



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL CASE NO. 1 OF 2020**

***(CORAM: F.M. GIKONYO J.)***

REPUBLIC.....PROSECUTOR

**-VERSUS-**

BENARD KIPASI MOYONGO.....1<sup>ST</sup> ACCUSED

JAMES PASARONI MOYONGO.....2<sup>ND</sup> ACCUSED

**RULING**

**BAIL APPLICATION**

[1] The accused persons herein are facing a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** .

[2] On 22<sup>nd</sup> June 2020, the 1<sup>st</sup> accused person through his defence counsel Miss Nchoe filed an application dated 19th June 2020 sought for orders that the accused person be released on bond/ cash bail pending the hearing and determination of this case.

[3] The said application was opposed by the Prosecution based on an affidavit sworn by PC Kenneth Muriuki, the Investigating Officer in the case.

[4] The prosecution filed the replying affidavit sworn on 26<sup>th</sup> June 2020 by **PC Kenneth Muriuki containing** reasons the prosecution believes constitute compelling reasons not to release the 1<sup>st</sup> accused on bond, to wit: -

***a) Witness interference- the witnesses are his close relatives.***

***b) Safety and security of the accused- that the local communities are angered about the death.***

***c) Flight risk- the 1<sup>st</sup> accused person like his accomplices who are still at large is a flight risk. That he is likely to escape to a neighboring country, Tanzania, which is currently locked down in efforts to combat COVID 19 pandemic. That if granted bail risks joining his accomplices to abscond***

[5] The 1<sup>st</sup> accused person swore a further affidavit filed on 21<sup>st</sup> July 2020. That the objection to bail has come as an afterthought since the I.O. ought to have sworn the affidavit immediately after conclusion of the investigations. That he has a fixed abode at Meirouwaju Village (Melili) where he resides with his family and he does not have any intentions to relocate to any other place. That he does not have any previous criminal records that could lead to the creation of any doubts in the mind of this court so as to deny him bail. That he is aware of the implication, risks and dangers of failing to attend court as and when he is required to. That there has to be proof of a likelihood of such interference. That he will adhere by the terms of the bail that will be granted to him.

[6] The prosecution filed an affidavit to oppose bond sworn on 5th November 2021 by **PC Kenneth Muriuki containing** reasons the prosecution believe constitute compelling reasons not to release the 2<sup>nd</sup> accused on bond, to wit: -

***i. Flight risk- the 2<sup>nd</sup> accused person with other accomplices after escaping switched off their mobile phones making all efforts to trace them futile. The 2<sup>nd</sup> accused was arrested following a tip off by members of the public operating a boda boda within Narok Town on 19<sup>th</sup> October 2021 at around 1000hrs. The warrant of arrest had been in force for a period of one year. If granted bail***

*is likely to interfere with efforts of apprehending the other suspects who are his close relatives. He may be having information as to their whereabouts.*

*ii. Interference with witnesses- the 2<sup>nd</sup> accused is likely to interfere with witnesses who are his close relatives and neighbors as they have expressed fear that they will not be able to freely testify if the 2<sup>nd</sup> accused person is released on bail or bond.*

[7] The 2<sup>nd</sup> accused person responded by filing a replying affidavit filed on 10<sup>th</sup> November 2021. That he has never been to hiding as he has been operating a motorcycle business within Narok Town specifically K24 total stage. That he is not aware of any warrant of arrest. That he frequently visits his rural home known as Meirowuaju over weekends to check on his parents and at no point has he been informed that police were looking for him. That he has a young family who solely depend on him and he has no intentions of hiding from them. That the prosecution has not raised any compelling reasons to have this court deny him bail.

