REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

(Coram: Odunga, J)

CRIMINAL CASE NO. E014 OF 2021

OSCAR EDWIN OKIMARU.....APPLICANT/ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR/RESPONDENT

RULING

1. The accused/applicant herein, **Oscar Edwin Okimaru**, is charged with the offence of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya for which a plea of not guilty was entered. The particulars of the charge were that on the night of 18th and 19th April, 2021 at Olekasasi Area within Ongata Rongai Town, Kajiado North sub county in Kajiado County, the accused jointly with others not before Court murdered Joshua Munagi alias Tinini.

2. When the Applicants sought to be released on bond pending their trial, the said application was opposed by the Prosecution based on an affidavit sworn by IP Peter Kamau, the lead Investigating Officer in the case.

3. According to the deponent, the accused is a police officer working with the National Police Service attached to Olekasasi Police Post in Ngong Division until his transfer on 4th November, 2020 to Moyale in Marsabit County. It was deposed that on the nights of 18th and 19th April, 2021, the accused and another not before court were effecting curfew orders outside the accused's person's area of jurisdiction when they arrested the deceased together with two of his friends and extorted money from them. In the process the accused and another person tortured the deceased thereby inflicting debilitating and grievous injuries which turned fatal.

4. It was deposed that there is overwhelming evidence linking the accused with the murder of the deceased as the accused was positively identified and further there is medical evidence linking the accused with the death of the deceased.

5. It was therefore contended that in the present case there are compelling grounds that justify the denial of the accused of his right to be released on bail since the accused, a police officer well conversant with the investigation and trial process may attempt to conceal or destroy the evidence the investigating office intends to use during the trial process hence may attempt to suppress the evidence that will incriminate him.

6. It was also contended that the accused may attempt to influence or intimidate the witnesses and prevent them from testifying against him since he is a person in authority having worked previously at the place of incident and his family currently reside there. That scenario, it was deposed creates an apprehension on the part of the two key witnesses who identified the accused and placed him at the scene that if released on bond he may harm them. Accordingly, the said witnesses are at the moment reluctant to even proceed with filing further charges against the accused for fear of further exposing themselves to danger.

7. It was deposed that one of the witnesses, a 17 year old, was traumatised and is still undergoing counselling sessions to enable him appear as a witness while key witnesses are still in the process of being enrolled under Witness Protection Program. It was however lamented that the systems, though very meticulous are not absolute hence the need for the court to ensure that the witnesses are given a chance to be heard in open court.

8. It was further deposed that the co-suspect is still at large and if released, the accused may jeopardise the efforts to bring him to book.

9. The prosecution was of the view that due to the nature of the offence, the strength of the evidence and the heinous manner in which the crime was committed, there is high likelihood of a conviction and severe sentence to act as a deterrent to extra judicial killing. It was further averred that the events of the incident are in the public domain and have attracted high emotions hence the life of the accused is in danger if

released on bond/bail. In the prosecution's view, it is therefore in the public interest that the application be denied.

10. In response the accused vide his affidavit sworn on 7th June, 2021 averred that he was arrested on 14th May, 2021 and was taken to Muthaiga Police Station and was arraigned in court on 14th May, 2021 at Kiambu Law Courts but no charges were read to him. At the time he had no legal representation but was informed that the prosecution had sought for more time to enable the police carry out investigations including but not limited to conducting mental assessment and an Identification Parade and they were granted 14 days to do so.

11. In 2nd June, 2021 he was arraigned before this Court where he took the plea and the prosecution requested for time to file an affidavit opposing his being released on bail.

12. According to the accused, since his arrest he has been remanded at Muthaiga Police Station and has not enjoyed his right to liberty despite the fact that the offence with which he is charged being bailable. It was his view that no compelling reason has been advanced to deny him bail. He deposed that he is a police officer inactive service for 4 years his last station being Moyale and that he has high moral standing having never been charged or convicted for any offence nor faced any disciplinary action in the police force. He lamented that the prosecution in opposing his release is attempting to testify to the issues in the case and denied having attempted to subvert justice by suppressing evidence. He disclosed that he had no intention of intimidating any witness since he did not know the said two key witnesses having not been in contact with them. He stated that he did not commit the offence and his advocate has never been supplied with the statements of the said key witnesses hence he is not aware of their place of abode.

