



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO.E013 OF 2021**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**EDWIN ODIWUOR OTIENO.....1<sup>ST</sup> ACCUSED**

**SAMUEL OKOTH ADINDA.....2<sup>ND</sup> ACCUSED**

**JUSTUS NYAMETE MANYURA.....3<sup>RD</sup> ACCUSED**

**RULING ON BAIL APPLICATION**

1. Edwin Odiwuor Otieno, hereinafter the 1<sup>st</sup> accused, Samuel Okoth Adinda, the 2<sup>nd</sup> accused and Justus Nyamete Manyura the 3<sup>rd</sup> accused, have jointly 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:

**“1.Edwin Oduor Otieno 2.Samuel Okoth Adinda 3.Justus Nyamete Manyura: On the 12<sup>th</sup> day of February, 2021 within Nairobi County, jointly with others not before court, murdered CAROLINE WANJIKU MAINA.”**

2. The accused persons were arraigned before this court for this offence and they all pleaded not guilty to the charge. The 1st and 2nd accused persons filed their application dated 8th March, 2021 seeking to be released on bail pending trial. The application is supported by an affidavit sworn by the 1st accused. The application is brought under **Section 124** of the **Criminal Procedure Code** and **Articles 20(3), 5, 4, 21(1), 22(3) & (4), 49(1)(h), and 50(2)(a)** of the **Constitution**.

3. The case against the 3<sup>rd</sup> accused was consolidated with that of the 1<sup>st</sup> and the 2<sup>nd</sup> accused. He has not filed any application for bail.

4. The application by the 1<sup>st</sup> and 2<sup>nd</sup> accused persons is premised on grounds on the face of the Notice of Motion which are:

**i. The offence of murder is bailable under Article 49(1)(h) of the Constitution.**

**ii. The Applicant has a qualified constitutional right to be released on bond/bail on reasonable conditions.**

**iii. The Applicant has a qualified constitutional right to be presumed innocent until the contrary is proved.**

**iv. The Applicant will avail himself to court as of when required to do so until the matter is concluded.**

**v. The Applicant shall abide by any conditions that shall be set by this Honourable Court as pre-requisite for grant of bond.**

**vi. The Applicant shall not interfere with witnesses in this matter and any investigations, should any be carried.**

**vii. The Applicant has been in police custody since the 15<sup>th</sup> day of February, 2021 and all the witnesses under witness**

protection have since been heard and therefore there is no threat to them.

viii. **The Applicant feels like he's being punished already for an offence not determined by the Court and he may end up staying in custody indefinitely.**

ix. **That there's a worldwide pandemic of corona virus, and the Applicant risks to die should the said virus find its way to the prison, an eventuality that is very likely.**

x. **That the Applicant is aggrieved.**

5. The State opposed the application through a replying affidavit sworn on 18<sup>th</sup> March, 2021 by PC Earnest Kinyua of the Directorate of Criminal Investigations, Dagoretti, Nairobi. He is the investigating officer of the case. He deposed that investigations in this case are still ongoing as two other suspects are still at large. He urged that if the accused persons are released on bail, they are likely to interfere with investigations aimed at arresting their accomplices.

6. The investigating officer deposed that some of the prosecution witnesses are well known to the accused persons, and there is therefore a likelihood that the accused persons will interfere with these witnesses by contacting them and inflicting fear upon them. He further deposed that there was a high possibility that the prosecution will secure a conviction of the accused persons as it has already tendered overwhelming evidence pointing to the guilt of the accused, including CCTV evidence, car track records and Safaricom data.

7. The investigating officer further deposed that the accused persons have no known gainful employment which increases their likelihood to abscond. **He was apprehensive that, taking into consideration the nature of the charges the accused are facing, and the likely punishment they will face in the event they are convicted, they were likely to abscond from the jurisdiction of the court.**

8. **The accused filed an affidavit in support of the application for bond. It was sworn by the 1<sup>st</sup> accused.** In the affidavit, the 1<sup>st</sup> accused deposed that he resides at Green Park Estate in Kitengela, within Nairobi County. He stated that he is married with two children who are dependent on him. He stated that he is the sole bread winner of his family. He averred that the offence of murder is bailable, and that the right to be released on bail is a right provided under the Constitution.

9. The 1<sup>st</sup> accused further stated that his case has been adjourned on several occasions which has extended his stay in remand custody. He urged this court to release him on bail due to the ongoing Covid-19 Pandemic. He promised to attend court when required to do so, and abide by any conditions that shall be set by this court. He urged that he was not a flight risk and prayed that the court grant the application for bail.

