



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 115 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ERASTUS NGURA ODHIAMBO alias BABA BILLY.....ACCUSED**

**RULING**

This is a ruling in respect of an application for bail. Erastus Ngura Odhiambo, the accused, had approached the court before seeking to be admitted to bail pending the hearing and determination of this case. He is charged with the murder of Linda Wanjiku Irungu on the night of 11<sup>th</sup>/12<sup>th</sup> December 2014 contrary to section 203 as read with section 204 of the Penal Code. The initial application canvassed before Hon. Mr. Justice Kimaru was denied after the court found that there were compelling reasons. The Judge based his ruling dated 3<sup>rd</sup> February 2015 on the likelihood that the accused was likely to intimidate the witnesses; the seriousness of the offence and the penalty and the likelihood of the accused absconding and concluded that “I decline to grant the Applicant’s application to be granted bail pending trial. He shall remain in custody until the said witnesses have testified in the trial against him”.

The accused moved this court through a Notice of Motion dated 26<sup>th</sup> May 2015 seeking to be admitted to bail pending hearing and determination of this case. I declined to grant the application. At the time of that ruling on 1<sup>st</sup> October 2015, the case had been fixed for hearing on 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> October 2015. I directed that after taking the evidence of the two prosecution witnesses said to be the key witnesses, this court would review this application and give orders/directions as may be appropriate.

On 14<sup>th</sup> October 2015 after receiving evidence of three prosecution witnesses, Mr. Onyango, counsel for the accused, revisited the issue of bail and other issues touching on the statements of witnesses. Both counsels, Mr. Onyango and Ms Mwaniki addressed the court on this matter and the court delivered its ruling on the same on 22<sup>nd</sup> October 2015. In their address to the court, Ms Mwaniki sought to have Justice Kimaru’s ruling interpreted which was opposed by the defence. I directed the parties to address me on the bail application without necessarily filing fresh documents. The prosecution filed a replying affidavit.

On 29<sup>th</sup> October 2015 Mr. Onyango addressed this court. He submitted that the fear of interfering with the witnesses had fizzled out given that two of the eye witnesses had testified; that the prosecution cannot plead new grounds to oppose bail application because this would amount to abuse of this court’s process and that the alleged interference with prosecution witnesses by the accused has never been demonstrated. He further submitted that the accused has rights that are guaranteed by the constitution. Mr. Onyango cited **High Court Criminal Case No. 129 of 2013 [2014] eKLR Republic v. Pascal Ochieng Lawrence**

and **Constitutional Petition No. 6 of 2012 [2014] eKLR** in support of his submissions.

Without going into the details of what transpired in court in terms of the arguments presented before me prior to the application being finally heard, the prosecution filed a replying affidavit by the Investigating Officer and submitted in response to the application. The prosecution relied on the replying affidavit of the Investigating Officer dated 30<sup>th</sup> October 2015 and reiterated that the accused is likely to interfere with witnesses especially the deceased's family members, watchmen and house helps, some of who have not testified. Counsel submitted that the family of the deceased is opposed to the release on bond of the accused. Counsel further submitted that the Constitutional Petition No. 6 of 2012 relied on by the defence is not applicable to their case because in the instant case there is on record the evidence of two witnesses and the prosecution acted within the law and that the prosecution in this case does not amount to abuse of court process. Counsel submitted that Article 27 of the Constitution guarantees equality before the law and that the only way to ensure that the rights of the deceased and her family are protected is to secure evidence of the witnesses. Counsel urged the court to find that the prosecution has demonstrated compelling reasons and decline the application.

Mr. Onyango responded to the submissions by prosecution counsel. He claimed that the accused and his counsel (himself) had been intimidated and threatened by the prosecution counsel, the investigating officer and Mr. Maina representing the Law Society of Kenya.

In response to the bail application Mr. Onyango told the court that the witnesses who testified did not express fear to the court nor seek protection from it. He reiterated that the prosecution has not provided evidence of interference and if such evidence exists, there is nothing to stop the prosecution from applying the law and charging the accused; that the Constitutional Petition cited is relevant as is meant to send a message to the prosecution against abuse of court's process and that there are no compelling reasons established by the prosecution.

Counsel urged the court to consider the paramount consideration in granting bail whether the accused will turn up for his trial until the case is fully heard and determined.

The court allowed the prosecution counsel to respond on the new matters raised by Mr. Onyango. She submitted that the prosecution counsel and the investigating officer did not intimidate the defence counsel and his client and no complaint has been received by the Director of Public Prosecutions on any threats on the accused and his counsel.

