



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE E015 OF 2021**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**OBED ALUVISIA KIMBO .....1<sup>ST</sup> ACCUSED**

**KENNEDY OWINO ODUOL ALIAS KANUTE .....2<sup>ND</sup> ACCUSED**

**RULING**

The 2 accuseds, **OBED ALUVISIA KIMBO** and **KENNEDY OWINO ODUOL** have made an oral application before this court that they be released on bail pending their trial Ms. Martha Waweru, appearing for both accuseds made their pleas before the court. It was generally submitted that bail is a constitutional right and that the accused are presumed innocent till they are proved otherwise. Further, that they are not flight risks. Counsel indicated that the 2 accused would be residing with their sister and mother respectively.

The prosecution, through learned counsel, Ms. Gikonyo, opposed this application. First on grounds that accused are likely to interfere with the witnesses. That the accuseds are in a well known criminal gang in Kawangware, and out of fear at least one eye witness has failed to come forth. That the lives of witnesses who are fellow boda bodas would be at risk should the accused be released on bond.

Counsel went further that one dangerous accomplice is yet to be arrested. The murder pistol is also yet to be recovered. Also that the pre-bail reports on the 2 accuseds clearly capture how the victims families oppose the release of the accused on bail. And lastly that both accuseds have no fixed abodes. Counsel urged that since the right to bail is not absolute, the application of the 2 accuseds ought to be dismissed.

I have considered the submissions of the 2 learned counsel for the 2 sides. I have also carefully considered the affidavit filed in opposing this application and those in support of it. I have also taken consideration of the 2 pre-bail reports filed in respect of the 2 accuseds.

Art 49(1)h of the constitution states

***“An arrested person has the 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.”***

From the above provision, it is clear that the right to bail is open to all persons accused irrespective of the nature of the charges that they face. There is however, a rider, that should there be in existence a compelling reason then the right to bail may be denied. This begs for the answer as to what exactly compelling reasons may entail.

Based on the bail-bond policy guidelines of the Judiciary, and the decisions coming out of the courts, the following circumstances have generally been considered to be compelling reasons amongst others:-

- ***Nature of the charges or offence and the seriousness of the punishment to be meted out in case of conviction.***
- ***The strength of the prosecution’s case.***
- ***Character and antecedents of the accused.***
- ***Failure to observe terms of bail in previous cases.***

- *Likelihood of interference with prosecution witnesses.*
- *Need to protect the victims*
- *Relationship between the accused person and potential witnesses.*
- *Whether the accused is a flight risk.*
- *Whether accused is gainfully employed.*
- *Public order, peace and security.*
- *Protection of the accused person.*

He who alleges must prove. It is therefore the responsibility of the prosecution to prove the existence of the specific compelling reason that would justify a denial of the right to bail to the accuseds.

The prosecution has raised a number of circumstances as constituting compelling reasons herein. I shall deal with them in the same order:-

**i) Likelihood of interference with witnesses:**

It is alleged that the accused would interfere with the witnesses, who are fellow boda boda operators. No evidence of any such attempt at interference was however shown to court. It was not even shown whether or not the accuseds and the witnesses are known to one another. In the circumstances, I am not convinced that the prosecution proved this ground.

**ii) That they have no fixed abodes:**

On this ground, the court has considered the affidavits filed by the sister of accused 1 and that of the mother of accused 2, both of which confirm where, in case of their release, the 2 accuseds would be residing. The 2 pre-bail reports filed herein also show the places of abode of the families of 2 accuseds.

**iii) That murder weapon is yet to be recovered:**

With respect to the submissions of counsel for the state, that fact that the weapon is yet to be recovered is an issue that falls squarely with the investigating arm. I am therefore not convinced that same can be used as compelling reason. And I hold the same with regard to the submissions that an accomplice is also yet to be arrested.

The totality of the above is that the prosecution has failed to establish any compelling reason herein. I therefore dismiss the objection of the prosecution. I allow the application for bail by the accuseds may be released on bail on the following terms.

- 1. Each may be on a bond of Kshs.2 million with 1 surety of a similar amount.**
- 2. In the alternative, each may be released upon payment of a cash bail of Ksh.300,000/=.**
- 3. Accused are ordered never to interfere with or have any contacts with any of the prosecution witnesses, directly or through any proxy, till this case is determined.**
- 4. The accuseds, shall, prior to being released, furnish the specific details of where they shall reside, they shall provide confirmation letters of their respective are chiefs.**
- 5. The accused are ordered, upon their release, to attend court at all times as the court may order from time to time, till this case is determined.**

**D. O. OGEMBO**

**JUDGE**

**3.9.2021.**

**Court:**

Ruling read out in open court (on line) in presence of the accused, Ms. Martha Waweru for accuseds and Ms. Kimani for the state.

**D. O. OGEMBO**

**JUDGE**

**3.9.2021.**

**Court:**

Case to be mentioned for allocation and for hearing date. Mention 27.9.2021 (Nzioka J.)