10. Mr. Naulikha for the State **made oral submissions to the effect that there existed compelling reasons why the accused persons should be denied bail. He urged that some of the suspects in the present case were still at large, and investigations geared at their arrest were ongoing. He stated that the prosecution witnesses are known to the accused persons, and there was a high likelihood that the accused may interfere with the said witnesses.**

11. **Learned Prosecution Counsel urged that the prosecution evidence in the form of CCTV footage which places the accused persons at the scene of crime. He urged that Articles 24 and 49(1)(h) of the Constitution limit the right to bail in the event the prosecution establishes compelling reasons why bail ought to be denied. He urged that the affidavit sworn by the investigating officer demonstrates compelling reasons to deny accused bail and urged this court to dismiss the application by the accused persons.**

12. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> accused persons, Mr. Ombetta, in response, submitted that the investigations ought to have been concluded by now. He stated that the allegation that the accused persons will interfere with witnesses since they are known to them has not been substantiated. He urged that the accused persons have been in custody, and no proof has been tabled to show that they have tried to contact any of the prosecution witnesses. He averred that the accused persons are presumed innocent until proven guilty.

13. Mr. Ombetta urged that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons have permanent abodes. He stated that the fact that the accused persons have been charged with a capital offence is not a ground for denial of bail. He maintained that no compelling reasons have been furnished by the prosecution to warrant this court to deny the accused persons bail. He stated that the accused are ready to abide by any terms set by this court and urged the court to allow the application as prayed.

14. The Probation Officer's Reports relating to the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were filed on 11<sup>th</sup> May 2021. The Pre-Bail Report in respect of the 1<sup>st</sup> accused indicated that he has strong social ties with his family. The 1<sup>st</sup> accused was also interviewed. He stated that he is married with one child aged 3 years, and is a guardian to another child aged 6 years. He resides with his wife and children at Green Park Estate, in Athi-River. His wife, Esther Anyona, stated that she was willing to stand surety for him. The Probation Officer indicated that the 1<sup>st</sup> accused's employment status was not stable since he dealt with tenders, and that he kept the company of peers suspected of violent offences. The Probation Officer, M. M. Abima assessed the 1<sup>st</sup> accused as being low risk in terms of likelihood to jump bail, but recommended that if the court was inclined to grant bail, stringent bail terms be given to take care of the security concerns raised by the family of the victim.

15. With regard to the 2<sup>nd</sup> accused, the Pre-Bail Report indicates that prior to his arrest, the 2<sup>nd</sup> accused resided at Lucky Summer Estate in Kasarani, within Nairobi County, with his wife Rose Atieno and two children aged 9 and 6 years. After his arrest, his wife and children moved to his home county in Siaya due to financial constraints. His employment status was unstable as he did freelance auditing and book keeping. The 2<sup>nd</sup> accused's family vouched for his character but stated that they were poor and requested for lenient bond terms.

16. According to the Victim Impact Statement, the deceased's family was opposed to the accused person being released on bail. They stated that the deceased was 38 years old and a single parent to two children aged 13 and 4 years. They stated that the death of the deceased caused

them pain and turmoil. They further indicated that they fear for their lives in the event the accused are released on bail. The deceased's siblings stated that they were known to the accused persons and that the accused assisted them search for the deceased when she was reported missing. The deceased mother stated that she received a threatening text message from one Jane Wanjiku which stated that: "*Pale Carol alipitia ndio mtapitia*". She feared that the said Jane Wanjiku could be working with the accused to intimidate them.

17. The Probation Officer, Mr. A. Kanyotu assessed the 2<sup>nd</sup> accused as a high risk in terms of jumping bail and threat to community safety on the basis of inter alia having weak community ties, having unstable source of income and keeping company of peers suspected of violent offences and alcohol use. He recommends that if bail is granted, the same should have stringent terms attached to it.

18. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons were arrested on 16<sup>th</sup> February 2021 and have been in custody since then. They jointly face a murder charge contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is no longer novice to say that the offence the accused face is bailable under Article 49 (1) (h) of the Constitution, unless there are compelling reasons to deny bond.

19. The Kenya Judiciary's **Bail and Bond Policy Guidelines, March 2015** at p. 25 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. Flowing from the above Policy Guidelines, it is very clear that it is the Prosecution that has the evidential burden to satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. In addition, the Prosecution is expected to state the reasons that in its view should persuade the court to deny the accused person bail

21. In **Republic vs Danson Ngunya & Another [2010] eKLR**, Makhandia J, (as he then was) brought in a further consideration that if the state wants the accused deprived of his right to be released on bond, then it must satisfy the court that it would not be in the interest of justice to make an order granting bond. That means that in addition to giving reasons for denial of bail, those reasons will be weightier if they are premised on public interest.

