REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL CASE NO. E001 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT KIPKORIR TONUI.....ACCUSED

RULING

1. Robert Kipkorir Tonui (Accused) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is accused of the murder of one Emmy Chepkoech Mitei, his wife of 25 years. The alleged offence occurred on 7th October 2020 at Seanin village, Toboino sub-location, Konoin Sub-County within Bomet County. The Accused took plea on 26th October, 2020 and denied the charge. The prosecution promptly urged the court not to grant Accused bond and sought time to file an affidavit in opposition. The court directed the defence to file a formal bond application which is now the subject of this ruling.

2. The application was filed on 18th February 2021 by learned defence counsel Brian Langat. He set out the grounds *inter alia* that the Applicant has 7 children, 6 of whom are still in school and stand to suffer immensely in the absence of both parents; that the Applicant was not a flight risk and will not fail to attend court when required; that the Applicant was a person of reasonable conduct and disposition and would not pose a threat to society if released on bond and, that there were no compelling reasons to justify denial of bond.

3. The Accused swore an affidavit to support his application. He deponed that he is a father of 7 children aged between 25 and 6 years. That he desired to be released to enable him provide for the children, and; that he would attend court whenever required. The Accused further deponed that his parents and siblings had informed him that there was no hostility on the ground and that they were willing to stand surety for him.

4. Solomon Kiplangat Maritim who described himself as the village manager of Kaptebeswet village, Kapset Sub-location, Kimulot location, Konoin Sub-County swore an affidavit in support of the Applicant's application to be released on bond. He deposed that he had known the Accused for his entire life and that the Accused married Emmy Chepkoech Mitey (deceased) in 1995 and established a matrimonial home at Kapset where they were blessed with 7 children the eldest of whom was now married. He further deposed that there was no hostility on the ground and that the Accused's neighbours were willing to welcome him home. On record is also another affidavit sworn by one Demas Kimutai Kitur who is the Assistant Chief of Kapset Sub-location, Kimulot location, Konoin Sub-County. His averments mirror those of Solomon Kiplangat Maritim stated above.

5. The application is opposed by the State. No. 46185 Sergeant Christopher Seko of DCI Konoin and also the Investigating Officer in the case swore an affidavit dated 18th March 2021. He deponed at paragraph 4 that on 3rd October 2020 at Seanin village, Kiptenden Sub-location of Konoin Sub-County within Bomet County, the Accused person doused with petrol and set on fire his wife namely Emmy Chepkoech Mitei and that she later succumbed to the injuries while undergoing treatment at Tenwek hospital. Sergeant Seko further deposed that there was hostility on the ground; that the Accused's two children were witnesses in the case, and; that the Accused was likely to either harm or compromise them if released. The Investigating Officer further deposed that the Accused initially went into hiding and was arrested while on flight to an unknown destination.

6. On record also are two other affidavits sworn in opposition of the bond application. Anita Chelangat Tonui deposed in her affidavit dated 11th November 2020 that she was the daughter of the Accused and that two of her siblings were witnesses in the case. That the Accused had threatened them in the past that he would do something terrible to them and their mother; that the Accused had not been providing for the family; and that there was a risk of the Accused being lynched if released.

7. Joseph Billy Mitei, the deceased's father also swore an affidavit in opposition. He deposed that the family was fearful that the Accused might harm them if released on bond. That his family resided only 5 kilometers away from the Accused's home, and; that his grandchildren were traumatized having witnessed their father commit the act.

8. The application was urged before me on 18th March 2021. In his submissions, Mr. Langat submitted that the application was brought under Article 49 (i) (h) of the Constitution. He submitted that the prosecution had not proved any compelling reasons. He urged the court to consider the primary consideration being that the Accused shall attend court. Counsel further urged the court to employ restrictive means rather than deny the Accused bail. He cited **R. V. Robert Zippor Nzilu, Machakos Criminal Case No. 14 of 2018 (2018) eKLR** to support his submissions.

9. With respect to the affidavits sworn in opposition, counsel submitted that the allegations therein were not supported by evidence.

10. In urging the court to dismiss the application, Mr. Mureithi the learned Principal Prosecution Counsel relied on the 3 affidavits sworn by the Investigating Officer, the Accused's daughter and the Accused's father in-law. He submitted that the Accused was likely to interfere with witnesses or perpetrate more harm on the victim's family. Counsel further submitted that the Accused's own safety might not be guaranteed if released.

11. The victim's Counsel Ms. Chemutai supported the Prosecution's submissions in opposition to the Accused's application. She submitted that the deceased was the Accused's wife and that their children were witnesses. She stated that both the parents' in-law and children of the Accused were traumatized by the death of the deceased and were undergoing counselling.

12. In a rejoinder Mr. Langat submitted that the alleged threats were a mere apprehension and that there were no compelling reasons to deny the Applicant bond. He urged the court to allow the application.

13. The starting point in an application of this nature is Article 49 (i) (h) of the Constitution which provides:-

> ***"an arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released."***

14. It is clear from the above provision that the right to bail or bond is not absolute and can be curtailed where there exist compelling reasons.

15. Section 123A of the Criminal Procedure Code sets out the parameters to guide the court in considering an application for bail. It provides thus:-

> ***(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—***
>
> ***(a) the nature or seriousness of the offence;***
>
> ***(b) the character, antecedents, associations and community ties of the accused person;***
>
> ***(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;***
>
> ***(d) the strength of the evidence of his having committed the offence;***
>
> ***(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—***
>
> ***(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;***
>
> ***(b) should be kept in custody for his own protection.***

16. In addition to the above, The Judiciary's **Bail and Bond Policy Guidelines, March 2015** sets out judicial policy on bail at page 25 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.