13. The accused depose d that he had returned his badge, rifle, uniform and all police apparatus and therefore incapable of accessing police facilities. It was his view that should the said witnesses be vulnerable they can be placed on witness protection program.

14. The accused disclosed that he has a fixed place of abode together with his family within Nairobi County and has no passport hence not a flight risk. He undertook to assist the police in any investigations needed as he had cooperated with them since his arrest and has no intention of jumping bail since he is the breadwinner for his wife, children and siblings. He disclosed that his wife and children had been evicted from their residence at the police quarters and were now in the cold with one child being of tender age of 2 months hence denying him bail would lead to denial of his family and aging parents of the opportunity to get basic needs like food, clothing and assurance of medical care and attention. In addition, he had taken a loan from the Kenya Police Sacco and unless he meets his monthly repayments, he stands the risk of losing his personal and matrimonial effects.

15. The accused further stated that he has been undergoing treatment at Moyale Referral Hospital before being referred to Nairobi West Hospital due to internal growth in his lower back and is currently under observation and medication. The accused undertook to attend court and abide by the directions for bail and its terms.

Determination

16. I have considered the application, the affidavits in support thereof, the submissions made and the authorities relied upon.

17. Article 49(1)(h) of the Constitution provides that:-

> **An accused person has the right …**
>
> **(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.**

18. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. I therefore associate myself with **Mativo J.** in **Republic –vs- Danfornd Kabage Mwangi (2016) eKLR** that**:**

> **"Granting bail entails the striking of a balance of proportionality in considering the rights to the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. incarcerations before trial, when the outcome of the case is yet to be determined, cuts against this principal. The need for bail is to assure that the accused person will appeal for trial and not to corrupt the legal process by absconding. Anything more is excessive and positive…"**

19. In the same vein, in the case of **Nganga –vs- Republic (1985) KLR 451,** it was that:

> **"Generally in principle, and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an Accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:**

(a) The Accused will fail to turn up at his trial or to surrender to custody, or

(b) The Accused may commit further offences, or

(c) He will obstruct the course of Justice."

20. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. See **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**. In that case the Court held that:

> **"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of 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 jeopardise the objectives or proper functioning of the criminal justice 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 (D) 146 in the following terms;**
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> > **"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."**
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> **In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *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 factor must be considered together with other factors in the case."**

21. It was therefore held in **Francis Macharia Karichu vs. Republic [2018] eKLR**, that:

> **"In addition, the Bail and Bond Policy recently published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail."** (Emphasis added).

22. Gravity of the offence as a consideration was appreciated by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

> **"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."**

23. It is true that if found guilty the accused is liable to be sentenced to death. However, he is yet to be found guilty. Secondly, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it is nolonger mandatory that those found guilty of murder must be sentenced to death.

24. The law is that an accused person is presumed innocent till proven guilty. While some people may find the presumption of innocence annoying, inconveniencing and an unnecessary hindrance, it is a time tested principle in all jurisdictions which apply democratic principles and unless we opt to go the dictatorship way, we have no option but to endure it.

25. Since the Constitution of Kenya prescribes the rule of law as a binding national value, the rule of law is paramount imperative and as was

appreciated in **Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006),** at page 12:

> **"... the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public…We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy: our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In dictatorship, we could simply round up all these persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decision."**

26. I associate myself with **Bagmall, J** in **Crowcher vs. Crowcher [1972] 1 WLR 425, 430** that:

> **"the only justice that can be attained by mortals, who are fallible and are not omniscient is justice according to the law: the justice that flows from the application of sure and settled principles to prove or admitted facts."**

27. In **Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120** it was held by the Constitutional Court of Uganda that:

> **"The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially…]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person's appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him."**

28. As regards the same issue, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** expressed himself as hereunder:

> **"Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;**
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> > **'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'**
>
> **Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."**

29. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

> **"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-**
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> > **(i) The nature of the charges;**
> >
> > **(ii) The strength of the evidence which supports the charge;**

(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 brought against the accused;

(viii) The probability of guilty;

(ix) Detention for the protection of the accused;

(x) The necessity to procure medical or social report pending final disposal of the case.

