



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE E061 OF 2021

PROSECUTOR..... REPUBLIC

VERSUS

BENSON MPUTHIA.....1ST ACCUSED

CONSOLATA NJERI KARIUKI 2ND ACCUSED

MARTIN MSAMALIA WANYAMA..... 3RD ACCUSED

NICHOLAS SANG CHERUIYOT 4TH ACCUSED

LILIAN CHERONO CHEMUNA 5TH ACCUSED

JAMES MWANIKI 6TH ACCUSED

RULING

The 6 accused persons **Benson Mputhia Maburi, Consolata Njeri Kariuki, Martin Musamali Wanyama, Nicholus Sang Cheruiyot, Lilian Cheron Chemuna, and James Mwaniki Njohu**, have all been charged with 2 counts of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accuseds have variously filed applications seeking that each be released on bail pending trial and determination of their case. These applications have been heard together view of the joint charge that the applicants are facing.

The applications of the applicants were heard on 23.9.2021. A battery of learned counsel appeared before the court with instructions to represent each of the accuseds.

For accuseds 1 and 3, Mr. D. Omari, opened the submissions by stating that there is indeed no evidence linking the accuseds to the death of the 2 deceased who were only charged due to public interest and pressure and for the victims represented by IMLU to pursue compensation. That even the post mortem forms show cause of death as out of hitting rough surface, bringing the possibility of moving out of a moving vehicle.

Further, that accuseds have been interdicted and cannot access any firearms. It was also submitted that being officers of their ranks, they have no ability to interfere with the prosecution witnesses, who could also be placed under protection. It was also contended that accuseds have fixed abodes. And that it is the responsibility of the police to maintain public order.

Mr. Ombeta, for accused 3, also submitted that it is incumbent on the prosecution to show existence of compelling reasons if bails is to be denied. Counsel submitted in detail on the fundamentals rights under Articles 19, 20, 21, 23, 24 and 28 of the constitution. Further that under Article so, the accused is presumed innocent till proved otherwise. Counsel referred the court to the case of **Richard Alden Versus Republic (2016)eKLR**, that for the prosecution to succeed on the ground of likelihood of interference with witnesses, it must be shown actual or perceived interest, and that at least some evidence of this ought to be shown (**Panju Versus Republic (1972)EA**).

Counsel, while submitted on the ground of likelihood of absconding, relied again on the **Richard Aldenn** case, that the court would have the option of putting stringent and appropriate terms of bail. And that in the famous case of **Dwight Sangarau** the court again stressed the need to put strict bond terms.

For accused 2, Mr. Adande submitted that all offences are bailable and that the accused is willing to abide by any terms that the court may set. He supported the submissions made on behalf of accuseds 1 and 3.

Mr. Arika for accused 4 submitted that the prosecution had shown no evidence of any attempt at knowing the fixed abodes of the accuseds (**Republic Versus Benjamin Kariithi (2020)eKLR**), nor evidence of any interference or attempt to interfere with the prosecution witnesses. That evidence of the same must be shown (**Republic Versus Jonathan Mwema (2021)eKLR**.) Counsel also submitted that the allegation that police officers are powerful is not a compelling reason (**Republic Versus Kirimi Gikangu (2021)eKLR**.) And further, that the primary consideration for bail is whether the accused shall turn up for his trial (**Oscar Edwin Okimaru Versus Republic (2021)eKLR**.)

Ms. Swiga, for accused 5, also associated herself with the submissions earlier made. She relied on the case of **Michael Oyamo Versus Republic (2018)eKLR**, that an accused person is presumed innocent till the contrary is proved, and on the fact that even if bail has been granted, the prosecution could still seek for revision of the terms. That, bail should not be denied on flimsy grounds (**Jackton Mayende & others Versus Republic**). Lastly that under Article 20(3)(b), the court is enjoined to adopt an interpretation that favours the accused.

Lastly, for accused 5, Mr. S. Wamboi urged the court to come up with a formula that does not discriminate against certain sections of the society. He urged for lenient terms.

