



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.31 OF 2020

LESIT J.

REPUBLIC.....PROSECUTOR

VERSUS

KELVIN BARASA WANYAMA alias JAMES KIMANI.....ACCUSED

RULING ON BAIL APPLICATION

1. The accused, Kelvin Barasa Wanyama *alias* James Kimani, has been charged with one count of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that:

“Kelvin Barasa Wanyama *alias* James Kimani: On the 13th day of April 2020 at around 10:00 hours, at Kiandaa area in Mathare slums in Starehe Sub-county within Nairobi County, jointly with others not before court murdered Elizabeth Wangechi.”

2. The accused pleaded not guilty to the charges. He has filed an application before this court dated 18th June, 2020 seeking to be released on bail pending trial. It is supported by an affidavit sworn by the accused. The application is brought under **Section 123A** of the **Criminal Procedure Code** and **Articles 49(1)(h), 159(2)(a) and 165(3)(a)** of the **Constitution**.

3. In the affidavit in support of the application, the accused urged that he has a right to be released on bail pending the conclusion of his case. He contended that prior to his arrest, he resided in Kiandaa area within Mathare slums. He stated that from 19th March 2020 until his arrest on 5th May 2020, he was living with his grandmother, Awino Anyango *alias* Mama Ben, at Block G7 in Muthurwa Estate.

4. The accused averred that if he is admitted to bail, he intends to continue living with his grandmother in Muthurwa Estate. He contended that he will continue attending court until his trial is concluded. He urged that while he comes from a family of meagre earnings, they were willing to meet any reasonable bond or bail terms that may be ordered by the court. He stated that he had no intention of interfering with prosecution witnesses involved in the present case. He urged that he was previously of good record prior to his arrest on 5th May 2020 for violating curfew restrictions. He undertook to abide by any conditions the court may set in admitting him to bail or bond terms. He urged the court to consider his financial status and admit him to reasonable bail or bond terms.

5. The State opposed the application through a replying affidavit sworn on 26th June, 2020 by PC Godfrey Munene of the Directorate of Criminal Investigations in Starehe. He is the investigating officer in the present case. He urged that the right to be admitted to bail is not absolute, and ought to be exercised judiciously, at the discretion of the court. He deposed that there existed compelling reasons to deny the accused bail.

6. PC Munene stated that the accused is alleged to have committed the offence of murder which took place on 13th April, 2020. He stated that after the alleged commission of the offence, DCI officers were unable to locate the accused and only managed to arrest him on 5th May 2020, after concerted efforts by the officers, and following a tip from an informant. He stated that the accused has already proven himself a flight risk and may abscond the jurisdiction of the court if granted bail.

7. PC Munene deposed that the accused was arrested while taking plea at Makadara Law Courts in PCR No.1388 of 2020 for the offence of breach of curfew orders. He stated that at the time of his arrest, the accused was going by the name ‘*James Kimani*’ while at the time of the alleged commission of the murder he was going by the name ‘*Kelvin Barasa Wanyama*’.

8. The investigating officer urged that despite the accused being an adult of over eighteen years, he is yet to be registered by the Registrar of

Persons and does not hold a national identification card. He contended that if the accused is released on bail, it will be impossible for the investigators to trace him if the need arises, since he does not hold a national identification card.

9. The investigating officer urged that the accused attempted to interfere with one of the prosecution witnesses, namely Johnson Gathuci Mwangi, his former landlord, by accusing him of having an affair with his wife. He annexed a statement from Johnson who claimed that he was scared for his life since the accused person accused him of having an affair with his wife, and that the accused's accomplice is still at large. He was apprehensive that if the accused is released, he might try to silence him, as he is the key prosecution witness, and the accused knows his place of work as well as his residence and identity of his family members.

10. PC Munene was of the view that the accused will likely interfere with the prosecution witnesses and their family members. He urged that the accused's accomplice, Eric Kivuva *alias* Erico, is still at large and that if the accused is released, he may interfere with those investigations. He was apprehensive that, taking into consideration the nature of the charges the accused is facing, and the likely punishment in the event he is convicted, he was likely to abscond from the jurisdiction of the court. He deponed that the accused has no fixed abode nor has he provided an address for any gainful employment. In this regard, he urged the court to exercise its discretion to deny the accused bail pending trial as there exists compelling reasons.

