REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO EO23 OF 2021

DOUGLAS OKWII MARCUS.....ACCUSED/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....RESPONDENT

RULING

Pursuant to the provisions of articles 49 (1) (h) of the 2010 Constitution of Kenya and section 123 of the Criminal Procedure Code (Cap 75) Laws of Kenya and all enabling laws the applicant has applied for bail pending his trial on two counts of murder contrary to section 203 as read with section 204 of the penal code (Cap 63) Laws of Kenya.

The applicant's application is supported by eight grounds that are set out on the face of the notice of motion and an eleven paragraphs supporting affidavit deposed by the applicant's counsel.

The major grounds in support of the application are as follows. The applicant was taken to the lower court in Makadara magistrate's court on 18/03/2021 wherein the police sought and obtained 14 days within which to complete their investigations. The offence was allegedly committed on 14/03/2021 and on 17/03/2021 the applicant presented himself to the police for interrogation and was subsequently detained.

The applicant has been in detention since 17/03/2021. He was taken to court for plea on 12/04/2021. He then pleaded not guilty. The applicant has been in service as a police officer for over 20 years.

In addition to the grounds in support of the application, counsel for the applicant (Mr. Roberts Kiprotich) has deposed to an eleven paragraphs supporting affidavit with the following being the major averments. The accused has been in custody since 17/03/2021and to date the respondent did not raise any allegations of threats to witnesses and interference with them. The applicant is not a flight risk and is still a serving police officer.

The other remaining averments have been raised as grounds in support of the application and it is unnecessary to replicate them.

The submissions of the applicant.

The applicant through his counsel (Mr. Khaminwa and Mr. Kiprotich) filed written submissions in addition to highlighting them orally in court.

Counsel submitted that the applicant co-operated with the police during investigations including presenting himself to the police for interrogation purposes. He further submitted that there are no compelling reasons to deny the applicant bail.

He has further submitted that the respondent has not placed before the court material to demonstrate that the applicant interfered with the witnesses. Additionally, counsel has also submitted that the respondent has also not placed before the court material to demonstrate that the applicant has threatened witnesses either personally or through a proxy. And if through a proxy it should be demonstrated that the proxy was acting on behalf of the applicant.

Counsel has also submitted that the applicant is in gainful employment. He also submitted that the cardinal principle to consider in an application of this nature is whether the applicant will turn up for his trial if he is released on bail and whether he is likely to abscond if released on bail. Counsel also submitted that the applicant is presumed innocent until proven guilty.

In the course of oral arguments counsel for the applicant urged the court to rule as unconstitutional the social report of the probation officer.

The case for the respondent

The respondent filed a 22 paragraphs replying affidavit through the investigating police officer (Paul Njihia Karung'o) in opposition to the application.

He has deposed to the following major matters. He is attached to the Independent Policing Oversight Authority (IPOA), which is the investigating agency in this case. The applicant is still a serving police officer attached to Railways Police Unit, China Road and Bridges Construction (CRBC) section 11 Camp situate at Utawala in Nairobi. When this incident occurred the applicant was based at that section. The applicant still has access to the firearms and exercises police functions including detention of persons and property.

The applicant was issued with an AK 47 rifle serial number 60035034 and was loaded with 30 rounds of ammunition and after recovery of one fired bullet cartridge at the scene of crime it was submitted to the ballistic examiner. The examiner found that the spent cartridge was fired from the AK 47 that was issued to the applicant.

The applicant has access to the firearms at the Kenya Railways Police Unit "*and that fact continues to cause valid panic among the civilian witnesses whom he knows very well and are based where the accused committed the offence."*

Furthermore, the "*interests of the victims should be protected by this court and the release of the accused on bail or bond would be prejudicial to them*."

The deponent has further deposed that some witnesses received threats and intimidation from persons suspected to be agents and proxies of the applicant during the night when the offence was committed.

If the applicant is released on bail before the evidence of the witnesses is taken there is a high likelihood of the applicant intimidating the witnesses in view of how the two deceased persons were brutally murdered.

In addition to the foregoing the applicant being a police officer is capable of interfering with witnesses because he has the technical knowledge and facilitation as a police officer to track and locate the witnesses using their telephone addresses and other means.

And since the applicant is a senior police officer (a senior sergeant of police) he is in a position to instill fear and intimidate some key witnesses who are fellow junior police officers who report to him at his place of duty.

And since the home of the applicant is in a border area namely Busia County he may be a flight risk and is likely to flee to Uganda, which borders his county's home. He will thus be out of reach of the court.

The deponent has also deposed "THAT the prosecution has overwhelming and irrefutable evidence that points to the accused guilt, thus is a high probability that the prosecution will secure a conviction. The prosecution is apprehensive that if the accused is released on bail or bond he may flee the jurisdiction of the court in fear of being sentenced."

