



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. E021 OF 2021**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**RIZIKI CHERONO ALI.....ACCUSED**

**RULING**

1. The accused, Riziki Cheron Ali, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya. Particulars of the offence are that on the 4<sup>th</sup> of June 2021, at Roco Apartments in Shanzu area within Mombasa County, jointly with others not before court murdered Herman Rouwenhorst.

2. In Count 2, the accused was charged with murder contrary to section 203 as read with Section 204 of the Penal Code Cap 63 of the laws of Kenya. Particulars of the offence are that on the 4<sup>th</sup> of June 2021, at Roco Apartments in Shanzu area within Mombasa County, jointly with others not before court murdered Evans Pole Bokoro.

3. According to the Affidavit sworn by the investigating officer No. 62024 Detective Reuben Mwaniki on 13<sup>th</sup> July 2021, a few reasons considered to be compelling were stated as to why the accused person should not be released on bail pending the determination/conclusion of the case. Under paragraph 8, the investigating officer stated that there was a high likelihood of the accused person interfering and intimidating the key prosecution witnesses if released on bail or bond. The reasons for this are that the four older children had recorded statements and were deemed to be vulnerable and key prosecution witnesses. Also, that there is a high likelihood that the accused person has so much influence on the children and if released on bail or bond there is a high possibility of interfering with them through inflicting real fear and anxiety. The investigating officer further stated under paragraph 12 that the accused person should not be granted bail for her own safety.

4. In the Replying Affidavit sworn by the accused person, Ali Riziki Cheron, on 26.7.2021, she prayed to be admitted to bail on the basis of her fundamental right, that there were no compelling reasons to deny her bail, that her rights had been violated where she had been kept in incarceration for over thirty (30) days with reasons for holding her having been the same since her arrest, and that she is unwell with acute ulcers. The accused person further stated that the children who are witnesses in the case recorded their statements with the knowledge and support of the accused before she was arrested but to date she has not asked them and does not know what they said and that the alleged fear of her interference is unsubstantiated and has no basis. Under paragraph 14, the accused person states that she takes responsibility for her security and that she is willing to accept any fair and reasonable conditions that may be imposed on the alleged perceived security concerns. Further, the alleged offended and aggrieved friends are unstated and that the deceased's friends were mainly non-citizen tourists. The accused stated that her arrest and confinement has been used to prejudice her which prejudice includes the deceased's brother Willem Rouwenhorst and that she prays that the investigators/DCI should not allow itself to be used to facilitate her dispossession in the guise of criminal proceedings.

5. In the Further Affidavit sworn on 29.7.2021 by No. 62024 CPL Reuben Mwaniki, the investigating officer stated that the accused person cannot be trusted while on bond. The reasons for this are that more suspects were arrested in connection with the offence with custodial orders having been granted by the court in Shanzu under Miscellaneous application E088/2021. Since the arrest of her accomplices, evidence shows that the accused authored the crime by planning, procuring and facilitating the perpetrators for her own benefit. Also, there is a marriage certificate and a birth certificate showing that the accused person was married to the deceased's brother and sired a child with him respectively. Further, that the accused person has not demonstrated that the medical facility at the prison cannot take care of her ailment, and that the issue of the accused being likely to be disinherited are outside the investigating officer's scope.

6. On 29.7.2021, counsels for the accused and the prosecution made oral submission in court on the issue of the accused being granted bail. Counsel for the accused made an oral application for the accused to be admitted to bail with reasons that the offence is bailable.

7. Mr. Muthomi, the prosecution counsel opposed the said application stating that bail is a constitutional right enshrined in Article 49(1)(h)

of the Constitution 2010. However, where there are compelling reasons then the right is not absolute. The constitution has not defined what compelling reasons are. However, the Judiciary Bail and Bond Policy Guidelines issued in March 2015 in particular page 16 and 17 where some considerations are provided where there is a likelihood of interference with witnesses, the accused may be denied bond. There must be strong evidence of likelihood of interference for court to deny bond. The affidavit sworn on 13.7.2021 and filed on 15.7.2021 under paragraph 8, the investigating officer has sworn that there are young children of the accused, 2 being her biological children. At the time the offence was committed, the children, the accused and 1<sup>st</sup> deceased in count 1 were living in the same house at Roco Apartments. All the children are prosecution witnesses and have recorded statements. They indicated accused was seen opening the gate on the material night and considering the tender years of the children, the court can find that there is real threat of interference. Mr. Muthomi submitted that there is a strong case for denial of bond and urged the court or the children to testify first.