11. The accused filed a further affidavit dated 1st December, 2020 in response to the affidavit by PC Munene. He reiterated his right to be presumed innocent until proven guilty. He stated that he was arrested on 3rd May, 2020 at Muthurwa Market for suspected robbery. He was subsequently arraigned at Makadara Law Courts where he was unprocedurally charged with the offence of breach of curfew orders. He was thereafter arrested by DCI officers from Starehe.

12. The accused urged that the allegation by the prosecution that he identified himself as '*James Kimani*' when he was arrested was false. He annexed an extract of the occurrence book entry of 3rd May 2020 to that effect. He urged that his failure to apply for a national identity card was due to the fact that he was a street urchin after running away from his family home in Kitale years ago. He did not have his parents' identification documents which are a requirement when applying for the identity card.

13. The accused stated that during his incarceration he has reconciled with his parents, and that his father and aunt are amenable to stand as personal sureties to ensure his attendance to court. He deponed that if admitted to bail, he will be living with his parents in Kitale. He urged that he has been in custody for seven months since 3rd March 2020, and that any pending investigations by the police ought to have been concluded.

14. The accused urged that the allegation that he was likely to interfere with prosecution witnesses was baseless and unfounded. He stated he has on several occasions contacted the investigating officer, personally and through his advocate, after receiving information on the whereabouts of Eric Kivuva, but that the investigating officer has neglected to act on that information.

15. I have considered the filed affidavits as well as the submissions by Mr. Michuki for the accused and Mr. Naulikha for the State. The two counsels in their submissions reiterated what was deposed in the affidavits sworn by the accused and the investigating officer respectively. I called for a Probation Report which was filed and I will take it into account.

16. The accused was arrested on 5th May, 2020 and has been in custody for one year. He faces a murder charge contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

17. The prosecution has the burden of proving, on a balance of probabilities, that there is a compelling reason(s) to deny the accused bail.

18. The other principle that the court must consider in determining the application is the legal presumption of innocence. The accused is presumed innocent until the contrary is established by the court (See **Article 50(2)(a)** of the **Constitution**).

19. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

a. The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a) That the accused person is likely to fail to attend court proceedings; or

b) That the accused person is likely to commit, or abet the commission of, a serious offence; or

c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d) That the accused person is likely to endanger the safety of victims, individuals or the public; or

e) That the accused person is likely to interfere with witnesses or evidence; or

f) That the accused person is likely to endanger national security; or

g) That it is in the public interest to detain the accused person in custody.

20. In the case of **Republic vs. William Mwangi Wa Mwangi [2014] eKLR Muriithi, J** held that:

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

21. In the case of **R vs Joktan Mayende & 3 Others [2012] eKLR** the Court (Gikonyo J.) considered the scope of **Article 49(1)(h)** of the **Constitution** on what constitutes compelling reasons. The Court stated thus:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the Court feel 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.”

22. In the present application, it is the prosecution’s case that the accused has no fixed abode and that he is a flight risk on account of not having a national identity card. The prosecution stated the accused fled the scene of crime and was only arrested for the present crime after he was arraigned before Makadara Law Courts for the offence of breach of curfew orders. The prosecution urged that there exists risk of the accused interfering with prosecution witnesses, especially the key witness Johnson Gathuci Mwangi, since he knows his place of work and residence. The prosecution urged that the accused was likely to interfere with ongoing investigations since his accomplice is still at large.

23. On the other hand, it is the accused’s contention that he ought to be presumed innocent until proven guilty. He stated that if he is released on bail, he will live with his parents in Kitale who are willing to stand surety for him. He denied allegations that he is likely to interfere with witnesses or the ongoing investigations. He urged that there were no compelling reasons to deny him bail.