17. The duty to demonstrate compelling reasons rests with the Prosecution. In the often-cited case of **R. V. Danson Mgunya and Kassim Sheebwana Mohamed, Mombasa Criminal Case No. 26 of 2008** Ibrahim J (as he then was) stated:-

> ***"I do hold that if the prosecutor objects to the release of the accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused to prove or at least demonstrate the existence of the 'compelling reasons'."***

18. In **R. V. Patius Gichobi Njagi & 2 Others Criminal Case No. 45 of 2012 (2013) eKLR**, the court in expounding the duty of the Prosecution stated that:-

> ***"….further, in my view, where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the state must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case of Jaffer V. Republic 1973 E.A. 39, the court cannot be called upon to speculate."***

19. In this case, the prosecution has opposed bail on the ground that there was hostility on the ground and that therefore the safety of the Accused would be in jeopardy. On the other hand, the defence have filed two affidavits stating that the Accused's family was ready and willing to accept him back home and that there was no hostility whatsoever on the ground. They have shown in the affidavit that the home of the Accused is some distance away from the home of the deceased's parents where some of the prosecution witnesses currently live. The Probation Officer's report on the other hand states that the relatives of the victim and the local community were opposed to the Accused's release on bail.

20. The statements above must be evaluated against the Accused's right to liberty and the impact of the heinous act on the family and the community. In this case, and according to the sworn affidavit of the Investigating Officer, the Accused is alleged to have doused his wife in petrol before setting her ablaze in broad daylight and in her parents' home where she had gone to seek refuge after repeated violence. While the Investigating Officer's averment does not amount to evidence which must be produced and tested in trial, it points to a heinous act which in the ordinary course of life must attract community outrage. This court therefore while being conceretly clear that the Accused remains innocent until proven guilty, must give due consideration to the fact that the release of the Accused would further fuel the outrage and may lead to further violence.

21. In stating the above so, this court is aware that the State through the police and indeed every citizen is under a constitutional duty to protect life and property, and; apprehend any law breakers. However, the court also takes judicial notice that security lapses do at times occur, as happened when the deceased was attacked, doused in petrol and set ablaze in broad daylight. I therefore find the circumstances stated above compelling enough to persuade the court to arrive at a decision that would stop further violence and foster community peace and harmony.

22. I have considered that the Accused stated in his supporting affidavit that he has 7 children to take care of. He has pleaded with the court to release him so that he can go and take care of the children now that he is the only parent.

23. It is undisputed that the Accused has 7 children. It is also not contested that the court must take into consideration the best interest of the children. In this case however, the children of the Accused have demonstrated through the affidavit of his eldest child Anita Chelangat Tonui that they were fearful of their father's release, and; that he did not provide for them in the past. This court holds the view that a person who takes away the life of their spouse must not be allowed as a matter of course, to use the rights of the children to parental care to shield themselves from the criminal process and in particular their possible loss of liberty. It behoves the court to critically examine the circumstances of each case to arrive at the finding whether or not the release of the Accused will benefit the children. In this case I am not persuaded that the children who have barely healed from the traumatic loss of their mother, were still terrified of their father and who have also deserted their home to seek refuge with the grandparents, would benefit from his release from custody. I must therefore dismiss this plea for release on the basis of the rights of the Accused's children.

24. Another reason given by the prosecution is the likely interference with witnesses. Judicial precedent has time and again held the view that interference with witnesses amounts to interference with the administration of criminal justice and is a compelling reason under Article 49 (i) (h) of the Constitution. In **R .V. Jackton Mayende & 3 Others Bungoma HCCRC No. 55 of 2009 (2012) eKLR** Gikonyo J, while dealing with the question of interference with witnesses rendered himself thus:-

> ***"……(22) All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with the witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of***

the accused."

25. I am fully persuaded by the authority above. In the circumstances of the present case, the Accused's daughter has sworn an affidavit stating how their father, the Accused had time and again threatened his children and wife. The fact that the wife eventually met her death in his hands must necessary instill deep fear in the minds of both his children and his aged parents' in-law. This fear I find has been demonstrated by both the prosecution and the victims. The children, who are witnesses in the case would clearly be intimidated by the release of the Accused.

26. As the law stands, it is the duty of the court to give effect to the rights of victims expressed in Section 10 of the Victim Protection Act No. 17 of 2014, as follows:-

10 (1) A victim has a right to:-

(a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

(b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

(c) Have their property protected.

27. Interference with witnesses has another facet. It undermines the criminal justice system and dents the integrity of the criminal process. This would in turn interfere with the administration of justice or prejudice the trial. It is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in **R. V. Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR** where she succinctly stated that:-

> ***"Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."***

28. In the final analysis, I have come to the conclusion that the Accused if released was likely to interfere with prosecution witnesses; endanger the lives of his children and parents-in-law and incite further violence. These are multiple compelling reasons to deny the Accused bail.

29. The Accused shall remain in custody pending his trial.

30. Orders accordingly.

Ruling delivered, dated and signed this 6th day of May, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Accused, Defence Counsel Mr. Brian Langat, Mr. Murithi for the DPP, and Kiprotich (Court Assistant).