



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KILGORIS
CRIMINAL CASE NO. E002 OF 2021
(CORAM: F.M. GIKONYO J.)
REPUBLIC.....PROSECUTOR
-VERSUS-
SIMON CHIRCHIR.....ACCUSED
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**. It is alleged that on 17th May 2019 at Mogor village in Mogondo Sub -Location, Transmara East Sub County within Narok County murdered **Richard Kibet Korir**.
2. On 31st May 2021, the accused through his defence counsel **Mulisa** orally applied for the accused to be released on bail pending the trial.
3. The bail application has been opposed by the prosecution. The prosecution filed an affidavit to oppose bond by **CPL John Anyimu** dated 31st May 2021. Defence counsel opted to submit orally in response to this affidavit.
4. The prosecution has advanced one ground why the accused should not be admitted to bond. That the accused is a flight-risk. They provided particulars; that the accused after committing the offence on 17th may 2019 has been on the run until when he was arrested on 23rd march 2021 after information was given by the members of the public. The court had issued a warrant of arrest on 13th January 2021. The accused was arrested after being involved in a road accident and was admitted at Tenwek hospital and members of the public who knew the accused alerted the police. According to the prosecution, if it was not for the accident the accused would still be on the run.
5. **Mulisa** for the accused urged the court to release the accused. He argued in the oral submissions that the affidavit lacks credibility in law and fact. That the arrest of the accused is not clear. The accused should be given the benefit pf doubt. That no evidence has been adduced to show that the accused has no fixed abode. In fact he has a family and relatives. He resides at Gorgor Abosi Bomet County with his three children.
6. That his father is willing to offer security of his son's attendance in court.
7. **Mulisa** continued to submit that the warrant of arrest talks of one Simon. There are so many Simon in the Republic. That the error is prejudicial to the accused and therefore he should be given the benefit of doubt.
8. That on the issue of the accident the investigating officer and the prosecution did not clarify on the same.
9. As regards the lower court record, **Mulisa** stated that they relate to other parties and offence. He therefore concludes that the prosecution has failed to show compelling reasons.
10. **Ms. Nyambura** for the state submitted orally that the date of the arrest is a typographical mistake. That the accused was arrested on or about 24/3/2021. That after the accused was discharged from the hospital they followed up on his whereabouts and noted that he went to Kericho. The father of the accused did not help the police yet he knew the whereabouts of the accused.
11. **Ms. Nyambura** further submitted that the accused was known by the name Simon in file no. 480 of 2019. Their file is clear on his name

and the order of warrant of arrest was issued by the magistrate.

ANALYSIS AND DETERMINATION

Bail/bond

12. Bail or bond has been subject of intense interrogation by scholars as well as judicial authorities and instruments. A string of judicial authorities on bail has now established some of the important matters a court of law should buttress in an application for bail, to wit:

- 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.
- 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 the decision taken on bail 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 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.

13. It is now abundantly clear that Bail/Bond is a constitutional right designed to afford the accused an opportunity to enjoy his liberty whilst guaranteeing his attendance in the trial. The Constitution requires terms or conditions of release on bond will be reasonable. But, I should state that reasonableness of terms or conditions of bail will be dictated by the circumstances of the case. In one case a free bond may be reasonable. In another, personal bond with surety or sureties may be reasonable. And so forth and so forth.

14. Bail or bond may however be denied on compelling reasons- reasons that bring conviction upon the court that releasing the accused on bail shall be prejudicial to the course of justice. For instance, absconding or interference with witnesses will not only impede the trial but will rattle administration of justice in the case. Of essence, however, bail should not be denied as a punishment to the accused; for the accused under Article 50(2) (a) of the Constitution enjoys the right to be presumed innocent until proven guilty.

15. See also the ***Bail and Bond Policy Guidelines*** at Paragraph 4:9 on some of circumstances that are relevant when considering bail application. These are:

- a. Nature of charge or offence and seriousness of the punishment.**
- b. The strength of the prosecution case.**
- c. The character and antecedents of the accused persons.**
- d. The failure of the accused person to observe bail or bond terms.**
- e. The likelihood of interfering with witnesses,**
- f. The need to protect victims of the crime.**
- g. The relationship between accused and potential witnesses.**
- h. The best interest of child offenders.**
- i. The accused person was a flight risk.**
- j. Whether the accused person was gainfully employed.**

16. Section 123A of the CPC also provides as follows:

“123A. (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 fulfillment 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;

The Constitutional test

17. Under article 49(1)(h) of the Constitution:

49(1) an arrested 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.

18. The prosecution must therefore prove that there are compelling reasons not to release the accused on bond. The phrase “compelling reasons” was considered in the case of **R vs. JOKTAN MAYENDE & 4 OTHERS[1]** where the court stated as follows:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very 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.”

19. In this case, the prosecution has adduced one ground which they believe is a compelling reason for which the accused may be denied bail, to wit; (a) he is a flight-risk.

Of Flight-risk

20. The ground relied upon by the prosecution in opposing bond to the accused is the fact that they have reason to believe that he is a flight risk. They have stated that, after committing the offence in 2019, the accused went into hiding to avoid arrest and charging with the offence. Whereas the defence counsel stated that the accused in case number 480 of 2019 is a different person, the truth of the matter is that the cases relate to same offence. That notwithstanding, the prosecution must prove the accused is a flight-risk.

21. According to them, the accused was being sought even through a warrant of arrest in case number 480 of 2019 as a principle offender in vain. They stated that the accused went into hiding and his father was aware of these events but did not assist the police with information of his whereabouts. The police only managed to arrest the accused after he was involved in a road accident and was admitted at Tenwek hospital whereupon members of the public alerted the police of his whereabouts. They used the information to track him down and arrested him.

22. The circumstances of this case show that the attendance of the accused during trial may not be guaranteed even with any amount of sureties. Possibility of absconding is real in this case. Accordingly, I find that the prosecution has proved that the accused is a flight-risk. Such is a compelling reason under article 49(1) (h) of the Constitution for which bail will be denied.

23. In the upshot, I find and hold that the prosecution has established a compelling reason to deny the accused bail. I therefore decline his request for bail.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF JULY, 2021

F. GIKONYO M.

JUDGE