



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL CASE NO.74 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES OMONDI NYAMBURI & 2 OTHERSACCUSED

R U L I N G

1. The accused person, **Charles Omondi Nyamburi**, has been charged with one count of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that: on the **22nd day of October 2019** at Kariobangi North, within Nairobi County, the accused person jointly with others not before court murdered **John Ochieng Achiando**.
2. The accused pleaded “**NOT GUILTY**” to the charge on **2nd March, 2021**. Thereafter, plea was taken and the accused through his defence counsel, **Mr. Juma** orally applied for bail.
3. The court then directed the defence to file a formal bail application which was filed on **10th July, 2020** and is the subject of the Ruling herein.
4. In the **Supporting Affidavit**, the Applicant has deposed that he be admitted to bail pending trial because the trial has not kicked off since his arrest in **2019**; he has a wife with four (4) children, hence a family man; he takes care of his siblings since they are orphans; has a known home with close ties in the community and has no passport hence he cannot run away from the country.
5. However, the application was opposed by the Respondent vide an **affidavit** dated **4th March 2021** and sworn by **No.78812, PC Paul Nyoro**, attached to DCI - Starehe. He has averred that; the accused person/Applicant jointly with eight others not before court murdered the deceased; the applicant is likely to interfere with prosecution witnesses since they are neighbors; the applicant is likely to abscond if released since some of his accomplices absconded to unknown places after committing the offence; although **Article 49(1)(h)** of the **Constitution** gives him the right to bail which the right is not absolute. Therefore, because of the above grounds, the prosecution has contended that there are compelling reasons to justify the denial of bond to the Applicant.
6. On **18th October, 2021**, the Honourable Judge directed that the appeal be canvassed by way of written submissions. The Applicant have on record submissions dated **10th November, 2021** while the state’s submissions are dated **29th October, 2021**. Both counsel opted to rely on their written submissions in urging their respective positions in the case of the bail application.
7. The learned counsel for the Applicant, **Mr. Nyamongo** reiterated the averments in the affidavit in support of the application and placed reliance on the following three cases; **Sharon Otieno Case No.46 of 2018**, **The Monica Kimani Case No.51 of 2018** and **The Tob Cohen Case No.60 of 2019**.
8. The learned state counsel **Ms. Gikonyo**, relied on the averments made by **PC Paul** in the affidavit to oppose bail and she submitted on four of the grounds in opposing the application. Firstly, that the accused persons are a flight risk; secondly that there are other persons who have not yet been apprehended and the Applicant’s release may interfere with the investigations of their arrest; thirdly, that there is real apprehension with accused interfering with prosecution witness and lastly, that the Applicant is likely to abscond the jurisdiction of the court. She has relied on the following cases in support of her case being **Republic –vs- Joseph Kuria Irungu & Another (2018)eKLR** and **Republic –vs- Fredrick Ole Leliman & 4 Others (2019)eKLR**, and has urged the court to deny the applicant bond pending the hearing and determination of the case.

9. I have considered the application in light of the arguments that have been advanced by both parties, I find that the only issue to consider is whether or not the Applicant should be released on bond and/or bail pending trial.

10. The release of an accused person is one of the rights guaranteed under **Article 49(I)(h)** of the **Constitution of Kenya 2010**, which provides that;-

“an accused person has a right to be “released on bond or bail” on “reasonable” conditions pending a charge or trial unless there are compelling reasons not to be released”.

11. The Constitution has however not defined the term **“compelling reasons”** or given an indication of what reasons a court may consider to be compelling to justify admission or denial of bail/bond when deciding whether or not to grant the same pending trial of an accused person.

12. In the case of **Republic –vs- Mohamed Hagar Abdirahiman & Another (2012)eKLR**, Stella Mutuku J, defined a ‘**compelling reason**’ in the following terms **“a compelling reason would be such a reason that is forcefully convincing to persuade this court to believe that something is true”.**

13. It then follows from the aforesaid that, for an accused to be denied the constitutional right to bail and/or bond, the opposing party must advance cogent reasons.

14. The issue for determination then is, whether the prosecution has made a case for the court not to release the Applicants on bail pending trial.

15. Under **Article 50(2)(a)** of the **Constitution of Kenya, 2010**, every accused person is presumed innocent until proven guilty.

16. It suffices to note that, in **The Bail and Bond Policy Guidelines of the Judiciary**, it is recommended that:

“The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.”

17. Accordingly, **Section 123A** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, stipulates that:

(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 fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.