The deponent has further deposed that it is in the interests of justice that bail be denied taking into account the unprovoked and violent manner in which the applicant caused the death of the two deceased persons**.**

The deponent has further deposed that it is the duty of the court to balance the rights of all persons and for the two deceased and that it is **"***our humble submissions that this court can protect the right that was lost under article 26 "Right to life" by providing an enabling environment for the prosecution witnesses to testify without fear or favour*."

Finally, the deponent has deposed that there are compelling reasons to deny the applicant bail.

The probation officer's report.

The court on its own motion ordered for a probation officer's report on 12/04/2021, which was prepared and filed in this court on 18/10/2021. According to the report the victims in count 1 are not opposed to release of the applicant on bail.

However, the victims in count II are opposed to the release of the applicant on bail because he is likely to interfere with witnesses for he knows most of them.

The submissions of the respondent.

Ms Ogweno, counsel for the responded opposed the release of the applicant on bail basing her submissions on the replying affidavit of the investigating police officer (Paul Njihia Karung'o) of the Independent Policing Oversight Authority (IPOA). She has submitted that since the applicant is still a serving police officer he is likely to use his position to instill fear and intimidate potential witnesses; since he will be a free person. This is more so given that the applicant has access to guns and ammunition.

Counsel has further submitted that the replying affidavit has demonstrated that the applicant murdered the deceased persons in a violent manner by shooting them.

Counsel has also submitted that the applicant be denied bail until the eye witnesses have testified; since his release before their evidence is taken is likely to jeopardize the case for the prosecution.

Finally, counsel has further submitted that the applicant does not have an absolute right to bail and that the prosecution has adduced

compelling reasons within the meaning of article 49 (1) (h) of the 2010 Constitution of Kenya to deny him bail.

Issues for determination.

I have considered the affidavits of the parties, their submissions and the applicable law.

I find that the issues for determination are as follows.

1 Whether the evidence placed before the court meets the evidentiary threshold to deny the applicant bail on the ground that he will interfere with witnesses; and is a flight risk since his home is in Busia County; which county borders the Republic of Uganda.

2 Whether certain averments of the applicant such as that the prosecution has overwhelming and irrefutable evidence that points to the guilt of the applicant is admissible

Issue 1

I find on the affidavits placed before me that the respondent has not produced any tangible and credible evidence to support its allegations that the applicant is likely to interfere with witnesses. He has made general allegations that some witnesses received threats and intimidation from persons suspected to be agents and proxies of the applicant during the night when the offence was committed. He has not disclosed the identities of these agents and proxies and has not established that they were issuing those threats and intimidation on the directions of the applicant. The nexus if any is lacking with the result that these allegations lack evidentiary basis**.**

Furthermore, the full particulars mode of threats and intimidation has also not been disclosed by the investigating police officer**.**

Furthermore, the investigating police officer has not shown what action he took following the alleged interference with the witnesses; since interference with witnesses is a punishable offence under section 117 of the Penal Code (Cap 63) Laws of Kenya. The investigating police officer has not deposed that the applicant or his proxies are under investigation or an inquiry file has been opened in respect of the allegations of interference with witnesses.

In the premises, I find that the respondent has not met the threshold of demonstrating that the applicant interfered or is likely to interfere with the witnesses through threats and intimidation.

The averment of the investigating police officer that the applicant is a flight risk since his fixed home is in Busia County; which county borders the Republic of Uganda. The respondent's further averment that the applicant is likely to flee to Uganda, and will thus be out of reach of the jurisdiction of this court; is devoid of merit. This is so in view of the fact that if this were to happen, Kenya would apply for the extradition of the applicant as there is in place an extradition treaty between the two countries**.** For avoidance of doubt I take judicial notice of the existence of that treaty namely the Extradition (Commonwealth Countries) (Cap 77) Laws of Kenya.

Furthermore, the refusal of bail on the ground that the applicant has a home in a border county that borders the Republic of Uganda has long been rejected by the courts as being speculative in nature and is potentially and constitutionally impermissible on account of being discriminative. In this regard, I sought and obtained guidance in the decision of the court in DCIO West Pokot versus Fred Komo Nguru, High Court of Kenya at Kapenguria, Miscellaneous Application NO.EO05 OF 2021, in which this court (Bwonwong'a, J) pronounced itself as follows:

> "*The second reason advanced in opposition to the release of the accused on bail is that the accused is a flight risk and since West Pokot county borders Uganda he can easily cross the border into Uganda. This allegation lacks supporting evidence. Additionally, mere residence in a county that borders Uganda is not in itself evidence of one being a flight risk. This argument is potentially discriminative as it suggests that suspects who are residents in this border county are by virtue of that flight risks and that those who are residents of non-border counties are not potentially flight risks. It is for this reason that the law requires evidence in support of a suspect being a flight risk irrespective where a suspect resides.* In this regard, I find as persuasive the decision of the court in Panju Vs. Republic [1973] E.A 282 at page 283 in which that court expressed itself in regard to interference with witnesses and being a resident near the border as follows:

> "*The Magistrate was right in discounting such allegations, which are now becoming stock allegations against accused persons, as such allegations need to be substantiated by affidavit, as it has often been held by this court (e.g Bhagwanji Kakubhai Vs. R. (1943) 1 T.L.R (R.) 143). If the courts are simply to act on allegations, fears, or suspicions, then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made. However, the prosecution did not appear to wish to pursue this matter any further in so far as the co-accused was concerned*."