30. Locally, the issue has been dealt with in the case of **Republic vs. Lucy Njeri Waweru & 3 Others Nairobi criminal Case No. 6 of 2013** which listed some of the factors that a court needs to consider in an application for bail as:-

a. Whether the accused persons were likely to turn up for trial should they be granted bail;

b. Whether the accused persons were likely to interfere with witnesses;

c. The nature of the charge;

d. The severity of the sentence;

e. The security of the accused if released on bond.

f. Whether the accused person has a fixed abode within the jurisdiction of the court.

31. This was the position adopted in **Dr. Ismail Kalule & 2 ors –vs- Uganda Crim. Case No. 115 of 2008 (2011) eKLR** where **Hon. Justice Owiny Dollo** stated that;

> **"There are well established guidelines Court should adhere to, in the exercise of its discretion, in considering the issue of bail.**
>
> **These include nature or gravity of the offence the accused is charged with, the severity of the sentence that could result therefrom if conviction is secured."**

32. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> **"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."**

33. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

> **(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—**
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> **(a) the nature or seriousness of the offence;**
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> **(b) the character, antecedents, associations and community ties of the accused person;**
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> **(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;**
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> **(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.

35. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."

35. 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.

38. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."

37. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in **Republic vs. William Mwangi Wa Mwangi [2014] eKLR** where **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."

38. In this case, it is contended that the prosecution has in its possession overwhelming evidence linking the accused with the murder of the deceased as the accused was positively identified and further there is medical evidence linking the accused with the death of the deceased. In my view there is nothing compelling about the prosecution forming a view that it has overwhelming evidence in its possession. In fact, a prosecution ought not to be commenced where the prosecution doubts its chances of success. In other words, the prosecution should not commence a criminal process where it feels that it has underwhelming evidence. To my mind, for this court to base its decision on the

weight of the evidence to be adduced against the accused persons at the stage of determination of an application for bail, may well be prejudicial. While the Court is not necessarily barred from taking a dim view of the evidence in in setting conditions for the grant of bail, that cannot be the basis for denial of a constitutional right to bail.

39. Where the prosecution's case is hinged on the allegation that the accused person is likely to endanger the safety of victims, individuals or the public, if released, there ought to be a basis for forming such a belief. It cannot be based on speculation and conjectures. I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & Others** (supra) that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."**

40. It is contended that the accused person is a police officer and that the measures which have been put in place as regards the witness protection program are not adequate to ensure the safety of witnesses. First the status of the accused ought not to be the sole basis for denial of bail unless it is shown that there has been a covert act on his part in the past which indicate that he is the sort of a person who is likely to take advantage of his position to influence the direction that the case is likely to take. There is no such evidence before me. Secondly, the inadequacy of the witness protection program is an indication of systemic failure on the part of those entrusted with the mandate of ensuring that the criminal justice system operates efficiently. It cannot be blamed of the accused person.

41. As for the allegation that there are other suspects who are at large, the Prosecution has not indicated what steps if any it has taken in apprehending the said suspects. It is not alleged that the accused has anything to do with the failure by the law enforcement agencies to apprehend the said suspects. An accused person cannot be denied his constitutional rights simply because the investigative agencies are lethargic or are not keen in their work.

42. It is also my view that even in cases where limitations contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words, the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to ***Thesaurus English Dictionary*** is forceful, convincing, persuasive, undeniable and gripping.

43. In **Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009** court defined the term "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."**

44. Citing the same case, the Court in **Felity Sichangi Nyangesa vs. Republic (2014) eKLR** held that:

> **"Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the Case where a person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The Court is then entitled, if not bound to infer that the intention of the accused in accosting the witness had been to dissuasive the witness from giving evidence."**

45. As I have stated above it is upon the prosecution to prove that there exist compelling reasons to justify the court in limiting the accused's otherwise constitutionally guaranteed rights. Such compelling reasons cannot be said to have been satisfied based on bare averments. It is contended that having known the case against him, the accused is likely tamper with the evidence. I however associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & other High Court Criminal Case No. 61 of 2012** that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."**

46. In this case it must be appreciated the Constitution guarantees to an accused the right to be supplied with the material the prosecution intends to use in its case. Such a right cannot be the basis of denying the accused another constitutionally guaranteed right – the right to bail.

