



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: . Hon. D. K. Kemei - J

CRIMINAL CASE NO. 32 OF 2016

JOSEPH MUSEMBI SILA.....1ST APPLICANT

BENSON MUASYA ALIAS VUTUS.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The accused person herein **Joseph Musembi Sila** alias **Kivi** and **Benson Nzioki Muasya** alias **Vutus** are charged with the offence of murder contrary to section **203** as read with section **204** of the **Penal Code**. The particulars of the charge are that on the night of 17th and/or 18th August, 2016 at Mitaboni Market, Kathiani Sub- County within Machakos County with others not before court they murdered **Samuel Munyao Kakovu**.

2. The accused persons have filed an application under **Article 49 (1)** of the **Constitution** seeking to be released on bond pending trial and have urged the court to uphold the constitutional provisions. They also maintain that they will ensure that they will attend court sessions when required and cooperate with the court until the determination of the case.

3. The State opposed the application vide a replying affidavit dated **4/6/2020** wherein Mr. Mwongera, learned counsel for the prosecution averred inter alia; that the public is still hostile towards the applicant; that the state is still apprehensive about the safety of the applicant if released on bond; that the solemn assertions by an applicant that he will not abscond from the court's jurisdiction cannot be guaranteed by him.

4. The court called for pre-bail reports on the accused persons and are dated 22/2/2021. The summary of the reports is that the accused are notorious persons who have terrorized the members of the community. The community members see them as a nuisance to them as they lack peace whenever they are around. The victim's statement clearly indicates that the victims are still bitter owing to the loss of their loved ones and that the accused persons are a threat to them, and might harm the only survivor of the incidence who is also a key witness in the matter after five members of the community were killed by the accused persons and their cohorts. The local administration noted that the incidence was very sensitive and sends chills to the members of the public whenever they are reminded of the incident. The accused are reported to be flight risks one of them was arrested four weeks after the incidence at Kyumbi area after phone tracking.

5. This court is now required to assess the current application and exercise its discretion afresh on the basis of the application now before the court. The court must therefore take into consideration the accused, the seriousness of the offence, the wishes and feelings of the victim's family. In addition, the court must take into account the fair and transparent administration of the justice system which comprises of the following:

a. The presumption of innocence, in other words every person is presumed to be innocent until he is found guilty;

b. The particulars and the seriousness of the offence. The applicant is charged with intentionally taking the life of another which is extremely serious.

c. The rights of the victims including taking their wishes and feelings into account.

d. The character and circumstances of the accused/applicant.

e. Ensuring that the decision engenders respect for and confidence in the legal system within the community generally.

f. Guarding against community anger and unrest whether it is directed towards the Police in Kathiani and/or the applicant and/or the court.

g. Setting conditions that are not debilitating.

h. Setting conditions that (a) prevent and/or restrict absconding, (b) prevent interference with the trial process and (c) prevent intimidation of witnesses.

6. I have considered the application, the affidavits both in support thereof and in opposition thereto as well as the submissions made. I have also considered the pre- bail reports.

7. **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.

8. The Constitution however has not identified what qualifies under the term “compelling reasons.” The ordinary meaning according to *Thesaurus English Dictionary* of the word “compelling” is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning, it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend his trial.

9. It is true 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 are 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 that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond trial. Therefore, 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 set 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. 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/her release.

10. 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: -

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.

11. 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.”

12. 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—

- 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.*

13. 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:

- b) That the accused person is likely to fail to attend court proceedings; or*
- c) That the accused person is likely to commit, or abet the commission of, a serious offence; or*
- d) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or*
- e) That the accused person is likely to endanger the safety of victims, individuals or the public; or*
- f) That the accused person is likely to interfere with witnesses or evidence; or*
- g) That the accused person is likely to endanger national security; or*
- h) That it is in the public interest to detain the accused person in custody.*

14. 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. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. 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.”

15. In this case the opposition to the accused persons release on bond is four-pronged. Firstly, it is contended that the offence with which the accused is charged is punishable by death hence the accused is likely to be a flight risk. 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 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.”

16. The second ground was based on the allegation that there is likelihood of the accused persons interfering with the witnesses. According to the pre-bail report the victim’s statement clearly indicate that the victims are still bitter owing to the loss of their loved ones and that the accused persons are a threat to them, and might harm the only survivor of the incidence who is also a key witness in the matter after five members of the community were killed by the accused persons and their cohorts. I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & Others 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.”

17. The third reason advanced is that the accused persons are a flight risk. From the pre-bail report, it is very clear that the 1st accused person was arrested four weeks after the incidence at Kyumbi area after phone tracking whilst the 2nd accused person lacks a fixed abode. It is for that reason that I am satisfied that the two accused persons are indeed flight risks as the likelihood of their jumping bail is real. I would therefore agree with the position taken in **Republic vs. Nadifo Mohamed Abshir [2019] eKLR** in which bail was denied for the same reason.

18. The fourth reason advanced relates to the safety of the accused persons. It is elaborate from the pre-bail report that according to the local administration, the security of the accused persons will not be guaranteed as the incidence still spikes a level of aggression from the public and that they are at risk of being lynched if released to the community.

19. As I have stated above it is upon the prosecution to prove that there exist compelling reasons to justify the court in limiting the applicant’s otherwise constitutionally guaranteed rights. From the foregoing observations, there are compelling reasons warranting a denial of bond to both accused persons at this stage until the vulnerable witnesses have tendered their evidence after which they will be at liberty to seek to renew their bail request.

20. In the result, it is my finding that the application by the accused persons filed on 6/1/2021 lacks merit. The same is dismissed. The accused may seek to renew their quest for bond once the vulnerable witnesses have testified.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF JULY, 2021.

D. K. KEMEI

JUDGE