This court takes seriously any threats or intimidation directed at parties before it, be they counsels on opposing sides, accused persons, complainants or witnesses. It has a duty to protect anyone who appears before it and shall endeavour to do everything in its power to provide conducive climate to enable peaceful resolution of disputes. It is my advice to Mr. Onyango or any other party that the allegations of threats and intimidation to him and his client ought to be reported to the relevant authorities, whether the Office of the Director of Prosecutions, the Police, the Law Society of Kenya or any other authority for investigations and appropriate action.

On the issue of the bond application, I will start by stating that I fully understand both counsels on the opposing sides. There is nothing wrong, in my view, in any of them passionately defending their respective sides. That is what they are paid to do, to defend their clients in the best way possible. My duty in all this is to arbitrate in accordance with the law. Bail is a constitutional right. Article 49 (1) (h) of the Constitution is couched in these terms:

**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.**

To state the obvious, it is the prosecution who must present compelling reasons to the court. To admit or not to admit an accused person to bail is the discretion of the court upon considering whether there are or not any compelling reasons. The law in this country on what constitutes compelling reasons is still developing and has not settled yet. But there are pertinent factors courts consider as amounting to

compelling reasons. These are various and include the six parameters mentioned by both counsel in the **Pascal Ochieng Lawrence case above**; that is: the seriousness of the offence; the weight of the evidence; the possibility of the accused interfering with witnesses; the safety and protection of the accused once released; whether he/she will turn up for trial and whether his/her release will jeopardize the community.

I have considered the rival oral submissions and the replying affidavit by the Investigating Officer. The affidavit reiterates the earlier averments that there is a possibility of real fear being inflicted on the witnesses; that the accused will intimidate the potential key witnesses; that there is a real possibility that the accused will abscond now that he knows the kind of evidence against him and that this will deny justice to the deceased and her family. I have considered the averments in paragraph 5 of the replying affidavit and note that the persons referred to in that paragraph are not named in the affidavit. This court does not know who they are or whether they are related in any manner with the accused.

This court has received evidence from two eye witnesses, PW1 and PW3. Their evidence is lucid. PW1 despite the pain of losing a sister seemed very courageous in court. She was present with the deceased on the that night in question. This court is alive to the fact that PW1 and PW3 will be recalled to identify the scene. I am aware too that their evidence describes the scene so vividly that there was clarity of the events of that night. They did not seem intimidated despite the length of their evidence and the detailed cross-examination.

I had the chance during the writing of this ruling and my earlier ruling to read the first replying affidavit by the Investigating Officer dated 5<sup>th</sup> January 2015. It had, attached to it, the statements of PW1 (“CM3”) and PW3 (CM4”) (see paragraphs 8 and 9 of that affidavit). Paragraph 7 of that affidavit singled out the two witnesses as the most crucial. It avers that:

**That it is important to secure/safeguard the evidence of the key prosecution witnesses more so that of the deceased’s family member (*sic*), house helps and watchmen more so that of the deceased’s sister being Dinnah Irungu for the following reasons.....**

This court is desirous, as always, of dispensing justice according to the law. In so doing it is alive to the need to secure evidence to ensure both parties get justice. I will keep this in my mind when determining this application. I wish to reiterate here that each case is determined according to its unique circumstances and that no two cases are similar. I have considered all the submissions, the replying affidavit, the authorities cited and the circumstances surrounding this case. I want to be guided by the paramount consideration whether the accused will attend trial if released on bond. In view of the fact that I have received evidence of two crucial witnesses for the prosecution, I am persuaded that the landscape has changed considerably in favour of the accused given the earlier ruling by Hon. Justice Kimaru. In the circumstances therefore I will allow the application and admit the accused to bail. I set the following terms:

1. That the accused shall execute a bond of two million Kenya Shillings with one surety of similar amount.
2. He shall deposit his passport or passports with the Registrar of this Court who shall hold it until this case is heard and determined or until further orders of this court.
3. He shall not reside, travel or conduct any business within Buruburu or its environs where the deceased family is said to reside.
4. He shall present himself to the Deputy Registrar of this court for monthly mentions of this case until all the prosecution witnesses have testified or until further orders of this court.
5. He shall not contact any prosecution witness in this case.
6. He is cautioned that violation of any of these terms and conditions of bail/bond shall result in automatic cancellation of his bond and his remand in custody for the remainder of the time it shall

take to determine this case.

Orders shall issue accordingly.

**Dated, signed and delivered in open court this 16<sup>th</sup> November 2015.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Mwaniki, prosecution counsel

Mr. Onyango, defence counsel

Mr. Erastus Ngura Odhiambo, the accused

Mr. Daniel Ngumbi, court clerk