24. According to the Probation Officer’s Pre-Bail Report, the accused’s parents are both deceased. His current guardian is his uncle, Dangstine Wafula, who is willing to accommodate him at his home in Mwita Village in Saboti in the event he is released on bail. The accused’s uncle is however not willing to stand surety for the accused. The report further states that the accused’s few relatives who own land are also not willing to stand surety for the accused, as they fear sale of their property in case the accused absconds court. This is contrary to accused’s deposition that his family is willing to stand surety for him.

25. On whether the accused is likely to interfere with witnesses, the prosecution annexed a statement by Johnson G. Mwangi who was the accused’s former landlord and is the key prosecution witness in the present case. In the statement, the witness urged that the accused person had accused him of having an affair with his wife and he therefore feared that if the accused is released on bail, his life would be in danger since the accused knew where he lived and his place of business.

26. In the case of **Republic Vs. Dwight Sagaray & 4 others [2013] eKLR** Korir, J. stated thus:

“For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others. I agree with the holding in Panju Vs Republic [1973] E.A 284, where the court in dismissing the prosecutor’s fear of interference with witnesses stated that before any one can say there would be interference with vital witnesses, at least some facts must be placed before court otherwise it is asking the court to speculate.”

27. The prosecution in the present application urged that since the accused knew where the key prosecution witness (his former landlord) resided, there was risk of the accused interfering with the said witness.

28. The probation officer interviewed the *nyumba kumi* chairperson in Kiandaa in Mathare area where the accused resided prior to his arrest. The chairperson described the accused as a violent person who abused drugs and committed crimes within the area. The probation officer also interviewed the residents of the said area who described the accused as being part of a gang that carried out criminal activities such as robberies and sale of narcotic substances. The accused in his affidavit admitted that prior to his arrest, he resided in Kiandaa in Mathare slums.

29. I find that there is a real likelihood that the release of the accused on bail will create fear and intimidation to potential prosecution witnesses as he is viewed as a dangerous man with a history of violence, drug abuse and criminal activities.

30. With regard to whether the accused person is a flight risk. I have considered the fact that the accused does not have a national identity card. He told the court that he was unable to apply for an identity card since he ran away from his parents’ home in Kitale years ago and became a street urchin. He did not have their identifying documents which are a requirement when applying for a national identification card. That alone is however not sufficient ground to deny bail.

31. According to the Probation Officer’s Pre-Bail Report, the accused has no fixed place of abode in Nairobi. His uncle, who is his guardian, is willing to accommodate him at his home in Mwita village in Saboti. The Pre-Bail Report has brought to the fore the fact the accused was not candid about his relatives. He gave the impressions his parents are alive which is not the case.

32. The prosecution urged that the police were not able to trace the accused after the alleged commission of the offence of murder, and only managed to arrest him at Makadara Law Courts where he was arraigned for another offence of breach of curfew orders. I agree with the prosecution that from the accused's past behaviour, it was likely that the accused would be a flight risk if he is released on bail pending trial going by his present circumstances.

33. The possibility of an applicant absconding, and the likelihood to interfere or intimidate potential witnesses is a compelling reason to deny an accused person bail or bond pending trial. The accused is said to maintain loose ties within the community and it may therefore be difficult to trace him in case he absconds court.

34. I have also considered that none of the accused's family members are willing to stand surety for him. Any orders made by this court requiring sureties shall therefore be orders made in vain. In addition, the probation officer noted that the accused was not truthful with regard to information given by him on his residence and family background during the interview. This puts into question his trustworthiness.

35. For the foregoing I am satisfied there exists compelling reason to deny the accused bail.

36. The applicant's application to be released on bail or bond pending trial is rejected and accordingly hereby dismissed. He shall remain in custody during the pendency of his trial.

DATED AT NAIROBI THIS 11TH DAY OF MAY 2021.

LESIT, J.

JUDGE

DELIVERED THROUGH TEAMS ON 11TH MAY, 2021.

In the presence of:

Ms. Kimani for the State

Mr. Michuki for the Accused

Accused present

LESIT, J.

JUDGE