8. Ms. Mwangeka relied on the case of *Republic v Toktan Mayende and 3 others* [2012] eKLR and *Republic v Dwight Sagaray and 4 others* [2013] eKLR and submitted that courts have agreed that the word compelling means forceful, strong, convincing and persuasive. Counsel submitted that there is no strong bond that exist like one for the mother and child which bond is susceptible to powers of persuasion and influence. Ms. Mwangeka also relied on the case of *Republic v Joseph Kuria Irungu and Another* [2018] eKLR where the court listed compelling reasons as set out under section 4.9 of the Bail and Bond Policy Guidelines. The court added that the impact which grant of bail will have should be considered also. Ms. Mwangeka argued that the law on witness interference was clearly set out in *Republic v Fredrick Ole Leliman and 4 Others* [2016] eKLR where the court held that all required to be shown is potential influencing compromised or inducement of a witness either directly or indirectly with the aim that the witness will not give evidence in a particular manner. Accordingly, counsel urged the court to find that the children's fear of seeing the accused out on bond when they have crucial evidence poses a real threat. Thus sufficient reason for the witness to give evidence in a particular manner and/refrain from testifying consequently frustrating the prosecution's case.

9. Mr. Katwa, learned counsel for the accused, submitted that bail is a right and it is only when there are compelling reasons it can be denied or granted on conditions. He argued that the present case, there are no compelling reasons and even if the court finds that there are, there are exceptions being the accused is unwell, she is suffering from ulcers which has compromised her health. She is also a mother of five (5) children, two (2) biological and three (3) for her brother in-law who is in Netherlands because their mother died in 2012. Learned counsel submitted that deciding whether or not to grant bail is a discretion of the court as was held in the case of *Republic v Joseph Kuria Irungu* [2018] eKLR.

14. It was submitted by Mr. Katwa that for the court to determine that bail will be denied, it must be established that burden has shifted to the accused and that there are undeniable grounds to deny bail. He also relied on the case of *Republic v Dwight Sagaray and 4 others* [2013] eKLR where the court defines what constitutes compellable grounds. On the issue of interference, the accused was arrested on 24.6.2021 and she has been in custody since then. The three children recorded witness statements and the last statement was recorded on 7.6.2021. This shows that when the three (3) children told the accused that they were required to go and record statements, she facilitated them and never asked what they recorded. The accused had all the opportunity to interfere with the children if she wanted and she was all along with the children before she was arrested. Reliance was placed in the case of *Joseph Kuria Irungu and Another* [2018] eKLR when the court held that there was no evidence of attempted influence or interference with witnesses when accused had a window to interfere. He also relied on the case of *Republic v Dwight Sagaray and 4 others* (Supra) where it was held that the prosecution should place material evidence as to actual interference and the court should be strongly convinced that there should be undeniable compelling reasons to interfere.

11. Counsel submitted that there is a possibility that the accused is innocent. Therefore, the paramount consideration is whether she will attend court. He relied on Article 53(1)(e) of the Constitution which requires that anyone dealing with any situation must protect the institution of the family unit and for this reason alone, this court should grant bail. In the case of *Republic v Richard David Alden* [2016] eKLR, Lesiit, J. held that mere relationship is not sufficient evidence of interference.

12. In the issue of a strong case, the prosecution alleged that telephone calls were made between Mary, Rashid and Riziki. The said Mary has given her telephone number and that of Rashid, the alleged perpetrator but that of Rashid is not captured. It is alleged, that the communication went on from May 2021 to 3.6. 2021 when the murder was committed. He submitted that the prosecution intended to persuade the court of a strong case, they had a duty to give the phone number of Riziki. It is therefore clear that the prosecution may have a case but not strong enough to warrant bond denial.

13. Mr. Katwa submitted that Mary's story about planning is hearsay since she said that Riziki stepped aside to talk to Rashid. The statement from Rashid together with the alleged photos of bedroom taken by Rashid are missing. There is no strong case and even assuming that the prosecution had a case, the Constitution is clear that all offences are bailable.

14. Mr. Katwa submitted that they are surprised that the certificate of marriage between the accused and her brother-in-law both dated 26.9.2009 both happened at Paradise Hotel. The certificates bear the same serial number 039044, the marriage is presided over by the same person and witnessed by the same witnesses and the presiding officer is from the Office of the Registrar General. However, it is not indicated where the marriage certificate was obtained from and that the accused signed the same certificate. Therefore, counsel submits that they are curious as anybody else to know how the certificate was fabricated. The Certificate of Birth of Anne is not indicate where it was obtained from and it has not been alleged that the accused made it. Reliance was placed in the case of *Republic v Richard David Alden* (supra) where the court held that forged documents are not reasons for denying bail.

15. It was submitted by counsel that in the event that court decides that the children should testify first, the accused persons mother is based in Eldoret where she can stay until the children testify before she resumes occupation of her apartment. That the prosecution has been saying that they intend to place children under protection but the same has now been abandoned. Accordingly, counsel urged this court to find that no compelling reasons happened to deny bail.

16. According to the Children's Report, it is in the public domain that some of the children could have vital information implicating some suspects on the murder hence potentially placing them as children in need of care and protection. Anne, the eldest child, revealed that the

accused person's family had come to their house immediately after her arrest. Mr. William, the deceased's brother instructed them to move out as the children were complaining of their threats. Currently, some of the children are residing in one of the deceased's apartments in Bamburi as they wait for progress in this matter. Anne and the house help Sara however claimed that despite the restriction to visit the household, the accused's mother, sister and brother have attempted to reach out to them. Anne has however instructed the caretaker not to let them into the compound. In the recommendations, it was stated that there are deliberate attempts to influence the children who are witnesses by the suspect's family.

