REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. E006 OF 2021

(CORAM: F.M. GIKONYO J.)

REPUBLIC

-versus-

PETER KAMAU THUKU

RULING

Bail Application

[1] The accused herein is facing a charge of murder contrary to ***Section 203*** as read with ***Section 204*** of ***the Penal Code***. On the 10th March 2021, the accused through his defence counsel Mr. Lemein applied to be released on bail pending the trial.

[2] The prosecution filed an affidavit sworn on 9th March 2021 by **PC Kenneth Muriuki** containing reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -

> ***i) That the accused is a flight-risk. They gave two reasons in support of this ground: (a) that, the accused was arrested while hiding under the bed inside the house of one of the witnesses in this case on 23rd December 2020; and (b) as the Applicant hails from Nyandarua County, Kipipiri Sub County and not in Enesampulai where the offence was committed, there is a risk of absconding if released on bond.***
>
> ***ii) That not only is there a likelihood of interference with witnesses, but that some of the witnesses have expressed fear that they will not be able to freely testify if the accused person is released on bail or bond.***

[3] Mr. Lemein for the accused urged the court to release the accused. He filed written submissions for the court to consider. Counsel cited provisions of **Article 49(1) (h)** of the **Constitution**, Section 123 of the CPC and Article 165 (2) (b) of the Constitution. Counsel also relied on the bail bond policy guidelines at paragraph 4.9 which sets out the various factors that the court may consider in an application for bail.

[4] According to Mr. Lemein, it is highly unlikely that the accused person will abscond court if granted bail/bond for fear of imposition of death sentence as the law is that other sentences may be imposed for the offence of murder. He cited the case of ***Francis Muruatetu & another Vs Republic and Other [2017] eKLR*** cited in ***Godfrey Ngotho Mutiso Vs Republic C.A. No. 17 of 2008*** and the high court in ***Joseph Kaberia Kahiga and Others Vs the Attorney General [2006] eKLR***. Counsel was of the view that, in any event, the accused is yet to be convicted and he enjoys the presumption of innocence until proven guilty under Article 50(2) of the Constitution. It is pre mature, if not impossible at this stage of the proceedings to engage in an appraisal of the prosecution evidence and determine which direction it will lead to. Also, no evidence has been tendered to indicate that the accused has previous criminal record and cannot therefore be relied upon as a ground of denying him bail/bond. Therefore, denying him bail would be making him undergo punishment before conviction. He relied in the case of ***Republic Vs Danson Mgunya & Another [20120] eKLR.***

[5] He argued further that it is not true that the accused person was arrested while hiding under the bed of one of the witnesses whose name has not been mentioned. The accused person in his statement recorded on 30th December 2020 stated that he was arrested at Enesampulai Trading Center.

[6] The accused person is a Kenyan citizen. The prosecution knows where he resides. The accused is known to be working for gain at Enesampulai Shopping Centre as a broker for the trucks intending to buy potatoes within Enesampulai area. See his statement dated 30th December 2020. The accused has no intentions of relocating from Kenya to any other country.

[7] The defence counsel stated that the prosecution has not given any tangible and concrete evidence of allegations that the accused will interfere with witnesses. There has been no complaint from any of the 7 prosecution witnesses of on any attempt by the accused person to

interfere with them. As a matter of fact, the accused has done everything asked of him to help with the investigations. He has recorded a statement to that effect. He relied on the case of ***Rep Vs Dwight Sagaray & Others High Court Criminal Case No 61 of 2012.***

[8] The defence counsel suggested that the court could impose conditions to safeguard 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.***

[9] The accused person undertakes not to interfere with witnesses and to obey all orders and directions that will be imposed on him. The accused person has been in custody for four months now. The prosecution has had ample time to complete their investigations and prefer further charges against the accused person if they so wished. Likelihood of further charges being preferred against the accused person cannot therefore be regarded as a compelling reason to deny bail and / or bond to the accused person. He cites the case of ***Ahmad Abolafathi Mohammad [2013] eKLR, Criminal Case No. 48 Of 2016 Rep. Vs Richard David Alden [2016] eKLR.***

[10] He took a swipe at the allegations that the life of the accused person may be in danger to be bare. The Enesampulai community where the accused works has not been interviewed by the probation officer and the accused person who was arrested at Enesampulai trading center on 23rd December 2020 has not reported that his life was in danger from any quarter. The alleged danger must be real and not merely subjective and speculative without evidence.

