



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO.E064 OF 2021

JOSEPH NJANJA KIMATHI *alias* NDUNGU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The accused, **Charles Joseph Njanja Kimathi alias Ndungu**, 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 **31st August 2021** at Nairobi city, Kamukunji Sub-county within Nairobi County murdered **Koche Hassan**.

2. On **2nd March, 2021**, the charge was read and explained to the accused who pleaded '**NOT GUILTY**' to the charge. Thereafter, the accused through his defence counsel, **Mr. Juma** orally applied for release on bail/bond. The court then directed the defence to file a formal application to this effect, which was filed on **10th July, 2020** and is the subject of the Ruling herein.

3. In the **Affidavit Supporting** the motion sworn by the Applicants deposes that he is facing criminal charges for the offence of murder contrary to **Section 203 as read with Section 204** of the **Penal Code**. He has also deposed that he was arrested on **31st August, 2021** and arraigned in court on **1st September, 2021** where the prosecution prayed and was granted time to complete their investigations. Further, the applicant/accused person has stated that he underwent mental examination and was found fit to plead after which he took plea of not guilty on **20th September, 2021**. According to the Applicant/accused person, the offence he is charged with is bailable and he will abide by the set bail terms. He has also deposed that he has no criminal record and he is a law abiding citizen and a family man. Further, the Applicant/accused person averred that he has financial obligations which include a loan which if not serviced may lead to the attachment of his property. Lastly, the Applicant deposed that he is not a flight risk and has known abode.

4. However, the application was opposed by the Respondent vide an **affidavit** dated **19th October, 2021** sworn by **PC Innocent Manzi**.

5. On **18th October, 2021**, the Honorable Judge directed the parties to file record submissions dated **1st November, 2021** while the state's submissions are dated **29th October, 2021**.

6. On **1st November, 2021**, when the matter came up for highlighting, the court ordered a social inquiry to be conducted on the accused person by the Probation Department and a report on the suitability accused person being released on bail pending trial be filed in court.

DETERMINATION

7. I have considered the application and the rival submissions made by each learned counsel in support and in opposition to the application. I have also considered the pre-bail report filed by the prosecution and legal counsel. I find the issue for determination being whether there are compelling reasons to warrant the accused person be denied release on bail/bond.

8. **Article 49 (I) (h)** of the **Constitution of Kenya 2010**, 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.

9. The wording of this Article denotes that the right to bail is not an absolute right. What the court is required to do when faced with such application is to establish whether there exists compelling reasons to warrant an accused being denied the right to bail.

10. It is settled law that in cases where the prosecution is opposed to the admission of an accused person to bail/bond pending trial, it bears the burden of proving to the required standard that there were compelling reasons to justify such denial.

11. In the case of **Michael Juma Oyamo & Another -vs- Republic [2019] eKLR**, the Court of Appeal stated that: -

“...Article 49(1) (h) of the Constitution states that 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”. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person...”

12. The first ground relied upon by the prosecution in opposing the accused application is the fact that he is a flight risk. The learned prosecution counsel has submitted that the accused person committed the offence on **31st August, 2021** in broad daylight, then fled the scene of the crime. It was not until **31st September, 2021** where he was arrested at Kariobangi South. Counsel has cited the case of **Republic -vs- Joseph Kuria Irungu & Another (2018)eKLR** to support this submission.

13. Counsel for the accused refuted the claim that the applicant is a flight risk. He submitted that the applicant is a Kenyan citizen without a passport. Furthermore, that all his family members reside within the jurisdiction of the court and some are willing to stand surety for him hence he is not a flight risk.

14. In his report, the Probation Officer prepared and filed a report in which he stated that the accused has resided at **Kariobangi South, Stage ya Corner near Civil Service Apartments** since **2015** but upon his arrest, his belongings were transferred to his brother's place in Kitengela. However, the Probation Officer went on to state that the social inquiry revealed that in the event the Applicant/accused person is granted bond, neither his family nor friends are willing to accommodate him.

15. I have read through the pre-bail report and find that the accused person has been depicted as a person who is socially unstable without strong family ties. It is therefore likely that the accused would be a flight risk if he is released on bail pending trial going by his present circumstances. I also find that the accused person has no fixed abode and tracing him to attend court in case he absconds would prove difficult. This is in spite of the commitment by his brother **Kangara David Kimanthi** in his affidavit sworn on **21st September, 2021**.

16. The second ground relied on by the prosecution in opposing the accused person's release on bond is his character and antecedents. According to the prosecution the accused person has a **Criminal Case No.609 of 2020**, at Makadara Law courts, where he is charged with the offence of assaulting one **Joseph Gicheha Mwangi**. He was released on bond and while the matter is still pending in court, he committed the offence he is currently facing which is **serious and in violation of his bail/bond terms**.

17. As from the above information, the applicant/accused person has been presented with a history of substance/drug abuse and violence hence has been I believe this is the cause of the broken ties with the family.

18. The third ground by the prosecution is the fear of the accused person interfering with prosecution witnesses. The prosecution has stated that most of the witnesses are the colleagues of the accused person and cited his violent nature as a legitimate claim that he may intimidate or threaten witnesses. The pre-bail report has brought out the issue of drug/substance abuse, hence the violent tendency in him, which has not been rebutted by the accused/Applicant in his submissions to court except for his counsel who has stated that it is unlikely that the accused will interfere with witnesses since he is yet to receive prosecution documents including the witness statements. It cannot be undermined that once the accused is released on bond, he will not find out who is testifying against him, even though the Probation Officer, as reported by the accused person understands the consequences of witness interference.

19. With the background and character (violence and drug abuse) of the Applicant/accused person, which has not been rebutted, I find that there is a real likelihood that the release of the Applicant/accused person on bail will create fear and intimidation to prosecution witnesses since he is viewed as a dangerous man.

20. Finally, the prosecution has stated that the accused is aware of the weight and strength of the prosecution's case against him since the offence was committed in broad daylight which is an incentive for him to abscond if granted bail. On the other hand, counsel for the accused stated that the accused should not be denied freedom until he is judged to be guilty or **innocent of the crime he is charged with**.

21. The gravity of the offence as a consideration in applications for release on bail/bond, was appreciated by in Mbogholi Msagha, J **Criminal Application No.319 of 2002, Priscilla Jemutai Kolonge -vs- Republic (unreported) at page 3**, wherein he held as follows:

“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”

22. Although it is true that some evidence has been adduced, the matter is yet to be heard to conclusion for the accused person's guilt cannot be decided at this stage. To say that based on the evidence adduced the accused person may abscond trial, it amounts to judging the accused before he is heard.

23. In conclusion, having established that the Applicant/Accused person's abode is indeterminate, that he is of violent and dangerous character, abuses drug/substance, has broken family ties to the extent that he would interfere with prosecution witnesses and abscond, I find that the prosecution has demonstrated compelling reasons why he should not be admitted to bail/bond.

24. Furthermore, the pre-bail report has shown that none of the family members are willing to stand as surety for him. In the circumstances, the application for accused person to be admitted to bail/bond is dismissed. However, the accused/Applicant is at liberty to review the application in case there is a change in circumstances.

It is hereby ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF DECEMBER., 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Maina for the State

Mr. Ruiru counsel holding brief for Mr. Mathenge counsel for the accused person

Court Assistant - Quintus