For accused 6, it was submitted by Mr. Omaiyo and Ms. Odongo, that bail is a constitutional right and that since the courts hands are not tied on the issue of sentence, it is not a compelling reason that murder is a serious offence.

In opposing the applications for bails, the state through Ms. Onya, submitted that the right to bail under Article 49(1)(h) is not absolute. That accuseds face a serious offence which attracts strict sentence. That prosecution's case is also strong. Further that accused are likely to interfere with witnesses as shown by the initial report made of the incident as a Road Traffic Accident that it was only after public outcry and the involvement of IPOA that the truth came out. Second that the applicants still possess powers and privileges like accessing the station and even firearms.

It was further submitted on the volatile situation in Embu over this incident, leading to riots, burning of the police Land Cruiser and animosity against the police. And that the witnesses are yet to be placed under protection. Also, that none of the applicants have shown evidence of their fixed abodes.

Counsel relied on the following decisions:

- i) Republic Versus William Kipkorir (2018)eKLR, on likelihood of interference with witnesses in regard of police officers.***
- ii) Republic Versus Taiko Kitende (2010)eKLR, on legitimate anxiety where accused is in an influential position.***
- iii) Republic Versus Emmanuel Otieno Pamba (2019)eKLR, that accused may be released on bail even at a later stage of the proceedings.***

Ms. Gichuhi, also for the state, further submitted that this is a serious offence and if bond is to be granted, it should be on stringent terms. She relied on **Republic Versus Fredrick Ole Lelliman (2016)eKLR**, that denial of bail is not tantamount to a conviction. That accuseds are well known police officers who are likely to interfere with witnesses.

Mr. Njoroge, for IMLU submitted on the trauma that the parents of the deceased have undergone as a result of the deaths of the deceaseds and that there is fear of interference with the evidence. Counsel gave an example of the police Land Cruiser which has subsequently been burnt. Also on public security since 3 lives have been lost with 7 sustaining serious body injuries.

Other interested parties in this matter also made submissions on this case. Mr. Mbanya, for International Justice Mission, basically supported the objection of the state. Similarly, Ms. Kamande for the Law Society of Kenya, also supported the objections raised by counsel for the state. She relied on the Lelliman case in which the Hon. Justice Lesiit denied the accuseds, police officers, bail. That the right to bail is not absolute and ought to be weighed against the right to life.

The above is basically the submissions that the parties made in support of these applications and the objection to the same. I have considered the respective submissions. I have also considered the various affidavits filed by the parties, and the authorities relied on by the learned counsel of the parties.

The application before the court is one of bail. Article 49(1)(h) of the constitution of Kenya declares the right to pre-trial bail or the following terms.

“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 to be released.”***

The constitution of Kenya, therefore guarantees all accused persons the right to bail irrespective of the nature or seriousness of the charges that they face. The same constitution, however also limits the enjoyment of the same right in certain circumstances. It does this by declaring that where there exists compelling reasons, then the right to pre-trial bail maybe denied. The right to bail is therefore not absolute and same may be granted or denied depending on the circumstances of each particular case.

Questions have been raised as to what constitutes compelling reasons with numerous decisions on this matter, it can only be said in simple terms that compelling reasons are reasons that are strong and good enough as to justify a denial of the right to bail. In the Bail and Bond

Policy Guidelines, a product of the National Council on the Administration of Justice at paragraph 4.9 lists some of the factors for consideration as follows:-

- ***The nature of the charge or offence and the seriousness of the punishment to be meted in case of a conviction.***
- ***The strength of the prosecution's case.***
- ***Character and antecedents of the accused***
- ***Failure of the accused to observe bail terms in previous incidents***
- ***Likelihood of interference with witnesses of the prosecution.***
- ***The need to protect the victims of the crime.***
- ***Relationship between the accused and the witnesses.***
- ***Whether the accused is a flight risk.***
- ***Whether accused is gainfully employed.***
- ***Public order, peace or security***
- ***Protection of the accused person***

I must say that this list is in no way exhaustive and many more factors may be considered in the determination of whether or not to grant bail.