[11] A major consideration for detention of the accused person as a measure of protection is whether there is no less restrictive means to achieve the same objective of protecting the accused other than denial of bond. It is not unusual for the courts in such circumstances to impose such conditions as are necessary with a view of striking the proper balance between the accused person's constitutional right to bail and the interest of justice including the requirement that the accused person keep off certain localities; the paramount consideration being that they be on hand for their trial and when required. The relied in the case of **Republic Vs Robert Zippor Nzilu[2018]eKLR.**

[12] He concluded that the averments in the affidavit sworn by PC Kenneth Muriuki do not amount to compelling reasons that would warrant the denial of his constitutional right to bail. The continued incarceration of the accused has led to the accused untold hardship to him and his family. The accused undertakes at all times to attend this court for hearing of his case and to abide by all the directions that this court will impose on him. He urged the court to grant him favorable bail/bond terms.

ANALYSIS AND DETERMINATION

[13] Bail is a constitutional right under Article 49 (I) of the Constitution. The right is, however, not absolute as liberty may be denied where there are compelling reasons. Compelling reason must be of a nature that brings conviction upon the court to impose and justifies limitation of right in an open and democratic society under Article 24 of the Constitution which provides thus:

> ***1. A right or fundamental freedom in Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-***
>
> ***a) The nature of the right or fundamental freedom,***
>
> ***b) The importance of the purpose of the limitation,***
>
> ***c) The nature and extent of the limitation,***
>
> ***d) The need to ensure that the enjoyment of rights and fundamental freedoms by any* individual does not prejudice the rights and fundamental freedoms of others; and**
>
> ***e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."***

[14] It was aptly put in ***Republic Vs. Danson Mgunya & Another*** by Ibrahim J (as he then was) that the principle that the liberty of accused should only be limited where there are compelling reasons not to be released and it is the duty of the state to demonstrate the same, and even then each case must be decided on its own circumstances touch and context.

[15] And in ***R. V. Richard David Alden (2016) eKLR,*** Lesiit J succinctly summarized some of the important considerations by the court in an application for bail in the ***Bail and Bond Police Guidelines*** as follows: -

> ***"The Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set out under Section 123A of the Criminal Procedure Code. These general considerations are: the nature of the offence; strength of prosecution case; character of the accused and antecedents; failure by the accused to observe previous bail and bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is child offender; whether the accused is flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person."***

[16] On the balancing of rights and obligations of the accused, on the one hand, and interest of justice and rights of victims on the other hand for purposes of bail, Lesiit, J in the case above cited, further stated: -

"Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims."

Applying the test

[17] Has the prosecution established compelling reasons not to release the accused on bond? From the pre-bail report on record and the affidavit by the I.O, it is apparent that the bond application has been opposed on three main grounds namely; interference with witnesses, flight risk, and the security of the accused. I will consider these issues beginning with accused's own safety and security.

Accused's own safety and security.

[18] The investigating officer in his affidavit stated that the life of the Applicant is in danger as it is evident that the local community is angered by the killing of the deceased. The defence hears none of this and submitted that the Enesampulai community where the accused works has not been interviewed by the probation officer as borne out in pre-bail report filed herein. According to them, as at the time of his arrest at Enesampulai trading center on 23rd December 2020, the accused person had not reported that his life was in danger from any quarter. They suggest that, should need arise, a report will be made to the police who may take appropriate action.

