



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. E046 OF 2020**

**ABDI MOHAMMED SIYADI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDET**

**RULING**

This matter now comes up before the court for the application of the accused **ABDI MOHAMED SIYAD**, dated 21.1.2021. The same seeks that the accused be admitted to bail pending his trial. The applicant has sworn and attached an affidavit in support of this application.

In moving this application, Mr. Wachira for the accused submitted that bail is a constitutional right of all accused persons, unless there is proof of compelling reasons. Counsel submitted that the prosecution has failed to prove compelling reasons. That bail cannot be denied on the basis of emotional or sentimental reasons. That the accused is a Kenyan with a National identity card and is not a flight risk. It was also denied that the accused will interfere with witnesses, nor that the prosecution has overwhelming evidence against the accused. Counsel cited **Anthony Ngirita Versus Republic (2016)eKLR**, and **Republic Versus Danford Kabage Mwangi (2016)eKLR**.

The counsel for the family of the victims, Mr. Kiprono, also made submissions on this application. He submitted that the family of the deceased has suffered deep loss and are opposed to the release of the accused on bond. Counsel relied on the affidavit of the father of the deceased wherein it was deponed that the accused is likely to abscond if released on bond as he is a Somali National, only having a Kenyan identify card. Also that he has no place of abode. Counsel relied on the list of authorities filed including

- i.) Joseph Lendrix Waswa Versus Republic (2019)eKLR, on extent of watching brief.
- ii.) Republic Versus Zachary Okoth Obado and others (2018)eKLR, on likelihood of interference with witnesses.
- iii.) Republic Versus Milton Kabulit and others (2011)eKLR, on considerations for grants of bail.
- iv.) Republic Versus Nadifo Mohamed Abshir (2019)eKLR,
- v.) Republic Versus Diana Suleiman Said & Another (2014)eKLR, on weighing the issue of public interest in Criminal trials.
- vi.) Jackline Ahimidiwe Swai Versus Republic (2019)eKLR on likelihood of absconding
- vii.) Eddlied Mandi Jilani & others versus Republic, (2018)eKLR, on balance between the interests of the applicant and public interests.

Ms. Ogwen, for the state, also opposed the application. First, that the accused is likely to interfere with the key witnesses who are known to him. Secondly, on grounds that the accused is a Somali national who left the refugee camp under unclear circumstances and whose place of abode is unknown. He is therefore a flight risk who would be impossible to trace if he absconds.

I have considered this application in great detail. I have also considered the authorities cited and relied on by the parties, the oral submissions made by the learned counsel for the parties before the court, and also the probation officer's report filed in court.

Article 49(1)(h) of the Constitution states;

“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”.

The right to bail pending trial is therefore a right available to all accused persons irrespective of the charges they are facing. The right however, is not absolute. The same may be denied if compelling reasons are shown to exist. This, to me would simply mean that should good and satisfactory reasons be given, good enough to justify the refusal, then the court could deny an accused the right to bail.

Courts have time ad again re-affirmed their position on what would generally constitute compelling reasons. The Bail and Bond Policy Guidelines at Paragraph 4.9 gives out some of these considerations as

- Nature of the charge and the seriousness of the punishment in case of conviction.
- Strength of the prosecutions case.
- Character and antecedents of the accused
- Failure of the accused to meet bail terms in past cases.
- Likelihood of interference with witnesses.
- Need to protect victims of crimes
- Whether the accused is a flight risk
- Whether the accused is gainfully employed

This list is in no way exhaustive. And the parties have also submitted on the same considerations i.e the case of **Republic Versus Danford Kabage Mwangi (2016)eKLR** cited by the applicant, and **Republic Versus Nadifo Mohamed Abshir (2019)eKLR**, cited by counsel for the family of the victims.

In our instant case, the prosecution has opposed this application on the following grounds:-

1. That accused is likely to interfere with witnesses.
2. Likelihood of absconding.

On the 1<sup>st</sup> issue of likelihood of interference with witnesses, it was submitted that the accused is well known to the prosecution witnesses who are in his neighbourhood. This fact seems to have been conceded to by the defence side. The prosecution, however, did not show in anyway attempted to interfere with such witnesses. In the absence of such evidence, the objection of the prosecution remains only a fear.

In Republic Versus Richard David Alden (2016)eKLR, the Hon. Lesiit J. held that;

***“for the prosecution to succeed in persuading the court on this criteria (of interference) it must place material before the court which demonstrates actual or perceived interference ..... at least some facts must be placed before the court otherwise it is asking the court to speculate.”***

This is exactly the situation that appertains in the prosecution’s submissions herein. Apart from the allegations of likelihood of interference with the witnesses, no proof or evidence of the same has been placed before the court. I am in the circumstances, not convinced that the prosecution quite proved this ground as a compelling reason. I dismiss this objection.

On the second objection that the accused is likely to abscond is released on bail, I must state from the onset that the purpose and intention of placing an accused person on bail is to secure his attendance to court for his trial even as he is out of prison custody. It is not a licence for him to stay away from court and face his accusers. It is therefore imperative that before release of an accused person on bail, the court must satisfy itself that he shall still attend court for his trial, and that should he abscond, it would still be possible to trace and bring back to court for his case. If the court cannot get this assurance, then obviously the accused would be considered a flight risk. The court would then be justified in denying “such accused person bond.

In our instant case, the prosecution has raised a number of issues with regard to this ground. First, it has been submitted both by the prosecution and the family of the victim that the accused is a national of Somali, only holding a Kenyan National Identity card. It has also been submitted that the accused originally came into Kenya as a refugee. How he left Kakuma refugee Camp before finding his way to Nairobi is also not clear. The investigating officer has also deponed to the fact that his place of abode remains unknown.

The question that this court ponders with is whether in the circumstances, if true, it would be in the interest of justice to place the accused on bond. If released on bond only for him to abscond, would it be possible to trace him and bring him back to court? I think not. He could easily leave the jurisdiction of the court never to be traced to stand trial.

I am therefore convinced that the prosecution has shown this element (likelihood of absconding) as a compelling reason good enough to

enable this court deny the accused the right to bail. I so find. I accordingly dismiss the application of the applicant dated 21.1.2021. I order that the accused shall remain remanded in custody pending determination of his case. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**1.4.2021**

**Court:**

Ruling read out in open court (on-line) in the presence of Mr. Wachira for the accused, Ms. Gikonyo for the state and Mr. Kiprono for family of the victims.

**D. O. OGEMBO**

**JUDGE**

**1.4.2021**

**Ms. Gikonyo:**

We ask for hearing date.

**Mr. Wachira:**

We have not been served with the bundle.

**Ms. Gikonyo:**

We shall serve.

**Court:**

Committal bundle to be served on the defence by the state. Matter to be mentioned before the Hon. Nzioka J. for directions on hearing date and for allocation of a trial court. Mention 7.4.2021 (Nzioka J.).