



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. E030 OF 2021
PAUL OTIENO OKOTH.....APPLICANT
VERSUS
REPUBLIC RESPONDENT

RULING

1. The accused, *Paul Otieno Okoth*, faces a charge of murder contrary to section 203 as read with *Section 204* of the *Penal Code*. The particulars thereof allege that on the night of 31st March 2021 at around 21:30 hours at Pipeline Kware area, in Embakasi within Nairobi County, he murdered *Henry Mburu Njeri*.

2. Accused took plea on 4th May 2021 and denied the charge. On the same date, the prosecution through learned state counsel *Ms Gichuhi* informed the court that it was opposed to admission of the accused to bond pending trial whereupon the court (*Hon LesiitJ*) directed the prosecution to file an affidavit detailing reasons for opposing bond or bail. An affidavit sworn by *PC Charles Macharia* who described himself as the investigating officer was subsequently filed on 12th May 2021.

3. To counter the claims made by the prosecution in the affidavit sworn by *PC Charles Macharia*, the accused filed his affidavit on 17th August 2021 in support of his application for bond pending trial.

4. At the hearing, learned counsel *Mr. Thabi* who held brief for *Mr. Otieno* for the accused and learned prosecuting counsel for the respondent *Ms Maina* chose to prosecute the application by way of oral submissions. In his submissions, *Mr. Thabi* emphasized that the accused has a constitutional right to be admitted to bond or bail pending trial unless the prosecution demonstrated compelling reasons to justify denial of that right. He reiterated the accused's denial in his supporting affidavit that he was a flight risk as alleged by the prosecution through the investigating officer. He reinforced the accused's claim that he was not arrested and that he was the one who willingly presented himself to Emali Police Station after he learnt that the police were looking for him.

5. Counsel further submitted that the duty to prove existence of compelling reasons lay on the respondent; that the only reason given by the respondent in opposition to bond in this case was that the accused was a flight risk which claim had not been proved. He invited the court to appreciate that the accused was presumed innocent until proven guilty and urged me to allow the application.

6. On her part, *Ms Maina* in her submissions in opposition to the application relied on the affidavit sworn by the investigating officer and averred that accused should be denied bail because he was a flight risk. To expound on this claim, counsel submitted that after the offence was committed, the accused disappeared to Makueni, switched off his phone and later surrendered at Emali Police Station. Further, counsel reiterated paragraph 11 of *PC Macharia's* affidavit in which it was deposed that if released, accused was going to interfere with witnesses since they are known to him being his neighbours. She invited me to note that the accused was charged with a serious offence and that though *Article 49 (1) (h)* gave him the right to bail, the right was not absolute. It was subject to existence of compelling reasons.

7. I have carefully considered the application and the rival submissions made by learned counsel on behalf of the accused and the respondent. I agree with both counsel's submissions that the accused's constitutional right to bail enshrined under *Article 49 (1) (h)* of the *Constitution* is indeed not absolute but is limited by existence of compelling reasons which would militate against the grant of that right.

8. The constitution does not however define what constitutes compelling reasons but leaves it to the interpretation of the court depending on the facts and circumstances of each case. The phrase "**compelling**" is defined in the *Oxford English dictionary* as "**powerfully evoking attention or admiration**".

From this plain meaning, it is clear that for the prosecution to demonstrate compelling reasons, it must lay before the court cogent evidence that would convince the court that if admitted to bond, the accused was likely to abscond or to be involved in acts that would undermine the

administration of justice.

9. The primary consideration that should guide the court in deciding whether or not to grant bond or bail is whether if released, the accused will attend the court whenever required or will abscond.

Other considerations are as contained in *Section 123A* of the *Criminal Procedure Code* and the *Bond Policy Guidelines* which include the following:

- i. The likelihood of the accused person interfering with witnesses.
- ii. The need to protect the victim or victims of crime.
- iii. The relationship between the accused and potential witnesses.
- iv. Whether accused is a flight risk.
- v. Whether the accused is gainfully employed.

10. In this case, the prosecution's claim that the accused is a flight risk is disproved by its own admission that accused was arrested after he surrendered himself to the police at Emali Police Station.

The claim that the accused is a flight risk is not borne out of the facts deposed in *PC Macharia's* affidavit considering that it is averred that the offence was committed on 31st March 2021 and the accused surrendered to the police station hardly two days later on 2nd April 2021.

The act of the accused surrendering to the police a few days after the offence was allegedly committed instead of waiting to be arrested is conduct that does not demonstrate a predisposition to abscond trial.

11. Further, the accused has maintained that he is gainfully employed as a mechanic and has given details of his place of abode and work place which details have not been contested by the prosecution.

It is thus my finding that the prosecution has failed to demonstrate that the accused is a flight risk.

12. Regarding the claim that the accused is facing a serious offence, this is indeed true considering that the accused is facing a serious charge of murder. However, under *Article 49 (1) (h)* of the *Constitution*, all accused persons are entitled to bond or bail pending trial irrespective of the gravity of the offences preferred against them unless no compelling reasons are given that would warrant denial of the exercise of that right. Moreover, an accused person has a constitutional right to be presumed innocent until proved guilty.

13. Lastly, the claim that the accused is likely to interfere with potential prosecution witnesses has not been substantiated by any evidence. No material has been placed before me to demonstrate that the proposed witnesses are in fact the accused person's neighbours and how the accused is likely to interfere with them. It is important to note at this juncture that interference with prosecution witnesses would constitute a compelling reason not to grant bond or bail considering that it goes to the root of the trial and may lead to subversion of justice. However, the claim that the accused if admitted to bond was likely to interfere with witnesses must be proved by way of evidence before it can form the basis for denying an accused person his right to bond or bail otherwise the prosecution would be asking the court to speculate. See: ***Panju V Republic, [1972] EA 284.***

14. For the foregoing reasons, I find that the prosecution has failed to establish to the required standard that there are compelling reasons in this case to justify denial to the accused of his constitutional right to bond or bail pending trial. I accordingly allow the application and direct that the accused shall be released upon signing bond of KShs.500,000 together with one surety of like amount. The surety shall be approved by the Deputy Registrar, Criminal Division.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2021

C. W. GITHUA

JUDGE

In the presence of:

Applicant present

Ms Chege holding brief for Ms Maina for the respondent

Mr. Otieno for the applicant absent

