



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE NO.E003 OF 2021

KHALID OMAR ALI Alias MCKENZIE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Aboubakar, Mwanakitina & Co. Advocates,

Mwangi for the State

RULING

Background

The accused was on 18/3/2021 charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 Laws of Kenya). In the information briefly the State alleges that on the 14/2/2021 at about 14.00 hrs at Utukuni village, within Lamu, the accused with others not before court murdered Abdul Ware Galgalo.

In his first appearance he was represented by legal counsel Mr. Aboubakar when the charge was being read he pleaded not guilty. Thereafter learned counsel immediately invoked Article 49(1) (h) of the Constitution for this court to exercise discretion to release the accused on reasonable terms of bail.

The application was vehemently opposed by the State vide an affidavit in support sworn by PC Bernard Cherus of Lamu – DCIO Office, who also doubles up as the investigating officer of the murder incident.

His main grounds of opposing the release of the accused as stated in the affidavit are in respect of the high chances of intimidation of witnesses and the conduct of the accused immediately after committing the alleged crime. That conduct of the accused avers the deponent has a bearing of the probability to interfere with the evidence in the event he is released on bail. Further, in paragraph 12 of the affidavit the deponent avers that in the first appearance at Lamu Law Courts accused was released on cash bail notwithstanding the objection raised by the State. But once on bail the accused started inquiring into the would be witnesses in the matter and intelligence held was for the purpose of scaring them away from participating in the court process. That there is need for the State to be accorded an opportunity to place the witness under the witness protection program before any such release is contemplated by the court.

The accused through his legal counsel filed a replying affidavits essentially denying all the averments in the supporting affidavit aimed at limiting the right to bail of an accused person. Further learned counsel went further to allude to the circumstances upon which the deceased might have met his death. In my view I do not think learned counsel was at the scene to allude to matters on death in an affidavit to call upon the court to weigh the rival arguments which require of him to be cross examined on critical evidential issues in the affidavit. In the case management directions, the court had directed that the probation officer to inquire into the matter and prepare a prebail report which was duly filed on 8/4/2021.

Determination

The predominant issue here is whether the State has placed sufficient material under Article 49 (1) (h) of the Constitution to satisfy the criterion on compelling reasons for the accused not to be released on bail at this stage.

From the outset although the grant of bail is a constitutional right availed the accused person, it's of significant to note that under Article 24 of the Constitution that right can be limited to the extent that **“the limitation is reasonable and justifiable based on human dignity, equality and freedom.....”** So the State has a duty to persuade the court with evidential information that is relevant for its consideration to

grant or refusal of bail.

What are the compelling reasons justifying pretrial remand of a suspect to a crime? In the comparative jurisprudence in **Nyaruyiro & Another (HB 262 – 17 HCB 122 – 127 XREF CRB 1454A – B-2017 ZWBHC 262 (31 August 2017))** the court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interest of justice where one or more the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardize the objectives or proper functioning of the criminal system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account.... In considering any question.... The court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused, (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account.... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be in *S v Nichas 1977 (1) SA 257 (C)* it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S v Hudson 1980 (4) SA 145* in the following terms:

“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”

In other words, the possibility of a sever sentence enhances any possible inducement to the accused to flee. See also *Aitken v AG 1992 (2) ZLR 247* and *Norman Mapfumo v The State HH 63/2008*.... The other relevant factor to be considered is the relative strength of the State’s case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this fact must be considered together with other factors in the case.”

As regards to these guidelines they apply mutatis mutandis as what constitutes compelling reasons under Article 49(1) (h) of our Constitution 2010. In addition to the above guideline it is important to keep in mind the same principles to be followed have been reflected in our jurisdiction in ***Hassan Mahat Omar & Another v R Nairobi Criminal Revision No. 31 of 2013, R v Ahmed Mohamed Omar & 6 Others v R [2010] eKLR***. Flowing from the foregoing cited authorities are issues crystalized and stated in the following language:

(i) The nature of the charges.

(ii) The strength of the evidence.

(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 sought against the accused.

(viii) Detention for the protection of the accused.

At the heart of this objection for the accused not to be released on bail is the pertinent issue to do with the likelihood of interfering with witnesses for the State. The investigating officer specifically demonstrated in his affidavit the circumstances which he thinks would make it possible for the accused to interfere with the key witnesses. In the pending matter the investigating officer further relied on the antecedent of the accused, where he made attempts to hide, crucial physical evidence of his clothes which had blood stains believed to be that of the deceased, the victim of the murder.