Taking law in own hands

[19] Arguments such as I am hearing, depicts a society of the ruffians or Mahocks whose talent was to use all manner of cruel and torturous methods to inflict as much pain as possible and to kill anyone found in their way. Such was a society without law and order. The Enesampulai community is within the territorial jurisdiction of the Republic of Kenya- a nation governed by law and order under the Constitution of Kenya, 2010. I wonder where the said community derives its authority to harm or kill a suspect under trial. No one is above the law or should take the law in their hands. All are bound by the Constitution which reigns. See article 2 of the Constitution which states: -

2. Supremacy of this Constitution

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

[20] At this age and time, it is disheartening and depressing that a community or group of people will haughtily express desire to harm or kill a person under trial who is by law innocent until proven guilty. Is not such an epitome of a criminal mind? Can one notice any difference between such persons and avowed criminal? Any such act to harm or kill a suspect, should be liable to prosecution in criminal law. I have stated before, and I will state it again, that such actions are unlawful, barbaric and uncouth without any place in law and the 21st century. The community in question should let the law punish the accused. This should stop and my view is that, the ground that the security of the accused is threatened by the members of the public or victim family, should never be encouraged to be a ground for denial of bail; otherwise courts will inadvertently promote or condone violence, disorder and usurping of law by individuals or group of people.

[21] In any case, it is the duty of the state to ensure safety and security of its citizens including the accused person. The police should take appropriate measures to ensure security of the accused person. I therefore find the argument that the accused be detained for his own safety and security to be without any legal or factual basis and I reject it.

Interference with witnesses

[22] The prosecution alleges likelihood of interference with prosecution witnesses. On this ground the court in ***R. V. Jaktan Mayende & 3 others***, stated that:

"- In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010……Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice…if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused."

[23] See also ***R. V. Patius Gichobi*** where the court held that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of the Constitution. Accordingly, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence as to persuade the court to deny the accused bond. More jurisprudence on the point is found in ***R. V. Dwight Sagaray & 4 others, 2013 eKLR***, where the court stated that: -

"For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others."

[24] It has been held severally by the courts that for this ground to stand as a compelling reason, there must be proof of existence of such

interference or attempted interference (see ***Republic Versus Margaret Kemunto & another HCCR 84/2019, and Republic Versus Sarah Wairimu Kamotho HCCR 60/2019. Also, Republic Versus Paul Ndolo Kasyoka, HCCR 49/2019,)*** by this court.

[25] In the present case the investigating officer stated in his report that the applicant is likely to interfere with witness. The allegations were left at very high level of generalization and devoid of such succinct details which would paint a vivid picturesque of the threat made to and therefore, likelihood of interference with witnesses. Accordingly, the prosecution has not proved threats to or possibility of interference with witnesses. It bears repeating that, the court must be satisfied that threats were made and were of a nature that would *inter alia*, put the witness in a vulnerable position vis-à-vis the accused or put the accused in a position of influence over the witness or would instill fear in or prevent the witnesses from testifying.

[26] After carefully analyzing the opposing views on the issue of possible interference with witnesses, I find no cogent material before court to demonstrate actual or perceived interference with witnesses by the accused if released. The stringent standard set by the Constitution has not been met as to justify limitation of fundamental freedom or liberty of the accused on this ground.

Flight-risk

[27] The prosecution made two arguments in the affidavit of PC Kenneth Muriuki in support of the ground that the accused person was a flight-risk, namely; (i) that the Applicant is likely to abscond to join his family members in Nyandarua county Kipipiri sub- county and leave Enesampulai where the offence was committed; and (ii) that was arrested while hiding under the bed of one of the witnesses. The latter ground is neither here nor there, for the concerned witness was not named so as to provide the argument with power and grace. I reject the argument.

[29] Concerning his family hailing from Nyandarua County- this is not *per se* a ground to deny an accused person bail. In any event, police already know his home which is within Kenya, and is not where the crime was committed or home of witnesses. It would be monstrous to prevent the accused from vising his home merely because he comes from a different county from the host of crime scene. No attempt was made to show that the accused was planning to leave the jurisdiction of the court or had attempted or made arrangements to leave the country. For the above reasons stated, that ground is not sustainable. I will however factor in this fear in setting the conditions of bail.

[30] In the final analysis, I have found no compelling reason not to grant the accused bail. He is released on a personal bond of Kshs. 500,000/= with one surety of similar amount. He shall, however, not leave the jurisdiction of the court without leave of the court. And he will report to the relevant police station once every month with effect from August, 2021, until otherwise ordered by the court. Any default on any of these conditions will result into cancellation of the bond. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 14TH DAY OF JULY, 2021

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F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for the Respondent

2. Accused in person

3. Mr. Mumunya Lemein for accused

4. Mr. Kasaso – CA

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F. M. GIKONYO

JUDGE