report chronicles the determined life of a young man who dropped out of school, started life in the city as a driver/tout; set up a Wines and Spirits shop and later took out a loan to purchase a car which he has been using for taxi business. There is nothing in that history that predicts that the Accused Person is a flight risk. Hence, the Bail Report recommends that the Accused Person should be released on bail on suitable security. The Bail Report indicates that the family of the Accused Person is ready to provide the medication and care he needs and relocate him to their rural home during the pendency of the trial.

19. Taken together, therefore, the circumstances of the arrest and the antecedents and social context of the Accused Person indicate that the violent conduct of the Accused Person during his arrest are not a predictor of the likelihood that he will abscond if he is granted bail. I therefore find that there are no compelling reasons to warrant the denial of bail.

20. Consequently, I hereby grant the Accused Person bond in the sum of Kshs. 1,000,000 and one surety of a similar sum. In the alternative, I grant cash bail of Kshs. 500,000.

21. In addition, the following conditions shall attach to the bail/bond:

- a. The Accused Person is ordered to refrain from contacting the Prosecution witnesses in any way whether electronically, in person, through agents or family or by phone. Any verified reported contact shall automatically lead to cancellation of bail/bond.

b. The Accused Person is ordered not to reside or visit Kahawa Wendani estate of Githurai sub-location or its neighbourhood during the pendency of the trial except with the written authority of the Deputy Registrar.

c. The Accused Person shall report to the Deputy Registrar every alternate Thursday beginning on 01/09/2016.

Orders accordingly.

Dated and delivered at Kiambu this 18th day of August, 2016.

.....

JOEL NGUGI

JUDGE