



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL CASE NO. E012 OF 2021

REPUBLICPROSECUTOR

VERSES

JOSEPH WAWERU KAFUTE.....1ST ACCUSED

EAVINE SUMBA alias BLACKY.....2ND ACCUSED

RULING

1. **Joseph Waweru**, the 1st Applicant(1st Accused) and **Eavine Sumba alias Blacky**, the 2nd Applicant (2nd Accused) through a Notice of Motion dated 2nd June, 2021, seek to be released on bail pending trial on reasonable bond or bail terms. The substratum of the application is that the accused persons are entitled to favourable bail terms. They reside at Baba Dogo with their families, they don't have previous records and are not a flight risk as both of them do not own passports; they are not capable of interfering with witnesses; they are incapable of disturbing public order or undermining peace. They are willing to attend court sessions if called upon, there has been no contrary report that they have not been co-operating with investigators and they have relatives who will guarantee their attendance.

2. Further, it is urged that both accused persons are students. The 1st Accused was alleged to be a form 3 student at St. Alice High School while the 2nd Accused was stated to be a form four student who had been scheduled to sit for KSCE examination but did not. They called upon the court to consider the factor of Education and underlying medical condition they were alleged to have. That the 1st Accused had tuberculosis while the 2nd Accused contracted Covid 19 while in custody.

3. This court has been urged to consider the rights of the accused persons to be presumed innocent until proven guilty so as not to be subjected to pre-trial detention. That in determining bail bond, the court should balance between the rights of the accused and justice, and also **Article 20(3)** of the Constitution. And, where compelling reasons are alleged, they should be demonstrated with convincing evidence.

4. The State through **No. 82026 Corporal Christopher Samoei** opposed the application. It was urged that following allegations that the accused persons were in school, the officer visited St. Alice High School and following preliminary investigations conducted, he found that the accused were not students but touts within Baba Dogo area. That there has been an attempt to interfere with witnesses and a statement to that effect has been recorded by one of the prosecution witnesses as the mother to one of the accused persons has been sending her emissaries with a view of not testifying. That where witnesses are intimidated by relatives of the accused persons the family of the deceased can only be defended by the court.

5. The accused persons are alleged to have committed a felony. **Article 49 (1)(h)** of the Constitution provides that:

“ 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.”

6. The afore stated provision of the law gives the court the discretion to determine whether or not to grant bail. In that regard I note that although bail is an Accused person's constitutional right, it is not absolute.

7. Considerations in determining whether or not to grant bail are set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at page 25 which provides as follows:

“a. The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

- a) That the accused person is likely to fail to attend court proceedings; or**
- b) That the accused person is likely to commit, or abet the commission of, a serious offence; or**
- c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or**
- d) That the accused person is likely to endanger the safety of victims, individuals or the public; or**
- e) That the accused person is likely to interfere with witnesses or evidence; or**
- f) That the accused person is likely to endanger national security; or**
- g) That it is in the public interest to detain the accused person in custody.”**

8. In the Nigerian Supreme Court case of *Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006*, a criteria to be considered in granting bail pending trial was set as follows:

- “(i) The nature of the charges;**
- (ii) The strength of the evidence which supports the charge;**
- (iii) The gravity of the punishment in the event of conviction;**
- (iv) The previous criminal record of the accused if any;**
- (v) The probability that the accused may not surrender himself for trial;**
- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
- (vii) The likelihood of further charges being brought against the accused;**
- (viii) The probability of guilty;**
- (ix) Detention for the protection of the accused;**
- (x) The necessity to procure medical or social report pending final disposal of the case...”**

9. In the case of *Republic vs. William Mwangi Wa Mwangi [2014] eKLR Muriithi J.* held that:

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

10. The Constitution does not define the term “Compelling reasons”. But, generally a compelling argument would be something that is in accordance with the fact or some reality. In the case of *Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009* the court defined the term “compelling reasons” 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.”

11. From a reading of decided cases, the most important test is whether the Accused will turn up for trial. The presumption of innocence while the Accused is yet to be found guilty while being considered, the interest of justice must also be weighed against the Accused’s right to liberty.

12. The bail information report filed by the Probation Department following social inquiry carried out shows that the 1st Accused, aged 23 years who was a student at St. Alice Secondary School dropped out in 2015 due to financial constraints when his mother developed a heart condition and family resources were depleted. As a result, the Accused started touting at Baba Dogo stage. He is single, but, a father of a two-year-old girl. The local administration, was of the view that the 1st Accused belongs to a criminal gang that harass and rob people. That

their arrest did result into disappearance of most of their accomplices hence calm returning in the area, therefore, release of the accused will result into an uproar within the community that is likely to cause instability and disturb public peace and security.

13. With regard to the 2nd Accused, aged 21 years old, he was a form four student at Fanikiwa Mixed Secondary School prior to his arrest. Following social inquiry carried out, the local administration alleged that just like his co-accused he belonged to a criminal gang, although the representative of the International Service Voluntary Association that has sponsored his education since primary school were of the view that he was a person of good conduct.

14. The victims in the matter were alleged to have been hostile to an extent that they declined to avail themselves for the interview.

15. It is a legal principle that an accused person is not guilty unless proven guilty. In **R vs Oakes [1986] 1 R.CS** it was held that:

“The presumption of innocence lies at the very heart of the criminal law and is protected ...this presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major International human rights documents...”

16. Therefore, prior to the case being proved, an accused person’s liberty should not be deprived on flimsy reasons, it must be on cogent evidence. On the other hand, the State that apprehends the suspect must strenuously advance the interests of the victim. For that reason, a balance must be struck between the cause of an accused person and the interests of the victim(s) of the offence. In the instant case the victims of the offence having been hostile to officers who were conducting a social inquiry, their views have not been brought the attention of the court.

17. The paramount consideration which the court should peg on its consideration as to whether or not an accused should be released on bail is, therefore, whether he will turn up for trial. It is stated that since the accused persons have no passports, they cannot abscond. Being in possession of a passport may not necessarily be a recipe to abscond as there are a myriad of cases where individuals abscond and become fugitives of justice within the country. In the instant case, however, it has not been demonstrated that the accused persons are flight risks.

18. It is also urged that that there is a possibility of the accused interfering with witnesses. The integrity of witness evidence must be preserved therefore it would not be right for any witness to be interfered with. But, it is not enough to allege that there will be interference, this should be demonstrated. And, where what is stated remains mere allegations, if released on bail, conditions must be set to be adhered to by the accused person.

19. The case herein being murder, is a serious one which attracts a grave punishment in case of a conviction. However, the peculiarity of the matter is the fact of the accused persons being young adults who may continue with education if granted the opportunity, it will therefore in the interest of justice for bail to be granted.

20. The upshot of the above is that, each Accused/Applicant is granted bond of Ksh. 500,000/- with two sureties of a similar sum. During pendency of the case, upon being released from custody, they are barred from interacting with witnesses who have recorded statements. In event that they engage in activities alleged by the local administration, the prosecution will be at liberty to apply for cancellation of the bond.

21. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 16TH DAY OF SEPTEMBER, 2021.

L. N. MUTENDE

JUDGE