



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei – J

CRIMINAL CASE NO. E002 OF 2021

REPUBLICPROSECUTION

VERSUS

UNKNOWN ALIAS CHRISTIAN BALEDI KADIMA

ALIAS ERIC KAMBAYE KATALAYI ACCUSED

RULING

1. The accused herein **Unknown Alias Christian Baledi Kadima alias Eric Kambaye Katalayi** has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 7th January 2021, at Syokimau Ferndale Court in Athi River Sub-County within Machakos County, he murdered **Elizabeth Koki Musyoki**.
2. The prosecution filed two affidavits one from the investigating officer and the other from the father of the deceased dated 3/2/2021 and 2/02/2021 respectively in which they vehemently opposed the release of the accused on bond. The accused filed a response vide an affidavit sworn on 1/03/2021.
3. Upon a return of a plea of not guilty by the accused, then it follows that he must be deemed innocent of the charge until the contrary is proved. Stemming from that presumption, Article 49(1)(h) of the constitution provides that the accused has a right to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
4. The prosecution sought reliance on the affidavits of the investigating officer and the father of the deceased as containing compelling reasons as to why the accused should not be released on bond. The two deponents averred inter alia; *that he is a flight risk and that he does not have a fixed place of abode as he was arrested while intending to flee the country as by then he was about to board a bus destined to Uganda; that his nationality is unknown and it will be difficult to pursue him once out of bond if he absconds; that he is likely to interfere with witnesses and also be a danger to them if released; that he is a fugitive from justice as there are claims that he is wanted in South Africa for an offence of assault in which he jumped bail and that the police are currently engaging Interpol over the same.*
5. The accused filed a replying affidavit sworn on 1/3/2021 in which he deposed that his name is Kadima Eluloge and not as described by the police in the charge sheet and that he is a Congolese citizen by birth and a South African by registration as per a copy of passport which he annexed thereto. He denied that he was trying to flee the country and that being a Congolese national, the Congolese head of mission is willing to guarantee his availability to court. The accused denied the allegations of interference with witnesses and maintained that he will abide by the conditions to be imposed by the court.
6. This court called for a pre-bail report on the accused herein. The same is dated 17/5/2021 and reveals several issues concerning the accused inter alia; *that he is from a dysfunctional family set up since his parents are separated and that his mother resides in South Africa while the father is in Democratic Republic of Congo and that his siblings reside in other countries; that he does not have documents to authenticate his citizenship and that he does not have a fixed place of abode and further that the few friends he pointed out declined to come and bail him out for fear that he will jump bail; that he has travelled and worked in many countries such as Mozambique, Nigeria, Angola, Ghana, Botswana, Zambia, Zimbabwe, Guinea, Democratic Republic of Congo, Namibia, Lesotho, Swaziland, Tanzania, Uganda and Madagascar; that while in Kenya he has changed places of residences several times while engaging in short-span relationships; that the family members of the deceased and who are witnesses are traumatized and in danger should he be released on bond.*
7. Parties agreed to canvass the bail application by way of written submissions. The submissions by Mr Mwangera for the prosecution are dated 12/03/2021 while the submissions by Mr Wokabi Mathenge for the victim's family are dated 26/05/2021 and those by Miss Kamende for the Law Society of Kenya are dated 27/05/2021. The accused presented oral submissions.

8. Mr Mwongera for the prosecution submitted that the right to bail is not absolute. He submitted that at the time of the arrest of the accused, he had in his possession a bus ticket No.4912950 dated 9/01/2021 bearing the name Eric Kambayi destined to Kampala as well as a police abstract dated 8/01/2021, a Congolese temporary pass No. A70018 clearly indicating that he was planning to flee the country. It was the contention of counsel that the accused should be denied bail as he has no fixed place of abode and that there is a likelihood of him jumping bail since the accused is a flight risk.

9. Mr Wokabi Mathenge for the victim's family submitted that there are compelling reasons to deny the accused bond such as the accused's unknown nationality as well as his true identity and hence if released on bond there will be no guarantee that he will attend court for his trial. It was also submitted that the severity of the sentence to be imposed in the event of a conviction should be a factor for consideration and in that regard reliance was placed in the case of **Republic V Ahmed Mohammed Omar & Others [2010] eKLR**. It was also submitted that the accused is a flight risk in that immediately after the incident the accused attempted to flee to Uganda. Learned counsel urged the court to consider the pre-bail report dated 17/05/2021 as the same mirrors the concerns of the victim's family. Finally, it was contended that the plea for release on bond should be rejected and that the accused be ordered to remain in custody pending trial of his case.

