



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL CASE (MURDER) NO. E002 OF 2021

REPUBLIC.....PROSECUTION

VERSUS

JOHN WAWERU NDUNGU.....1ST ACCUSED

JOHN GITAU MURIITHI.....2ND ACCUSED

RULING

1. The 2nd Accused in this matter is jointly charged with the 1st Accused for the murder of Sarah Nafula Palanga on 9th December 2020. He, the 2nd Accused has applied for bail pending hearing.
2. The applicant's application is premised on the fact that: bail is a constitutional right only deniable for compelling reasons; he has been in custody now for 6 months, there is no cogent evidence that he is likely to interfere with witnesses; he has a family who are ready to stand surety for him; he is not a flight risk; and he has a known abode in Turasha Nyandarua County while the offence occurred in Gilgil in Naivasha.
3. The Applicant urges that bond on stringent terms can be granted and that he will comply including reporting to the police station and offering surety of Shs 500,000/=.
4. Bail is opposed by the State on the grounds that: the 2nd accused is likely to interfere or intimidate witnesses who are well known to him; that they live in the same area; that the murder was gruesome in that victim's body parts were severed; and that the 2nd accused has no fixed abode.
5. The State produced an Affidavit deponed by the Investigating Officer. It asserts, inter alia, that the accused are likely to interfere with witnesses since they live in rental houses where the suspects resided; that the accused knows most of the deceased's family members and that the gravity of the offence and the fact that the 1st Accused's/Respondent's confession to the offence is intended to be used against him.
6. The DPP urged the court to consider the **Bail and Bond Policy Guidelines**, in particular, **Clauses 2.2 (h), 3.1 (f) and 4.5** together with the Pre-Bail Report and the Investigating Officer's affidavit before making its decision.
7. The court has considered the representations of counsel on both sides and the documents filed namely; the Investigating Officer's Affidavit, the Pre-Bail Report and the Charge Sheet.
8. I, note, and it was pointed out by the defence counsel that the Investigating Officer's Affidavit and Pre-Bail Report contradict each other as to whether the accused had a physical or permanent address. The Investigating Officer alludes to the absence of accused's permanent address whilst the Pre-Bail Report shows that the accused has a permanent residence is Leleshwa Village, Turasha Sub-location where his family own land. On this issue, I accept the information in the Pre-Bail Report on this point.
9. On the question of interference with potential witnesses, I note that: it is asserted by the Investigating Officer that the witnesses are well known to the accused, which is confirmed in the Pre-Bail Report under the title Community's Attitude towards the suspect. The community fear that the accused's release would interfere with the case and their security could be at risk considering the seriousness of the offence faced by the accused.

10. According to the Pre-Bail Report, the Victim's family out-rightly rejected the idea of the accused being admitted on bond, expressing fear for their lives, as among them some are key witnesses. The report states the circumstances of the arrest and retrieval of the body of the deceased further causes the victims to fear for their lives.

11. In addition, I have considered the **Bail and Bond Policy Guidelines**. **Clause 2.2 (h)** provides as follows:

“2.2 (h) Safeguard the interests of victims of crimes in bail decision-making.”

12. **Clause 3.1 (f)** of the **Bail and Bond Guidelines** requires the court to consider the rights of victims and in particular that:

- Victim's views should be considered.
- Safety of the victims should be considered.
- Victims should be informed about bail conditions especially those designed to protect victims.

13. **Clause 4.9 (e)** of the **Bail and Bond Guidelines** deals with “*likelihood of interfering with Witnesses*” and provides:

“4.9(e) Likelihood of interfering with witnesses. Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if (i) there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and (ii) the court cannot impose conditions to the bail or bond to prevent such interference. For example, where the accused person has been provided with witness statements, and therefore knows the identities of the prosecution witnesses and the nature of the evidence that these witnesses will adduce at trial, there is a real likelihood that the accused person may contact the witnesses. The likelihood that such an accused person may contact witnesses “could probably inflict genuine fear and anxiety in the potential prosecution witnesses,” and therefore constitutes a compelling reason for the denial of bail. In this regard, defilement cases present a special challenge. The country is not only experiencing an upsurge in defilement cases, but many such cases are compromised as soon as accused persons are released on bail. This happens because the families of the accused person and the victim usually negotiate to settle the cases out of court. Some courts are dealing with this challenge by denying accused persons bail until witnesses, especially the victim, have testified in such cases. The courts have adopted the same approach in murder cases, particularly where the witnesses are closely related to the accused person.”

14. In this regard, it has been held that where there is “*a real possibility of the accused making contact with potential witnesses if granted bail. That could probably inflict genuine fear and anxiety in the potential prosecution witnesses.*” A finding on such contract or fear could form a compelling reason not to release the accused on bond. (See **Republic v Joseph Wambua Mutunga & 3 Others [2010] eKLR**).

15. Similarly, in **Republic v Lucy Njeri Waweru & 3 Others [2013] eKLR** the court stated that it is “*under obligation to do all in its power to preserve evidence in a case where there is danger of interference with witnesses or likelihood of destroying evidence.*” There, the court declined to grant bail.

16. But equally critically, the court must also take into account the interests of victims who, like accused person, also have constitutional right of protection under **Article 50 (9)** of the **Constitution**. To this end the Bail & Bond Policy Guidelines seek to implement the **Victim Protection Act No. 17 of 2014**. **Section 2** defines “*Victims’ as any person who suffers injury loss or damage as a consequence of an offence.*”

17. **Section 10** of the **Victims Protection Act** provides that:

“A victim has a right to—

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

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

(c) have their property protected.”

18. I have noted from the 2nd Accused's Pre-Bail Report that the victims express fear for their lives as they are key witnesses, should the accused be released early before the hearing process has started.

Disposition

19. Taking into account all the foregoing factors and the fact that counsel confirmed that the scene of the crime was Gilgil which counsel estimated to be a mere fifty kilometres away from the accused's home in Turasha, it does not appear to me that I can issue bond terms that place plausible restrictions on the accused which would seriously deter his contact with the witnesses or victims. In addition, the defence made no request for the re-location of the accused to another area.

20. In the circumstances, including the fact that the Pre-Trial has not been held, I am of the view that this court should give opportunity so

that it can hear from the victims in terms of **Section 10 (1) (a) (b) and (c)** of the **Victim Protection Act** before a determination is made on whether to grant bail and on what terms and conditions such bail should be granted, if granted.

21. Accordingly, a hearing date shall be set within forty five (45) days when the hearing of the appropriate victims shall be conducted so as to enable them to state their safety and intimidation concerns as victims and potential witnesses. The same shall then be taken into account in determining the bail application herein.

Administrative directions

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 19th Day of July, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Mr Wairegi for the 1st Accused
3. Mr Owuor for the 2nd Accused
4. John Waweru Ndungu - 1st Accused at Naivasha Medium Prison
5. John Gitau Muriithi - 2nd Accused at Naivasha Maximum Prison
6. Court Assistant - Quinter Ogutu