Having said that, it is important to consider the general principle behind the right to bail. Bail is simply a guarantee placed on the accused person to ensure that he attends court as and when required for the hearing of his case. So that an accused person who has been placed on bail must commit to attend court for the hearing of his case. The determination of whether or not the accused shall attend court, therefore, is the main consideration in the grant or not of the right to bail. The Hon. Justice E. C. Mwita, held in the case of ***Republic Versus Godfrey Madegwa and 6 others (2016)eKLR***, that:

“The primary purpose for bail is to secure the accuseds person’s attendance to court to answer the charge at the specified time. The primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial”.

It is therefore incumbent upon the prosecution, while opposing the release of the accused on bail, to show to the court that the circumstances of the case are such that a denial of the right to bail would be justified.

In our instant case, the objection to the release of the accuseds on bail has been based on several grounds. I shall deal with them in the order in which they were raised during the hearing of the applications of the accused.

i) Strength of the prosecution’s case

On this ground, it was submitted by the learned counsel for the prosecution that the prosecution has a strong case against the accused. In deciding on whether this would be a compelling reason in the circumstances, it is important to consider a number of issues. First, is the fact that evidence is yet to be laid in this case. This court is therefore not in a position to determine whether or not the prosecution has a strong case against the accuseds. Second, is the fact that under Article 50(1)(a), the rights of an accused person to be presumed innocent till proved otherwise is guaranteed. In effect therefore even if the prosecution’s case against the accused is strong, until such evidence is proved to be so strong by the court, the accused remains presumed innocent.

The net effect of this is that since the court has not had the opportunity to weigh the evidence of the prosecution, it would not be possible to reach a conclusion that the said evidence is strong as submitted. I am therefore not convinced that this ground on its own can be a compelling reason good enough to justify a denial of the right to bail to the accused persons.

ii) Likelihood of interference with witnesses and investigations

On this ground, it was submitted that the accused’s being police officers all wield considerable influence and are likely to interfere with both the witnesses and the investigations. Examples were given of how the initial report was made that the whole incident was as a result of a Road Traffic Accident. And also the fact that the accused’s would still access the relevant police station and even firearms.

It is firm position of this court that for the prosecution to succeed on this ground, it must show to court that the accused(s) has interfered or attempted to interfere with such witnesses and the same must be shown to have been direct or indirect. It is not enough for the prosecution to merely allege the same. No such evidence was shown to court. In ***Republic Versus Benjamin Karithi Menja(2020)eKLR***, this quoted by the defence, in court held;

“the prosecution must show the direct or indirect interference or the intention to do so. In the absence of such proof, this ground cannot stand”

The same threads runs across our jurisprudence. The cases cited by the defence, including ***Republic Versus Dwight Sagaray and 4 others, HCCR 61/2012, Republic Versus Richard Alden, HCCR Bo. 48/2016***, are just some of the cases in which the courts have held the same view.

The prosecution has not in our instant case shown as against any of the accuseds, any interference or attempt at interference with any of the prosecutions witnesses or with the investigations.

This court has further noted that the accused have all also been placed on interdiction and would probably not have the benefit of all privileges of servicing police officers. Some of them (if not all) have even been said to have been transferred to other work stations.

In the absence of any specifics proof by the prosecution, the submissions of the prosecution are fears that the prosecution probably have. It is the view of this court, that the fears of the prosecution, however genuine, cannot amount to a compelling reason if same are not sufficiently proved.

iii) Public order

The prosecution submitted that as a result of this incident, riots erupted in Embu county leading to clashes between the police and members of the public. And that more lives were in the process lost and property destroyed. That there is likelihood of such breach of peace should the accused be released on bail. The same submissions were made by the interested parties herein, the LSK and the IMLU. There are matters that are in public domain having been widely captured on both the print and broadcast media. The court duly takes judicial notice of the same.