10. Miss Kamende for the Law Society of Kenya submitted that the accused does not merit to be released on bond because of the fact that his identity and nationality is unknown and that he is a flight risk as captured in the pre-bail report. It was also submitted that the accused has no fixed place of abode and that his conduct in attempting to flee the country before he was arrested left no doubt that he is a flight risk. It was the contention of counsel that there are compelling reasons to deny the accused bail pending trial.

11. The court had earlier appointed a pro bono counsel for the accused but the accused along the way declined to have him continue representing him in the matter and opted to conduct his case by himself. The counsel was thus discharged from representing him. The accused pleaded with the court to release him on bond so as to enable him reach his relatives and then be in a position to organize the conduct of his case. He added that the deceased had been his wife with whom he intended to formalize their union. He denied the allegations made by the prosecution and asserted that the prosecution is out to peddle propaganda against him with a view to ensuring that he remains behind bars during the pendency of the case.

12. I have given due consideration to the rival affidavits and the submissions. I have also considered the pre-bail report. I find the only issue for determination is whether the prosecution has raised compelling reasons to warrant the accused being denied bond/bail. The accused having denied the charges must be presumed as innocent until the contrary is proved. Pursuant to the provisions of Article 49 (1) (h) of the constitution, the accused is entitled to be released on bond or bail pending a charge or trial unless there are compelling reasons not to be released. The prosecution has sought reliance on the affidavits of the investigating officer and the father of the deceased while the accused sought reliance on his replying affidavit. These notwithstanding, the key factor for consideration is whether the accused person will avail himself for trial if admitted to bail. The burden to prove the compelling reasons must now fall on the shoulders of the prosecution to discharge and which are contained in the two affidavits. Other than the key consideration namely whether the accused will attend court for his trial, the courts have also been relying on the judiciary's *Bail and Bond Policy Guidelines* which contain a list of compelling reasons for consideration when determining matters to do with bail/bond. They include the following:

- a) *The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.*
- b) *The strength of the prosecution case.*
- c) *Character and antecedents of the accused person.*
- d) *The failure of the accused person to observe bail or bond terms.*
- e) *Likelihood of interfering with witnesses.*
- f) *The need to protect the victim or victims of the crime.*
- g) *The relationship between the accused person and potential witnesses.*
- h) *Child offenders.*
- i) *The accused person is a flight risk.*
- j) *Whether the accused person is gainfully employed.*
- k) *Public order, peace or security.*
- l) *Protection of the accused person.*

13. Looking at the above guidelines, I note that the prosecution has hinged its opposition to the release of the accused on bond on the ground that he is a flight risk and that his real identity had yet to be established as well as the fact that he has no fixed place of abode and with no familial ties in Kenya as the major compelling reasons to justify denial of bond/bail to the accused pending trial. The investigating officer averred that the accused was arrested on 8/1/2021 from a lodging, a day after the incident and that the police recovered a bus ticket destined for Kampala Uganda under the name of Eric Kambayi Katalayi. It was claimed that he was on his way to flee the country and thus the prosecution's contention that he was likely to abscond once admitted to bail. The accused has vehemently denied the accusations levelled against him and maintains that the prosecution has waged a propaganda war against him. I will analyse the above three main compelling reasons fronted by the prosecution so as to establish whether or not they justify a denial of bond/bail to the accused herein.

