



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE E049 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL ORONI KAMANDAACCUSED

RULING

The applicant **SAMUEL ORONI KAMANDA**, vide an application dated 14.9.2021 urged this court that he be admitted to bail on reasonable terms pending the determination of this case. He has supported his application with an affidavit sworn on the same date. In moving the application, Mr. Mituga, counsel for the applicant/accused, submitted that the applicant has a place of abode in Nyatike, Kisii County as shown by the annexed letter of the chief.

That bail is a constitutional right. He is also presumed innocent. Counsel relied on the case of ***Republic Versus Nuseiba Mohamed (2018)eKLR***, in which the Court of Appeal held that liberty is sacrosanct. Also the case of ***Michael Juma Oyamo Versus Republic (2019)eKLR***, on the meaning of compelling reasons.

It was also denied that the accused is a flight risk (***Republic Versus William Kipkorir (2018)eKLR***). That community ties of the accused have been shown. Counsel also challenged the fact of strength of the prosecution's case as being a valid compelling reason (***Danson Mugunya, HCCR 26/2008***). And on likelihood of interference with witnesses, counsel relied on ***Republic Versus William Kipkorir (2018)eKLR***, that there has to be evidence of the interference, threats or intimidation.

Mr. Okeyo for the state, oppose the application on ground that there are compelling reasons in this matter. It was first submitted that the applicant is a flight risk as shown by his conduct after the incident. That the incident was on 19.6.2021 and he was arrested on 30.6.2021, about 11 days later. That applicant in the meantime took leave to evade arrest from his known place of work, confirming that he is a flight risk.

It was further submitted that accused faces a serious charge with aggravating circumstances. Thirdly that he is likely to interfere with the evidence and witnesses. That the deceased's phone and Mpesa account remains unavailable and if released, the accused would hamper efforts at recovery. Also that the accused is well known to the witnesses who are relatives and neighbours of the deceased.

I have considered the submissions of both the applicant and prosecution sides. Article 49(1)(h) of the constitution of Kenya reads:

“An arrested 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.”

The constitution of Kenya therefore guarantees the right to bail to all accused persons irrespective of the nature of the charges that they face. The constitution however puts a rider to the grant and enjoyment of the right to bail. That the same may be denied should it be shown that there exists reasons (compelling reasons) good enough as to justify the denial of the right. In effect therefore, the right to bail is not absolute. It may be denied if the prosecution shows that such compelling reasons exists in the case.

As to what constitutes compelling reason, the Bail and Bond Policy Guidelines (NCAJ) has given guides on the same. Similarly, courts have agreed on same. The famous case of ***Republic Versus Danson Mugunya and Another (2010)eKLR***, lists the following as some of the factors that could constitute compelling reasons:-

- ***The nature of the charge***
- ***The strength and evidence which supports the charge***

- *The gravity of the punishment in the event of conviction.*
- *Previous criminal record of the accused.*
- *Probability that he may not surrender himself for trial*
- *Likelihood of interference with witnesses.*
- *Likelihood of further charges being brought against the accused*
- *Probability of finding a guilt.*
- *Detention for protection of the accused*
- *Necessity to procure medical or social report.*
- *Accused's own safety, security and protection.*
- *Whether accused would pose public danger*
- *Consideration of public confidence on the justice system.*
- *Community ties.*

The determination of whether the accused should be placed on bond would therefore depend on the specific circumstances of each case. In our instant case, the prosecution has objected to release of the accused on bail on various grounds. I shall deal with each of these grounds separately.

i) Likelihood of interference with witnesses:

It was submitted by the prosecution that the accused apparently took leave from work immediately after the incident to avoid arrest. That he was arrested about 10 days later. On this ground, this court notes that it is conceded by the prosecution that accused in fact took leave from work. He reported back to work on the due date and was promptly arrested. He was not arrested while in hiding. He was not arrested out of the jurisdiction of the court, or while on flight. There is therefore a doubt as to whether the act of taking leave would in itself be taken to mean that the intention of the accused was to evade arrest. Neither do I find that act in itself as being an indication of one who is likely to abscond if released on bail. I therefore do not find this ground to have been sufficiently proved as a compelling reasons.

ii) Interference with witnesses

This ground was based on the fact that the accused knows well some of the witnesses of the prosecution, specifically, the sister and neighbours of the deceased. The prosecution did not show if the accused has in way contacted, threatened, intimidated and or approached any of the witness. The submissions of the prosecution were therefore based on fears.

In the case of Republic Versus William Kipkorir Chirchir and Another(2018)eKLR, cited by the applicant, the Hon. Justice Mutuku dealing with a similar situation held;

“..... The allegation that the accused may interfere, intimidate and threaten witnesses, it is my view that in the absence of evidence to support the same, these are just suspicious and fears harboured by the prosecution.”

The Honourable Judge proceeded to hold that such fears of the prosecution would not on their own amount to a compelling reason. I share the same view and I so hold.

iii) Likelihood of interference with investigations:

It was submitted that deceaseds phones and Mpesa accounts have not been recovered and that if released, the accused would likely hamper the efforts at recovery. I would not say much on this. Except to note that the responsibility of investigations do not lie with the accused, but with the investigating officers. Such investigating officers have had the opportunity to investigate this matter from the date when this incident occurred on 20.6.2021 (as per the charge sheet). This ground can therefore not be a compelling reason good enough to justify a denial of the right to bail.

iv) Lack of fixed abode:

Whereas the prosecution submitted was that the accused has no known place of abode or permanent residence, the accused has shown details of his permanent place of abode (home) and proved same with a letter by his chief. His place of employment is also known. The submissions of the prosecution have been disapproved by the evidence produced by the accused.

The main objective of the right to bail is to sufficiently secure the release of the accused while at the same time ensuring that he turns up in court for his trial. In this matter, I am not convinced that the prosecution has proved the existence of any compelling reason that would justify the denial of the right of bail to the accused. On the other hand, I find that it is in the interest of justice to place the accused on bond on appropriate terms.

I therefore find merit in the application dated 14.9.2021 and allow the same. I order that the accused may be released on bail on the following terms

- i) A bond of Kshs. 1 million with 1 surety of a similar amount.*
- ii) In the alternative, a cash bail of Ksh.300,000/=.*
- iii) The accused is ordered never to interfere with any prosecution witnesses directly or by proxy till this case is determined.*
- iv) The accused, before his release, to furnish specific details of where he intends to reside pending determination of this case. Also details of a contact person, Identity card/phone.*
- v) He is ordered to attend court at all times as would be ordered by court from time to time till this case is determined.*

It is so ordered.

D. O. OGEMBO

JUDGE

3.11.2021.

Court:

RULING READ OUT IN OPEN COURT IN THE PRESENCE OF THE ACCUSED, MR. MITULLA FOR THE ACCUSED AND MS. KIMANI FOR THE STATE.

D. O. OGEMBO

JUDGE

3.11.2021.

COURT:

A NEW HEARING DATE TO BE FIXED. HEARING 14TH/16TH FEBRUARY 2022.

MS. KIMANI:

WE URGE FOR SUBSISTENCE FOR 1 WITNESSES.

COURT:

ALLOWANCE FOR 1 WITNESS (NAIROBI).

D. O. OGEMBO

JUDGE

3.11.2021