REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. E014 OF 2021

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

-versus-

JOEL KOONYO TARAIYA.....ACCUSED

RULING

Bail Application

[1] The accused has been charged with murder contrary to ***Section 203*** as read with ***Section 204*** of ***the Penal Code***.

[2] On 31st May 2021, the accused through his defence counsel Mr. Kamwaro orally applied for the accused to be released on bail pending the trial. Counsel argued that the accused has a fixed abode. He presented himself to the police after the incident. Thus, he is not a flight risk. The accused has been in in custody since 14/10/2021 which is sufficient time for the prosecution to complete investigations. The accused was also injured and a P3 form was issued to him. However, he could not seek treatment due to incarceration. He states that the accused will abide by any terms the court may impose and to appear during trial. Mr. Kamwaro therefore prays that the accused be released on bond.

[3] The prosecution is not opposed to the accused person being released on bail or bond. Mr. Karanja the prosecution counsel told the court that the investigation officer had indicated to him that the accused person and witnesses live at different places. He however requested for a pre- bail report to be ordered by the court.

[4] The victims have however opposed bail application. Mr. Yenko advocate for the victims argued that the victims are still in pain of what happened. The accomplice is at large and is still contacting witnesses trying to intimidate them not to mention him. He is the brother to the accused and so there is real threat of interference with witnesses. Although they are in different places, he works at Ewaso Ngiro and also has boda boda plying the route where the accused and witness reside. He therefore prayed that the accused be denied bond.

[5] Mr. Kamwaro in a rejoinder argued that bail is a constitutional right and this offence is bailable. No compelling reasons have been proved.

[6] Mr. Kamwaro further submitted that vide misc. cr. appl. no 098 of 2021 before the chief magistrate's court, the prosecution applied for the accused to be held in custody to enable them complete investigations. The investigation officer in his affidavit did not give any reason or indication of an accomplice at large.

[7] Mr. Kamwaro continued to submit that the victim's family has not also provided any evidence that the accused has contacted any of the witnesses. Conduct of another person who is not even a co accused cannot be a basis to deny bail. The charge sheet shows the accused alone allegedly committed the offence. That what is stated by the counsel for the victims is merely evidence from the bar not from the victims as they should have filed an affidavit. He therefore argued that this is a right and so the accused should be set free on reasonable conditions. He relied on the case of ***Crispus Karanja Njogu V The Attorney General Ur Criminal Application No. 39 of 2000 (HC)***

ANALYSIS AND DETERMINATION

[8] According to Article 49 (i) (h) of the Constitution: -

> **"An arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released."**

[9] Therefore, right to bail or bond will be denied only where there are compelling reasons not to release the accused. The prosecution bears the burden of proof of compelling reasons. See ***Republic Vs. Danson Mgunya & Another*** Ibrahim J (as he then was) stated the principle that the liberty of accused should only be limited where there are compelling reasons not to be released and it is the duty of the state to demonstrate the same, and even then each case must be decided on its own circumstances touch and context.

[10] Compelling reasons should be of a nature that justifies limitation of right in an open and democratic society under Article 24 of the Constitution which provides thus:

> **1. A right or fundamental freedom in Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-**
>
> **a) The nature of the right or fundamental freedom,**
>
> **b) The importance of the purpose of the limitation,**
>
> **c) The nature and extent of the limitation,**
>
> **d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
>
> **e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

[11] I also find it necessary to cite ***R. V. Richard David Alden (2016) eKLR,*** where Lesiit J (as she then was) succinctly summarized the Bail and Bond Police Guidelines on the important considerations in bail applications as follows:

> **"The Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set out under Section 123A of the Criminal Procedure Code. These general considerations are: the nature of the offence; strength of prosecution case; character of the accused and antecedents; failure by the accused to observe previous bail and bond; witness interference; protection of the victim; relationship between the accused and the potential witness(es); whether the accused is child offender; whether the accused is flight risk; if the accused is gainfully employed; public order; peace security; and whether there is need for the protection of accused person."**

[12] Notably, Lesiit, J (as she then was) in the case ***Alden case (ibid)*** also identified some of the rights which require a delicate balancing in an application for bail to: -

> **"…include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims."**

Applying the test

[13] The prosecution is not opposed to bail. Except, the victims opposed bond on the grounds namely; i) they are still in grief; and ii) possibility of interference with witnesses.