This court, on its own motion, called for a social inquiry report from the probation office, which reports dated 14.10.2021 was duly prepared and filed in court. I have considered same. From the report, it is clear that the community of Kianjokoma are against the release of the accuseds out of fears of reprisals from the accused. This court must therefore consider the fears and views of the community and victims, side by side the rights of the accused to bail.

It is on record that accuseds have all been interdicted and (possibly) transferred from the locality. They would therefore not be within the jurisdiction of the police station as to pose any practical danger to the community by the fact of their release. This court is of the view that such fears of the community would be allayed if this court puts in place strict and appropriate terms of bail for each accused.

iv) Protection of victims

This ground is similar to the one above. I adopt the same position and finding on the same.

v) Lack of places of abode.

On this ground, again on the courts intervention suo moto, each of the accuseds filed affidavits stating where they would be residing if released. They have also stated their rural homes and permanent residences. These facts have further been confirmed by the probation officer's reports filed in court respecting all the accused.

Of importance to note, is that none of the accuseds is a resident or intends to reside in Kianjokoma or Embu County generally. The prosecution has also not expressed any fears that any of the accuseds would abscond.

Considering the circumstances of this case in totality, I am not convinced that the prosecution has proved the existence of any compelling reason good enough to make this court deny the accuseds their right to bail. I accordingly dismiss the objections of the prosecution and order that the accuseds may be released on bail on the following terms:-

i) Each of the accuseds may be on a bond of Ksh.3 million with 1 surety of a similar amount, or an alternative of Kshs.300,000/= in cash bail.

ii) Accused 2, 3, 4, 5 and 6 are hereby ordered never to visit or reside within the jurisdiction of Kianjokoma and Embu County generally, during the pendency of this case, except upon appropriate orders being obtained from court.

iii) For accused 1, who hails from Meru County the terms above (ii) apply to him as well, except that he may be at liberty to transit through Embu County to or from his home county, Meru.

In any case, he shall not go within 10 kilometres of Kianjokoma jurisdiction without an order of the court.

iv) The accuseds are ordered never to contact and or interfere with any of the prosecution witnesses either directly or indirectly till this matter is determined.

v) Each accused, before his release, shall specifically furnish the details of where he/she will reside during the pendency of this case. The accused shall also furnish particulars of at least 1 contact person including copies of their ID cards and phones numbers.

vi) *Accuseds are ordered to attend court at all times as would be ordered by the court till this case is determined.*

Orders accordingly.

D. O. OGEMBO

JUDGE

4.11.2021.

Court:

Ruling read out in court in presence of the following:

All accused

Ms. Gichuhi/Ms. Arunga/Mr. Kiragu and Ms. Gikonyo for state.

Ms. Mbugua for Ms. Owino for IPOA.

Ms. Mundia for FIDA(K) (not parties yet)

Ms. Kamende/Mr. Mochangi for Havi/Ms. Kabita/Ms. Angawa/Mr. Mmbone/Mr. Guantai for LSK

Mr. Njoroge for IMLU (also for Ms. Obara)

Ms. Nyambeki for Mr. Ombany for IJM

Mr. Omari/Mr. Ombeta for accused 1 and 3

Mr. Kariuki for Mr. Andanda for accused 2

Mr. V. Arika for accused 4

Ms. Swiga/Mr. Wamboi for accused 5

Mr. Omaiyo/Mr. P. Macharia Ms. C Odongo for accused 6

D. O. OGEMBO

JUDGE

4.11.2021.

Court:

Matter to be mentioned before the Presiding Judge, Criminal Division for formal allocation of a court and for fixing of a hearing date. Mention 10.11.2021 (Nzioka J.)

D. O. OGEMBO

JUDGE

4.11.2021.

Ms. Kamande:

We apply for copy of the ruling.

Court:

Certified copies of the ruling to be supplied to the parties.

D. O. OGEMBO

JUDGE

4.11.2021.