Besides the above cited cases section 123A of the Criminal Procedure Code expressly state the factors that must be considered by a court in limiting right to bail under Article 49 (1) (h) of the Constitution.

In the instant case despite the spirited objection raised by learned counsel on behalf of the accused at the time of evaluating the State evidence at this interlocutory stage I have no doubt a prima facie case exist of a possibility of interfering with the investigations of the offence. There is even a great danger as stated on oath by the investigating officer that the accused is likely to obstruct the investigations by tampering with the star witnesses.

After assessing all the evidence both from the State and from the accused person, considering the seriousness of the offence of which the accused is suspected to have committed. The reason in which it was allegedly committed and the suspects personal characteristic, past conduct, the environment and conditions in which he lives, there is need to restrict his release on bail at this stage. The factors set out in the prebail report as derived from the community and the victim's impact statement purpose sufficient material in support of the likelihood of interference with witnesses. As an alternative to that restrictive measure the probation officer goes further to give conditions that the accused be prohibited from his residence at Lamu County.

Perhaps, most important information in the prebail report is the perspective given about the victim impact statement and the need for the accused to relocate from the Sub-County of residence for his own safety and to prevent any likely harm to the witnesses.

The issue at this stage of the criminal proceedings is whether the accused alleged actions should result that the State has proved the accused would pose a risk to intimidation of witnesses. I do not find the statements in the affidavits to be bald assertions that are not well founded. As granting bail is not a matter of grace or favour, the burden to establish existence of compelling reasons has been justified for the court to exercise discretion as such.

Whereas in principle the accused is presumed innocent unless the contrary is proved, under Article 50 (2) (a) of the Constitution the court on a preponderance of evidence must explore whether the State has made out a case for pretrial detention. The ensuing discussion on the right to bail and the presumption of innocence should not demean the principle of equality of arms which is one of the basic linchpins of the whole administration of justice.

In the comparative jurisprudence in the case of **Dombo Beheer v The Netherlands 274 Eur ct H.R [1993]**, **Ocalan v Turkey Euro ct HR [2005]** the court in the latter case held **"Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence under conditions that do not place him at a substantial disadvantage visa viz his opponent."** In the **Turkey case "the principle of equality of arms also encompasses the fundamental right to adversarial proceedings."**

As a matter of fact, the State has raised serious concerns on issues pertaining to interference of witnesses by the accused in the event he is released at this early stage of the proceedings. In my view within the ambit of the criminal justice system, the case is won or lost at the investigations stage. For the work of the court or independent tribunal is made easier as required under Article 50 of the Constitution on the right to a fair hearing, when the minimum pretrial guarantees are safeguarded.

At this stage the State has put forth a case that there is a real prospect by the accused interfering with their star witnesses. I am of the conceded view that if the court accedes to the application to release the accused on bail it would undermine the integrity of the trial.

In arriving at a conclusion which I am about to in whatever circumstances the court has to adopt abroad interpretation of the Constitution and its provisions requiring the rights of the accused, the State and victim in the administration of justice are protected in equal measure. The call for pragmatic approach in that adjudication of the issue is the principle under Article 27 of the Constitution that **"espouses equality of every person before the law and has the right to equal protection and equal benefit of the law."**

Again as guided by the comparative case in **Prosecutor v Tadic case No. 17-94 – 1A Appeals Chamber** the court observed inter alia that **"The principle of equality of arms ought to embrace not only procedural equity or parity of parties but also substantive equality.... It entitles both parties to equality, before the courts, giving them the same access to the powers of the court and the same right to present their cases. The principle does not call for equalizing the material and practical circumstances of the two parties."**

It cannot be gainsaid that in criminal trial public interest element cuts across the entire litigation. Therefore, for a right to a fair trial and its ideals as embodied in the Constitution, the court should not relent in levelling the plane on equality of arms with the accused based rights. It seems to me plain from the material on record that there is an apparent risk of the trial being rendered nugatory if the accused right to bail is not restricted at this stage of the trial. It may be also worthy pointing out that the scales of public interest tilt towards denial of bail to the accused.

Consequently, the motion to grant bail under Article 49(1) (h) of the Constitution as read in conjunction with section 123 and 123A of the CPC is denied. The State is granted leave to preserve the status quo, and further seize the opportunity to invite the witness protection agency to guarantee the safety and security of the star witnesses as prescribed by law established. The period so granted shall not exceed 30 days from today's date., so to speak to enable a review of the relief on bail to be revisited by the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwangi for the State

Mr. Aboubakar for the Applicant

The Applicant