



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 66 OF 2020

EMMANUEL WAFULA VIAMBAKA.....1ST APPELLANT

GODWINE WEKESA SIRENGO.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING:

EMMANUEL WAFULA WAMBAKA ALIAS MOHA and GODWINE WEKESA SIRENGO are charged with the offence of murder, contrary to Section 203 as read with Section 204 of the Penal code.

The particulars of this offence are that on the 7th day of October, 2020 at Mbururu Police Post in Likuyani Sub-County within Kakamega County, they murdered Dennis Lusava Malongo alias “Mkali” alias “Rasta”.

Both the accused persons are in custody as they await hearing of their case on 5th of May, 2021. Through their advocates, Mr. Sambu for the first accused person and Mr. Miyienda for the 2nd accused person, they applied for their release on bail or bond. Mr. Miyienda who argued the application averred that the accused persons are Police officers and therefore Public servants. They are well aware of the terms to abide with if released on bond. They will not interfere with any witness and are unlikely to abscond. He urged the Court to treat them like any other ordinary Kenyan and release them on bond.

Madam Limo, the State Prosecutor, opposed their release on bond. She relied on a filed affidavit sworn by I.P Samuel Kamau and Pre-bail reports prepared in respect of each accused person. She averred that the accused being Police officers are persons in authority and therefore likely to interfere with witnesses. The deceased met his death while in their detention and after his death they tried to conceal the offence by throwing the body into the river.

There’s hostility on the ground and the incident caused huge public outcry which led to torching of the Police Post by members of the Public. The position has not changed. Pre-bail reports supports the position as there’s indication that the Community expressed that if they are released such may trigger violence. If they are released they will be at risk as the deceased’s family members as well indicated. The witnesses are in fear as some declined even to disclose their names. Accused as Police officers cannot be limited in their movement. Bond/bail is not an absolute right to the accused person. The state expressed that these are compelling reasons for bond denial.

Article 49(1) (h) of the Constitution of Kenya 2010 states that 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.

In ***Republic -Vs- Joktan Mayende and 4 others, Criminal case No. 55 of 2009***, the Court defined the phrase “**Compelling reasons**” as follows:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the Court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.”

In relation to the above, the Judiciary Bail and Bond Policy Guidelines, at paragraph 4.9, it’s expressed that the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial. In practice, the Courts have made this evaluation by considering the following non-exhaustive factors:-

- a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

- b) The strength of the Prosecution case.
- c) Character and antecedents of the accused person.
- d) The failure of the accused person to observe bail or bond terms.
- e) Likelihood of interfering with witnesses.
- f) The need to protect the victim or victims of the crime.
- g) The relationship between the accused person and potential witnesses.
- h) Child offenders.
- i) The accused person is a flight risk.
- j) Whether the accused person is gainfully employed.
- k) Public order, peace and security.
- l) Protection of the accused person.

The foregoing factors as expressed are not exhaustive and I can add that they don't carry the same weight. The core intention of bond or bail is to ensure that an accused person when released on bail or bond turns up for trial. This factor therefore carries greater weight than any other.

The accused herein are Police officers. Their personal details are therefore well known by their employer. Given such they are not the kind of suspects most likely to abscond if released on bond/bail. As stated by Mr. Miyienda they appreciate the terms to abide with if released on bond. The incident allegedly took place at Mbururu Police Post where they were working. It's the Community there that got irate and torched the Police Post. The Pre-bail reports reveal that the accused if released on bond will live at their homes as they attend trial; first accused at Matete and the second accused at Kapsitet where each would be safe.

Since the incident took place at Mbururu Police Post, the key witnesses are Police officers attached then at the place, who well understands legal procedures regarding witness protection and independence. They are unlikely to be interfered with by the accused persons.

Murder charge though a serious offence is bailable. The sentence upon conviction is no longer mandatory death sentence as expressed by I.P Peter Kamau; given the decision in the case of **Francis Karioko Muruatetu and another -vs-Republic (2017) ekr.**

The accused persons though charged with a serious offence are suspects and incarceration of suspects is expensive to the state and the society. That's why the Constitution states of "compelling reasons" of which is high standard on which a suspect can be denied bond/bail.

Having considered the foregoing, I do find that the reasons expressed by the state not compelling to warrant the accused herein be denied their Constitutional right to bond/bail. Their application is therefore granted.

Each one of them will be released on bond of 500,000/-Kshs with one surety in like amount.

During pendency of the case they should not set foot at Mbururu Police Post or get in touch with any officer at the place. In case of an issue with their employment it should be handled through the Headquarters in Nairobi.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF MARCH, 2021.

In the presence of:-

Mr. Miyienda for the 2nd accused.

Mr. Sambu for the 1st accused.

Gladys - Court Assistant