In view of the foregoing findings, I find that it is moot or academic to rule on the issue as to whether the social report of the probation officer is constitutional or not.

Issue 2

The investigating police officer deposed that: "THAT the prosecution has overwhelming and irrefutable evidence that points to the accused guilt, thus is a high probability that the prosecution will secure a conviction. The prosecution is apprehensive that if the accused is released on bail or bond he may flee the jurisdiction of the court in fear of being sentenced." This deposition is inadmissible and highly prejudicial. This deposition amounts to a finding of guilt by the investigating police officer. Even the trial court is not allowed to make such a finding

until all the evidence has been presented before it and closing submissions, if any, have been made by the parties. The investigating police officer has assumed the role of an investigator, the prosecutor and the jury (court). This deposition is inadmissible for it is not evidence but a finding.

An affidavit should only contain matters that are capable of being presented as evidence by the person making the deposition. It therefore follows that counsel for the applicant (Mr. Kiprotich) should not have made the deposition in support of his client's application. It is legally impermissible for counsel to have deponed to matters of fact. These are matters which are for the client to depose to; for they are matters that are clearly within his knowledge.

Furthermore, it is also legally impermissible for the investigating police officer to depone that*:*

> "*THAT it would be in the public interest and the interest of justice that bail denied in this case taking into account the unprovoked and violent manner in which the accused caused the death of the two deceased persons."*

This deposition is also inadmissible for it amounts to a finding of guilt by the investigating police officer; which is a matter for the court to decide. This is clearly the position because the accused has pleaded not guilty. And by virtue of that plea of not guilty every allegation in the information (the charge sheet) is in dispute and is subject to proof beyond reasonable doubt. The investigating police officer has trespassed into the province of the trial court which is allowed to make findings of fact at the conclusion of the evidentiary hearing of the trial.

There is another equally important matter that warrants the attention of this court; which is in relation as to who are the proper parties to a criminal case. Counsel for the applicant has cited the Director of Public Prosecutions (DPP)as the respondent to this application. This is not proper as the DPP is only a prosecuting agent on behalf of the Republic, who is always the prosecutor. The other agent is the private prosecutor. This matter was ably pronounced upon by the Court of Appeal in Rufus Riddlebarger vs. Brian John Robson [1959] EA 841 at 845 para B, C, D, in which that court observed that: " In Tenywa Maganda v Attorney General (2), a case in which the appellate proceedings in the High Court of Uganda were intituled "The Attorney-General of Uganda, Appellant v. Tenywa s/o Maganda, the Respondent" this court said at p. 293:

"Finally we wish to draw attention to the title given to the appeal to the High Court. The case before the district court was intituled correctly as '*Regina v. Tenywa Maganda*'. In Uganda, as in the other East African territories, in all criminal matters, the prosecutor is in law the Crown see M.K. Shah v. A.C. Patel and others, ante p, 236. Likewise, when by s. 327 of the Criminal Procedure Code a right to appeal from an acquittal is conferred upon the attorney-general, he exercises that right as her Majesty's attorney general, and the aggrieved party or appellant is in law still the Crown acting at the instance of the attorney-general. We think, therefore, that as a matter of form the appellate proceedings in the High court should have been intituled in the same manner as in the trial court."

In addition to the foregoing authority this court (Bwonwong'a, J) in Embu High Court Criminal Appeal No. 58 of 2013 Director of Public Prosecutions v Nyaga Nthia Mbarinjo & another [2016] e-KLR**,** in that regard similarly pronounced itself as follows:

"This position in law was declared to be so in *Tenywa Maganda v. Attorney General (1954) 21 EACA 290***,** in which it was held that when the right of appeal against an acquittal is conferred on the Attorney General, he exercises that right on behalf of the Crown (now the Republic). The Attorney General did not do it in his own behalf, because the Attorney General was not a party to the criminal proceedings in the magisterial court and cannot therefore be a party in the instant appellate proceedings. The DPP is the chief of public prosecutions. The reason being that the Republic is always the prosecutor in all criminal cases."

From the above cited cases it is clear that the parties in a criminal case are the Republic and the accused person. The 2010 Constituting of Kenya has not changed that position. However, any omission to follow the law as pronounced in *Tenywa v. Attorney General,* is a curable irregularity in terms of section 382 of the Criminal Procedure Code.

In the premises, I find that the applicant' application succeeds with the result that he is hereby released on a bond kshs 500,000/= with a surety of a similar amount to be approved by the Deputy Registrar of the court.

In the alternative to the foregoing, the applicant may be released on a cash bail of kshs 300,000/-

The applicant is to remain in custody pending his compliance with the terms of his release on bail.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021.

J. M. BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua, court assistant

Ms. Kimani for the Republic

Mr.Kiprotich for the Respondent