



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 6 OF 2010**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ERICK ONYANGO OKOTH ..... ACCUSED**

**RULING ON BAIL**

By Notice of Motion dated 16th July, 2013 the accused has applied for his release on bond/bail, citing that it was his constitutional right to be granted bond.

An earlier similar application was made before Hon. Justice Azangalala (as he then was). A Probation Officer's report dated 1st November, 2011 was filed with the court. The same was not favourable to the accused citing that the accused was likely to interfere with witnesses and that at the time, due to the nature of the offence, the environment on the ground was very hostile. It is for this reason, Mr. Angu, counsel for the accused requested that a second Probation Officer's report be filed. This proposal was agreeable with the learned counsel Mr. Mulati.

The said Probation Officer's report was filed. It is dated 17th December, 2013 and signed by P. W. Wafula, a Probation Officer in Uasin Gishu County. Mr. Wafula states that the family of the victim are still apprehensive that the accused, if released on bond may abscond or interfere with prosecution witnesses. He cites in particular the victim's father one Samuel Ouma Okeyo who wrote a letter to the Senior Deputy Prosecution Counsel expressing his reservation towards accused's behaviour describing it as deviant which may lead to the accused jumping bail.

But Mr. Wafula adds that the accused's family members have committed to stand surety for him and ensure that he attends court when required to.

Although Mr. Mulati initially seemed to indicate that he would not be objecting to this application if the Probation Officer's report was favourable, he nonetheless opposed the application. He relied on the Replying Affidavit sworn by Samwel Ouma Okeyo, the father of the deceased (victim) on 16th December, 2013. The gist of the Replying Affidavit is that the deponent lives about ten metres away from the home where the accused lived. That he also lives with a sister and a brother of the accused who are prosecution witnesses namely William Oyugi Okoth and Dorine Atieno respectively. That therefore, if the accused is released on bond, he is likely to interfere with their evidence.

Mr. Samwel Ouma also depones that the jembe that was the murder weapon was given to the accused by a neighbour one Susan Wanjiru who is also a witness.

He also depones that the accused has friends in Uganda and may flee to this country if he is granted bail.

Under Article 49 (i) (h) of the Constitution, an accused person has a right to bail unless there are compelling reasons not to be released. The compelling reasons will depend on each particular case and an avalanche of criminal justice case law has settled on the most basic factors the court should consider in an application of this nature. Some of the factors were enunciated as far back as in the case of **NG'ANG'A -VS- REPUBLIC (1985) KLR 451** in an application for bail by Chesoni, J. (as he then was). He had this to say:-

***"The primary purpose of bail is to ensure the accused person's attendance at court to answer the charge at the specified time. I would therefore agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial, the following matters must be considered:-***

***1. The nature of the charge or offence and the seriousness of the punishment to be awarded if the Applicant is found guilty. Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***

***2. The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justified to remand him in custody.***

***3. The character and antecedent of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal to bail.***

***4. Accused's failure to surrender to bail, on previous occasion will by itself be a good ground for refusing bail.***

***5. Interference with prosecution witnesses where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference."***

The above factors in addition to others as referred to in the case of **ALHAJI MUJAHID DUKUBO ASARI -VS- FEDERAL REPUBLIC OF NIGERIA S.C 20A/2006** as cited in ruling for application for bail in **REPUBLIC -VS- DANSON MGUNYA & ANOTHER (2010) E KLR** as:-

- (i) The nature of the charges.**
- (ii) The strength of the evidence which supports the charge.**
- (iii) The gravity of the punishment in the event of conviction.**
- (iv) The previous criminal record of the accused if any.**
- (v) The probability that the accused may not surrender himself for trial.**
- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.**
- (vii) The likelihood of further charges being brought against the accused.**

**(viii) *The probability of guilty.***

**(ix) *Detention for the protection of the accused.***

**(x) *The necessity to procure medical or social report pending final disposal of the case.***

In the instant case, the primary reason advanced as to why accused should not be granted bail is the likelihood of interference with witnesses. The learned state counsel made a statement in reply to the application that he would solely rely on the Replying Affidavit. It is in paragraph 4 (a) and (b) the deponent points out that he is currently living with two of the prosecution witnesses namely Dorine Atieno and William Oyugi Okoth, just a few metres from where his deceased son was buried. At the very least, court expected that the State Counsel should have confirmed that the three witnesses referred to in paragraph 4(a) and (b) of the Replying Affidavit were indeed prosecution witnesses. But he remained mum and assumed the court would take as gospel truth the averments contained in the replying affidavit. He allowed the unseen deponent to conduct his case.

Moreso, a close scrutiny of the said Replying Affidavit is one sworn by a bitter person - so bitter is the deponent that he also wrote a letter to Deputy Prosecution Counsel expressing his reasons why he thinks the accused should not be granted bail. Of course it is human to be bitter at the loss of a child. The court understands that the emotions run high at instances of murder cases. But again the rule of law takes precedence and must be read carefully against the circumstances of each case. I say this because, if court were always to consider the feelings of the family of the deceased, not a single accused in a murder trial would be accorded bond.

For this reason, the primary consideration in an application for bond must be the probability of the accused availing himself for trial. In this case I think the prosecution has not met the required threshold in convincing the court that the accused is not deserving of the orders he seeks. I have already said that the prosecution did not confirm that Dorine Atieno, William Oyugi and Susan Wanjiru were its witnesses, and so probability of interference with witnesses cannot be ascertained. Prosecution did not also demonstrate that the accused would flee to Uganda if granted the bond.

Again, it must be borne in mind that when such fears as that the accused may flee to a neighbouring country are raised, they must be met with stringent bail terms so as to militate the temptation of the accused absconding.

In the result, I find that it is in the interest of justice and to further safeguard the accused's constitutional rights that this application must succeed. I accordingly order that the accused be released on a bond of Kshs 1,000,000/= with two sureties of similar amount to be assessed by the Deputy Registrar of this court.

**DATED and DELIVERED at ELDORET this 18th day of February, 2014.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

No appearance for Angu for the Applicant/Accused

Mr. Mulati for the Respondent/State