22. 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** and 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."**

23. In the above case, the judge was saying that an accused person should only be denied bail if there are real and cogent grounds, without requiring that they must necessarily come only from the Prosecution.

24. In the present application, it is the prosecution's case as well as the sentiments of the victim's family that the accused persons will interfere with ongoing investigations and the prosecution witnesses if released on bail, on grounds the key prosecution witnesses are known to them, that they were part of those assisting in searching for the deceased, and that some of their accomplices are still at large. The mother of the deceased was on record saying she has been threatened through a text sent by a lady she suspected were working with the accused persons. She, like her other family members fear for their lives. In addition, the Probation Officers Reports indicate that the accused persons keep company with persons of violent tendencies.

25. Counsel for the accused on the other hand stated these allegations were unfounded as no proof of interference had been tabled by the prosecution.

26. I have carefully considered the application before me, together with the affidavits sworn in support and opposition to the granting of bail, and submissions by both counsels. I have also taken into account the Report by the two Probation Officers.

27. The court has been told that the accused are a flight risk because they know the family of the deceased and that they even assisted in looking for the deceased. Further that their accomplices are at large. They are accused of keeping company with persons of violent tendencies. As observed earlier, compelling reasons required to deny bail should be real and cogent, and should be such as would convince the court that it would be against public interest to grant bail.

28. Merely knowing witnesses is not sufficient in itself to satisfy the above test. There should be proof of some other ground that would justify a finding that knowing the witnesses poses a threat to the lives of the witnesses. No such ground was established. The issue of keeping company with violent people per se is neither here nor there, unless there is a demonstration that keeping such company has an impact on the case, for example, the pending investigations, or some other relevant dimension. None has been established. Furthermore, the concern this poses can be dealt with through attaching the relevant terms of release sufficient to address that concern.

29. The issue of two other accomplices who are still at large. The investigating officer in his affidavit stated that investigations geared at arresting the two suspects is still ongoing. It has not been shown how granting bail to the two accused will affect the on-going efforts to track them down.

30. I do appreciate the concerns of the victim's family. The text sent to the mother with a veiled threat is indeed unfortunate. However, unless some nexus is made between the sender and the accused person's, it will remain mere suspicion that the accused were involved in it.

31. Having carefully considered the application by the 1<sup>st</sup> and 2<sup>nd</sup> accused, I find no compelling reason to deny them their request. Accordingly, I grant the application for bail on the following terms:

**1. Each accused may be released upon:**

- a) **Deposit of cash bail in the sum of 500,000/.**
- b) **In addition, by providing a parent or close kin to sign up as a contact person to ensure the accused person's whereabouts are traced in case the court requires him.**

**2.) In the alternative, each of the accused persons may be released:**

- a). **On a bond of Kshs. 1, 0000,000/= with two sureties of similar amount each.**
- b). **In addition, at least one of the sureties should be a parent or close kin to the accused, the relationship which must be proved to the Deputy Registrar.**

**3.) Each accused person must also abide by these additional terms:**

- a). **Each accused should file with the court, and serve the ODPP, an affidavit detailing particulars of the actual place where he intends to stay during the pendency of this case, and also particulars of the place of business where he intends to do business or work during the pendency of this case.**
- b). **Each accused is warned not to interfere with, intimidate, threaten or harass any of the witnesses or potential witnesses, or relatives of victims in this case, whether in the form of covert or overt action(s), through social or other media, and whether by himself or through proxy or through others. He should not approach, call or visit, the potential witnesses in this case by any means whatsoever.**
- c). **Each accused will provide their phone contacts to the court, and ensure that he attends court if and when required to do so.**

**4.) Failure to provide the information required in 3) (a) and (b) above will result in the bail not being approved.**

**5.) Additionally, failure to observe all the terms and conditions set under 3.) above will result in the respective bond being cancelled.**

**DATED AT NAIROBI THIS 2ND DAY OF JUNE 2021**

**LESIT, J.**

**JUDGE**

**DATED SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF JUNE, 2021**

**BY**

**OGEMBO, D.O.**

**JUDGE**

Court:

Ruling read out in open court (on-line) in the presence Mr. Mwinzi for both accuseds 1 and 2 and Mr. Okeyo for the state and the 2 applicants.

**OGEMBO, D.O.**

**JUDGE**

Mr. Mwinzi:

We need a hearing date

Court:

Matter to be mentioned before the Hon. Nzioka J. for allocation and a hearing date. Mention 21.6.2021.

**OGEMBO, D.O.**

**JUDGE**