14. On the issue of whether the accused is a flight risk, it is noted that he was arrested a day after the commission of the offence from a lodging and was in possession of a bus ticket issued on 8/01/2021 indicating that he was to travel from Nairobi to Kampala on 9/01/2021. The police also recovered a Congolese temporary pass issued the same day in the name of Eric Kambayi Katalayi. Also recovered was a police abstract dated 8/01/2021 on loss of original Congolese passport. The Safaricom call data on mobile phone number 0742 640 835 indicated the registered owner as Zukiswa Nomganga a South African national. Looking at the conduct of the accused in trying to travel out of the country immediately after the incident, I find that the same is a clear indication that he had planned to flee out of the country. All the travel paper work was processed a day after the commission of the offence. This militates against his plea for release on bail since the possibility of him turning up for trial once admitted to bail will not be guaranteed. The accused did not deny the fact that he was preparing to leave Kenya since he has deliberately avoided to respond via his replying affidavit. It transpired also from the pre-bail report that the accused has been travelling to several countries and hence it is likely that he might not be traced once released on bond as he can easily melt away in any of those countries. In the case of **Republic Vs Ahmed Abolfathi Mohammed & Another [2013]** Ajode J held that the probability that the accused persons may not surrender themselves for trial was high considering the fact that Kenya had not signed an extradition treaty with Iran and it would therefore be impossible to prevail upon Iran to return its nationals to Kenya to be prosecuted should they abscond and return to Iran. The pre-bail report indicates that the accused has in the past travelled to several countries in Africa and hence there is a possibility that once he is granted bond he can easily disappear in any of those countries and it would be difficult to secure his attendance in court. I am satisfied by the prosecution's claim that the accused person is a flight risk and that there would be difficulties in tracing him once he absconds.

15. On the issue of the identity of the accused, it has transpired that the accused went by several names and which might explain the reasons behind the investigating officer preferring alias names for him. Indeed, the investigating officer indicated that the police have already forwarded the accused's details to Interpol for verification on his true identity and nationality. The accused maintains that his name is Kadima Euloge and has attached a copy of his South African Passport No. A04739359. However, the Congolese travel pass recovered from him had the name Eric Kambayi Katalayi and which are also indicated on the police abstract on loss of passport. The bus ticket recovered from him has the name Eric Kambayi. From the above, it can safely be concluded that the accused had different names on each of the passports for South Africa and The Democratic Republic of Congo. Again, the mobile number that he was using is registered in the name of one Zukiswa Nomganga. It is clear therefore that the identity of the accused has not been clarified and hence it would be unsafe to admit him on bond as there is a high likelihood that he might not turn up for his trial. It is noted from the documents recovered from the accused that he gave out the name Eric Kambayi to the police when seeking for a police abstract on loss of passport. The same name also features on the travel pass from the DRC embassy. With all those details on the various names, the accused's claim that his only name is Kadima Euloge is not truthful at all. Further, it transpired that the accused does not have any familial ties in Kenya. Even though he claimed that the deceased had been his wife with whom he intended to formalize their union, the pre-bail report painted a picture of a person always on the move. The report indicated that the accused's modus operandi was that he would befriend ladies whom he would cohabit for short periods and then end the relationship and kept on changing residence while he was in Kenya. The report also indicated that he came from a dysfunctional family since his father had separated with his mother and that the father resides in the Democratic Republic of Congo while the mother lives in South Africa with the siblings living in other countries. The accused has claimed that his country's embassy officials are willing to guarantee his availability to court but that is as far as it went because none of the alleged officials have sworn affidavits in support of the accused's quest to be released on bond. Again, none of his former girl friends or acquaintances have come forward to express any interest in bailing him out. The pre-bail report indicated that the accused provided a list of his Kenyan friends but upon being contacted they shied away claiming that their properties might be sold off in the event the accused absconds court. The report also indicates that the accused does not have a fixed place of abode and it will be difficult to trace him once he jumps bail. The report indicates that the accused kept on changing residence and the last one was the one belonging to the deceased and after the incident the accused ended up in a lodging and was arrested while in the process of fleeing to Kampala Uganda. There is therefore proof that the accused does not have a fixed place of abode and it will be difficult to trace him once he is admitted to bail and fails to turn up in court. In the case of **Erick Ramazani Vs Republic [2020] eKLR** Kimaru J held that the accused did not have ties in Kenya that would persuade the court to grant him bail and further that due to the accused's immigration status which is yet to be established it would be a risk for the court to release him on bail pending trial. The learned judge went ahead to find that there was anecdotal evidence that the accused's actual identity could not be verified and proceeded to hold that even if stringent bond terms were imposed, there was no guarantee that the accused will attend court.

The circumstances obtaining in the above case perfectly fit with the present circumstances of the accused herein. I am satisfied that it is not prudent to grant bond to the accused as there is high possibility that he might not attend court for his trial.

16. In light of the foregoing, it is my finding that the accused's application to be released on bond/bail lacks merit. The same is declined. The accused shall remain in custody pending the hearing and determination of his case or until further orders of the court.

It is so ordered.

Dated and delivered at **Machakos** this **9th** day of **June, 2021**.

D. K. Kemei

Judge