17. According to the Pre-bail Report, the family of the accused owns land that they are willing to use as collateral in this matter. The mother to the accused person known as Monica Bitok is willing to stand surety for her. In conclusion, the accused is not a threat to the community. She has a strong family support. She has children who depend on her although, she may not access them in this case as they are witnesses in this matter. She is a Kenyan citizen and has an active passport. Following the death of her husband there may be issues relating to succession which may need her participation, custodial remand may compromise her involvement in the same. She understands her obligations to court and is willing to follow through. She has been warned not to interfere with witnesses in any way. The court may consider releasing the accused on favourable bond terms.

### **Analysis and Determination**

18. I have considered the bail and/or bond application together with the affidavits in support and in opposition thereto. I have also considered pre-bail report and the Children Officer's Report and the issue that arises for determination by this court is:

- i. Whether the accused person when released on bond is likely to interfere with witnesses two of whom are her biological children and three stay with her as their guardian.
- ii. Whether the certificate of marriage and certificate of birth annexed to the Further Affidavit of the Investigating Officer are sufficient proof that the accused person is not trustworthy.

19. **Article 49 (1) (h) of the Constitution of Kenya 2010** provides that 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.”**

20. **Section 123A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya** states that:-

**(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**
- (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.**

21. In the Bail and Bond Policy Guidelines, under paragraph 4.9, it is restated that:-

**“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”**

22. The question would be whether in balancing the rights of the Accused Persons and the interests of justice, in the circumstances of this case, there are compelling reasons to warrant the denial of bail at this stage in the trial.

23. In *Republic v William Kipkorir Kipchirchir & Another* [2018] eKLR, the court held as follows:-

**“...intimidation, interference and threatening of witnesses are serious matters and they are compelling reasons where evidence of such intimidation, interference or threats is provided to the trial court..... in the absence of the evidence to support the same, these remain just mere suspicions and fears harboured by the prosecution ....”**

24. In Republic v Joseph Thiongo Waweru & 17 Others [2017] eKLR states as follows:-

**“The Constitutional standard for denying bail is “compelling reasons” test. The burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify denial of bail. Our emerging jurisprudence on the question is clear as to the kind of evidence needed to establish the “compelling reasons”: the evidence presented must be “cogent, very strong and specific evidence” and that mere allegations, suspicions, bare objections and insinuations will not be sufficient.”**

25. It is true that the accused and the children who are witnesses in this matter were residing in one place prior to the murder of the deceased. The prosecution have claimed that there is a strong likelihood of interference with the witnesses because of the strong bond that exists between a mother and her children which bond makes the children susceptible to powers of persuasion and influence and that the accused has the potential to influence, compromise and induce directly or indirectly to give evidence in a particular manner.

26. The Children’s Officer carried out an inquiry and interviewed Anne Rouwenhorst, the niece to the deceased and their house help and she told them that it is the accused person’s family that went to the house immediately after her arrest. She also said that the accused person’s mother, brother and sister have attempted to reach out to the two children but the caretaker has been instructed not to let them in. The accused person’s biological children were not interviewed because they were in school, the children’s officer recommended that the allegations that there are attempts to influence the children’s testimony should be investigated. There was no report that the accused person had tried to reach out to the children in person or through her family members.

27. The pre-bail report on the other hand, concluded that the accused is not a threat to the community although she is aware that although her children are witnesses, she may not be able to access them until they testify and that she understands her obligations in case she is released on bond. In consideration of the fact that the investigating officer has not proved that the statements recorded by the children were influenced by the accused despite the fact they were in her custody prior to her arrest, this court finds that the fear that she is likely to interfere with them has not been proved.

28. In regard to the allegations of forged certificate of marriage and certificate of birth, the prosecution did not give evidence as to their source and it will be necessary to verify the same before attributing them to the accused person.

29. In conclusion, this court finds that the accused person is entitled to a release on bond on the following terms:-

- i. The accused shall execute a bond of two million shillings (Kshs. 2,000,000) with two sureties of a similar amount.**
- ii. The accused is restrained from accessing Roco Apartments in Shanzu where the children in question reside without the authority of the court.**
- iii. The accused person is restrained from contacting, interfering or intimidating any witnesses and more specifically the children in question whether directly or indirectly.**
- iv. Upon release on bond, the accused person shall reside with her mother Monica Bitok in Uasin Gishu where she will be reporting on a weekly basis to the nearest DCI offices.**
- v. Prior to her release on bond, the accused shall deposit her passport with the Deputy Registrar at High Court in Mombasa.**
- vi. Mention on 12.10.2021 for consolidation**

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**In the presence of:-**

Ben- Court Assistant

Ms. Muthoni and Ms. Keya for the DPP

Mr. Kigen for the Accused

Mrs. Kipsang Advocate for victim

Accused present in person

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**