18. Further, in **‘The Bail and Bond Policy Guideline’**, it is restated as a general guideline at **Paragraph 4.9** that:

“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”

19. The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

a. The nature of the charge or offence and the seriousness of the sentence to be meted if the accused is found guilty;

b. The strength of the prosecution case;

c. Character and antecedents of the accused person;

d. Failure of the accused person to observe bail or bond terms;

e. Likelihood of interfering with witnesses;

f. The need to protect the victim or victims of crime;

g. The relationship between the accused and potential witnesses;

h. Child offenders;

i. The accused is a flight risk;

j. Whether accused is gainfully employed;

k. Public order peace or security; and

l. Protection of the accused person.

20. Having taken into consideration the foregoing parameters in the light of the averments set out in the affidavit of **PC Paul** as well as the submissions made by both counsel, the key issues raised, and which now arise for consideration in connection with the bail application herein are that:-

a. Are Applicants/accused persons flight risks, therefore likely to abscond the jurisdiction of the court?

b. Are the Applicants/accused persons likely to interfere with the investigations into the arrest of the other persons who have yet to be apprehended upon their release?

c. Whether the Applicants/accused persons are likely to interfere with prosecution's witnesses.

20. The first ground that has been relied upon by the prosecution in opposing the Applicant's application for release on bond/bail is that he is a flight risk and may abscond the court's jurisdiction. In her submissions, **Ms. Gikonyo** submitted that the Applicant and his co-accused persons fled the scene of crime but were later on apprehended. Moreover, the 3rd accused herein was apprehended in **2021**, which is two years after the commission of the crime. The rest of the perpetrators relocated to unknown areas and the police are still trying to trace them.

21. On behalf of the Applicant, **Mr. Nyachoti** his counsel submitted and denied the assertion that the Applicant is a flight risk. He submitted that he has a fixed abode at Ngomongo in Nairobi County and that his late parents were residents of Kisumu County. Additionally, **Mr. Nyachoti** has averred that the Applicant does not possess a passport and therefore has got no intentions of running away from Kenya.

23. In the case of **Kelly Kases Bunjika –vs- Republic [2017]eKLR**, Muriithi, J held that;

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

24. From the above holding by Hon. Muriithi J., it is clear that the purpose and intention of placing an accused person on bond/bail is to secure his freedom while ensuring his attendance in court for his trial even as he is out of prison custody. It is not a license for him to stay away from court and not face his accusers. It is therefore imperative that before an accused person is released on bail, the court must satisfy itself that he shall still attend court for his trial as and when he is required to, and that should he abscond, it would still be possible to trace and bring back to court for his case. If the court cannot get this assurance, then obviously the accused would be considered a flight risk. The court would then be justified in denying such an accused person release on bond/bail.

25. In this instant case, the third accused/Applicant herein disappeared for close to two years after the commission of the offence. The other perpetrators are still at large. From the foregoing, I agree with the prosecution that there is a likelihood of the Applicant disappearing to an unknown place just like his co-accused and the other perpetrators, if released on bail/bond.

26. On the issue of interference with the investigations, as it currently stands, **PC Paul** has stated that investigations are still ongoing in an effort to arrest the other perpetrators who are said to have been involved in the murder of the deceased. In view of this, I find that releasing some suspects while others are yet to be arrested, is likely to cause interference in investigations into their arrests.

27. The third and last ground by the prosecution is that the accused is likely to interfere with prosecution's advanced witnesses. In the case of **Republic –vs- Dwight Sagaray & Others High Court Criminal Case No.61 of 2012**, it was held that:-

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the

court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.”

28. In the present case, having read through the witnesses’ statements, I find that the incident which led to the death of the deceased occurred in public and in broad daylight. It is also clear that the prosecution’s witnesses come from the same neighborhood as the Applicant. In fact, it is in evidence that one of the prosecution’s witnesses barely escaped with his life as he was among those targeted to be killed by the accused persons. On the other hand, the Applicant states that he has a fixed abode at Ngomongo which I believe he plans on going back to if released on bond.

29. From the foregoing, I am persuaded, and find for the prosecution that admitting the Applicant/accused persons to bond/bail at this stage may be prejudicial to its case as the accused persons’ presence in the estate may create fear and cause anxiety among the witnesses who may not feel safe to testify against him during the trial.

30. In conclusion, I find that the prosecution has demonstrated that there are compelling reasons to justify the Applicant/accused person being denied admission to bond/bail at this stage.

31. I therefore disallow the application filed on **10th July, 2021**. The Applicants/accused persons be at liberty to review the bail application for bond/bail once the key witnesses have testified.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 9TH DAY OF NOVEMBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Maina counsel for State

Mr. Michuki counsel holding brief for M/S Nyamongo counsel for the 1st accused

person

1st accused person present

Court Assistant - Quintus