47. On the other hand, without pre-empting the outcome of the case, I bear in mind the severity of the offence vis-à-vis the right of the accused to be admitted to bail and that there are mechanisms for protecting the witnesses in the case. I also consider that the court in admitting the accused to bail must do so on conditions which are reasonable both to the accused and to the victims. I have also considered the nature of sentence available for the offence of murder in the event the accused is convicted and also the issues raised by the parties.

48. Therefore, the Court in making a determination must consider whether such safeguards, if invoked, are unlikely to have any impact of the safety of the witnesses including barring the accused from stepping in the jurisdiction where the witnesses are as was held in **Republic vs. Zacharia Okoth Obado & 2 Others [2018] eKLR**. In that case the Learned Trial Judge found that:

"On the whole question of the likelihood of interference with the case witnesses and intimidation this cannot be taken lightly. The Accused persons have been supplied with the witness statements and have the names and contacts of those who have adversely mentioned them in connection with the case. The manner in which the deceased met her death is in the public domain and the evidence has also been provided. I find that given the circumstances of this case the likelihood of the adversely mentioned Accused persons contacting the witnesses can inflict genuine fear and anxiety to them. I think that the mere release of the Accused is sufficient to inflict anxiety and fear leading to intimidation of potential witnesses."

49. Notwithstanding that finding the Learned Trial Judge proceeded to grant the 1st Accused bail on the following terms:

1. The 1st Accused may be released upon deposit into court of cash bail in the sum of Kshs. 5 million.

2. In addition the 1st Accused will provide two sureties of Kshs. 5 million each.

3. The 1st Accused must deposit all his travel documents including his Kenyan, East African and Diplomatic passports which he holds.

4. The court will be at liberty to cancel this bail and bond and to remand the 1st Accused in custody if any of the following conditions, which I hereby set as part of the terms upon which he is released, are breached:

i. He shall not cause an adjournment in this case.

ii. He shall report once a month to the Deputy Registrar of this court.

iii. He shall not go anywhere within 20 kilometers of Homabay County boundary on all sides of that County.

iv. He shall not contact or intimidate, whether directly or by proxy any of the witnesses in this case as per the Witness Statements and other documents supplied by the State to the defence.

v. He shall not intimidate the parents, siblings or other close relations of the deceased.

vi. He shall refrain from mentioning or discussing the deceased and or this case in gatherings or political meetings.

50. What comes out from the said decision is that there are in place constitutional and legislative mechanisms in place to protect witnesses who are shown to be under real threat if an accused person is released.

51. In this case, the Prosecution intimated that it was in the process of placing the vulnerable witnesses under witness protection program. The accused was arrested on 14th May, 2021, more than three weeks ago. I have not been told what steps have been taken to complete the said process. As a result, there is no basis upon which this Court can find that as at the time of the delivery of this ruling there are existing compelling reasons to warrant denying the accused person to bond.

52. In the premises, I hereby admit the accused to bond of Kshs 800,000.00 with 1 surety of similar amount to be approved by the Deputy Registrar of Kajiado High Court. Since the accused has stated that his family stays in Nairobi, I further direct the accused not to be within 5 kilometre radius of Olekasasi Area in Ongata Rongai Town until the case is determined or unless otherwise directed by the trial court. The accused is further directed not to interfere with the prosecution witnesses or the manner in which the prosecution's case is being conducted either directly or indirectly. He is directed to appear in court as directed by the trial Court. In the event of violation of any of these terms, his bond shall be liable to cancellation and he will be placed in custody till the determination of his case.

53. The prosecution and the accused or the victims are at liberty to make an appropriate application if the circumstances change.

54. Orders accordingly.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS 10TH DAY OF JUNE, 2021

G V ODUNGA

JUDGE

<u>In the presence of:</u>

Miss Abuya with Mr Mwangi for the accused.

Mr Ngetich for Ms Nkirote for the State

Ms Majune for the family