



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO.E006 OF 2021

REPUBLIC PROSECUTOR

VERSUS

DAVID GATHURA M'IKINITIA Alias DAUTI.....ACCUSED

RULING

1. On the 3rd February 2021, **David Gathura M'ikinitia Alias Dauti**, the accused, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He pleaded not guilty to the said charge, then made an application for bail pending trial which was vehemently opposed by the prosecution. The opposition prompted the court to call for the pre-bail report and an affidavit in opposition to bail. The investigating officer, one David Ng'ang'a, swore the said affidavit on 21/5/2021. In the affidavit he contends that after the alleged murder on 30/6/2020, the accused went into hiding only to be arrested on 25/1/2021. He is thus fearful that if the accused is released on bail, he will endanger the safety of the witnesses given the close proximity of their homes. He believes the accused is a flight risk, as he has been reliably informed that the accused family was planning on facilitating him to escape to a neighboring county, to defeat the course of justice.
2. Mr. Maina for the state and Mr. Kirimi for the accused made rival oral submissions on 22/7/2021, each supporting his stand.
3. I have anxiously considered the application, the pre-bail report and the affidavit in opposition to the application. Article 49 (1) (h) of the Constitution provides that an accused person has a right to be released on bond or bail on reasonable conditions pending the trial, unless there are compelling reason not to be released.
4. The prosecution whilst opposing the application for bail has in the affidavit sworn by the investigating officer listed a number of reasons, which they term as compelling reasons. The advanced reasons are that the accused is a flight risk and that he will interfere with the witnesses. I note that bail is a constitutional right which is not absolute.
5. Section 123 A of the Criminal Procedure Code provides the circumstances to be considered by a court whilst considering granting bail as follows:

“(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;”

6. The accused faces a charge of murder which is a serious offence carrying the maximum sentence of death. Whereas there is an apprehension by the prosecution that the accused might not turn up for trial if released on bail. To the contrary, there are recommendations made in the pre-bail report that favourable to the accused being admitted to bail. This court proceeds from the standpoint that chances of an accused absconding can be addressed adequately by the terms of bond to be imposed by the court. Such chances per se, should not be the reason to deny an accused the right to bail/bond. I do not consider the apprehension of flight risk as a compelling reason not to grant bail/bond. In the instant matter, I do note that the accused was only arrested about 7 months after the alleged offence took place and the prosecution pitches its opposition that there is a basis to deem him a flight risk. On the other hand, the accused countered the accusation with the contention that he was never arrested but did surrender himself to the police when he learnt that they had been looking for him.

7. Having considered the material placed before the court and the applicable law on the matter, I take the view that bail being a constitutional right ought not be denied on flimsy or unproved allegations. I am guided in this position by the decision of the court of appeal in **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR** where the Court stated: -

“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”

8. In this matter, the allegations by the investigating officer that the accused may be aided to escape to an unnamed neighbouring country and that he will interfere with witnesses have not been supported by any cogent fact. I consider the same flimsy and not satisfying the requirement for compelling reason.

9. Considering the fact that the accused is faulted for having disappeared after the offence, but without demonstration of efforts made to trace him, coupled with his uncontroverted assertion that he did not disappear but submitted to the police voluntarily, I do find no reason to decline granting bail. There is equally no real threat of interference with the witnesses if the accused is released on bail.

10. The upshot from the foregoing analysis is that, the application for bail is allowed. The accused may be released on own bond of Kshs 250,000 with one surety in the like sum. In the alternative, he may be released on cash bail of Kshs 150,000.

11. To address the fear of interference with witnesses, he is directed not to visit or contact the prosecutions witnesses, by whatever means. If at any time, during the pendency of this matter, he shall breach this term of the bond, the counsel is directed to advise him that the court shall not hesitate to cancel his bond/bail.

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY, BY MS TEAMS, THIS 14TH DAY OF SEPTEMBER 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Maina for state

Mr. Hiram Kiririmi for the accused

PATRICK J.O OTIENO

JUDGE