Of grief and pain

[14] The legal counsel for the victim family stated that the family is still grieving over the loss of their kin. I am acutely aware that loosing kin is not a small matter. The deceased may have been of such proximate relationship with the members appearing in court, say, a father, a mother, a brother, a sister, a son, a daughter, a husband, a wife, cousin etc. etc. The deceased may even be the sole breadwinner. The loss is immeasurable. As such, although time is said to heal, the grief and pain of the victim family may linger or reignited every time they think about their deceased kin especially the close family members. It is not something that can be obliterated; memories come and sometimes with the original pain. But in all these, seeking healing and strength from the divine source- **THE ALMIGHTY GOD**- should never escape the minds of those who are mourning. The court expresses sympathies to the family.

Interference with witnesses

[15] Be that as it may, the real ground for opposing bail is that the accused is likely to interfere with prosecution witnesses. This is a potent ground on which to deny bail. See ***R. V. Jaktan Mayende & 3 others***, that:

> **"- In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010……Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or**

perversion of the course of justice…if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused."

[16] Courts have held that interference with witnesses is an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of the Constitution. See also ***R. V. Patius Gichobi*** .

Proof of specific claims

[17] It is not enough to state that the accused is likely to interfere with witnesses, the specific instances of actual interference or likelihood of interference with witnesses must be established before the court with such succinct detail or evidence which will persuade the court to deny the accused bond.

[18] Here I am content to cite ***R. V. Dwight Sagaray & 4 others, 2013 eKLR***, where the court stated that: -

"For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others."

[19] As a matter of law, the court has the duty of giving effect to the rights of victims. Under Section 10 of the Victim Protection Act No. 17 of 2014: -

10 (1) A victim has a right to: -

(a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

(b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

(c) Have their property protected.

[20] It bears repeating that interference with witnesses is not only an attack on those witnesses; it also undermines the criminal justice system and dents the integrity of the trial. Quite apt expressions of some of the instances which may undermine the criminal justice system were made by Lesiit J (as she then was) in ***R. V. Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR*** that:-

"Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."

[21] It is clear that interference with witnesses is a serious matter that may deny a person liberty, so it requires factual basis and proof. In the present case the counsel for the victims stated in his submission that the accused is likely to interfere with witness, for; i) he works at Ewaso Ngiro and he has a boda boda that plies that area; ii) his brother who participated in the commission of the crime is at large and has been making contacts with witnesses intimidating them not to mention him. These matters, especially the latter are serious. However, having a boda boda or working at Ewaso Ngiro, *per se* does not mean much unless such other or specific evidence is adduced to show that the accused is likely to interfere with witnesses in the circumstances of the case. No such evidence or explanation was given. The legal counsel made these submissions from the bar without any affidavit by the victims or witnesses which should ordinarily provide details of their apprehension of interference with witnesses.

[22] It bears repeating that, other than the submission by counsel that, the brother of the accused- the alleged co-accused- is intimidating witnesses, no evidence was provided to back the allegation. I do note also that the charge sheet does not state or even allude that the offence was committed by the accused with others not before court. This completely tears down the core genetic texture of the allegation. Thus, a safe conclusion; the allegation was left at very high level of generalization and devoid of any specific details which would paint a vivid picturesque of the connection between the accused and the threats made by his brother to witnesses so as to conclude likelihood of interference with witnesses by the accused. The police should however investigate these claims as they may have a significant bearing on this case if they are true.

[23] In the upshot, I find no proof of threats to or possibility of interference with witnesses by the accused, directly or indirectly.

[24] The accused will be released on a personal bond of Kshs. 500,000/= with one surety of similar amount. He shall not move anywhere near the witnesses or communicate or attempt to communicate with or reach any of the witnesses during the pendency of his trial. Any breach of any of these conditions may lead to the cancelation of the bond. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 9TH DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Kamwaro for accused – Yenko holding brief

2. Ms. Torosi for DPP

3. Mr. Kasaso – CA