[8] Ms. Torosi, counsel for the prosecution in her submission has relied on affidavit filed that the three compelling reasons; likelihood to interfere with witnesses, the accused are a flight risk and the security of the accused persons and the case of **Republic Versus Joyce Kagendo [2017] eKLR And Republic Versus Joktan Mayende And 3 Others [2012] eKLR.**

### **1<sup>ST</sup> ACCUSED PERSON'S SUBMISSIONS**

[9] Ms. Nchoe submitted on behalf of the 1<sup>st</sup> accused that there is no factual evidence that has been provided before this court revealing such likelihood of fleeing to Tanzania on a balance of probability. the 1<sup>st</sup> accused person is a resident Meirowuaju village at Olendem area of melili location where he resides with his family and which is miles away from the border of Kenya and Tanzania where the investigation officer alleges the accused person intends to flee to. That the accused person does not have previous criminal records that could lead to the creation of any doubts in the mind of this court so as to deny him bail. The accused person was arrested on the same day of the commission of the offence and that he never tried to flee to any place. She cited the cases of **R Vs Mohammed Hagar Abdirahiman & Another [2012] eKLR and R Vs Joktan Mayende & 3 Others.**

[10] It was submitted on behalf of the 1<sup>st</sup> accused person that the prosecution has not placed any material before this court to demonstrate actual or perceived interference. She cited the cases of **Republic Vs Dwight Sagary and Another Hccr No. 6 Of 2012, R Vs Richard Aden Milimani Hcc No. 48 Of 2016 And R Vs Danson Ngunya & Another [2010] eKLR**

[11] Ms. Nchoe submitted that the ground of hostility cannot be used as a ground for denial of bail. That the accused person has been in custody since 7<sup>th</sup> February 2020, close to two years. The allegation of the community being angered by the act was made in the month of June 2020. She urged this court to disregard the social inquiry report alleging hostility on the ground as the accused person has been in custody long enough as to allow the hostility if any to fade away. She cited the cases of **R Vs Titus Kimathi Murea & Another and R Vs Eric Masega Alias Madiaba.**

[12] Ms. Nchoe urged this court to consider the fact that the accused person was arrested on the same day of the commission of the offence and he has been in custody for a close to two years and his trial has never taken off because of mere reason that the other suspects are yet to be arrested. She cited the case of **Republic V Stephen Robi Marwa & Another [2014] eKLR**

[13] In conclusion, it was submitted on behalf of the 1<sup>st</sup> accused person that this court should consider the period in which the accused person has been in custody and while trial has never taken off due to the grounds provided by the prosecution, which are unfounded as no factual evidence has been laid before this court to prove such allegations. They prayed that the accused person be committed to bail pending trial.

### **2<sup>ND</sup> ACCUSED PERSON'S SUBMISSIONS.**

[14] Ms. Cheruto submitted on behalf of the 2<sup>nd</sup> accused person that at the moment he is presumed innocent until proven guilty and is entitled to be released on reasonable bond terms pending trial. She cited the case of **Republic Vs Victor Oricho Ochwal [2021] Eklr, Republic Vs Robert Zippor Nzilu [2018] eKLR, Michael Juma Oyamo & Anor Vs Republic [2019] eKLR**

[15] It was submitted that apart from the allegations by the investigation officer, there is no such other tangible evidence indicating that the 2<sup>nd</sup> accused person is a flight risk.

[16] It was submitted that no affidavit or statement has been produced by the prosecution sworn or written by any of the prosecution witnesses indicating that they have been interfere with so far by the 2<sup>nd</sup> accused person.

[17] It was submitted that the life of the 2<sup>nd</sup> accused person will not be at risk if and when released on bond.

[18] It was submitted that the 2<sup>nd</sup> accused person should be released on reasonable bond terms.

[19] In conclusion, Ms. Cheruto submitted that if bond terms must be denied, then it should be on cogent evidence. The prosecution failed to prove the alleged reasons set forth as compelling reasons to bar the 2<sup>nd</sup> accused person from being released on reasonable bond terms hence this court should therefore grant the 2<sup>nd</sup> accused reasonable bond terms and not deprive him of his constitutional rights to bond and liberty.

### **ANALYSIS AND DETERMINATION**

[20] Bail is a constitutional right under Article 49 (I) of the Constitution. The right is, however, not absolute as liberty may be denied where there are compelling reasons. Compelling reason must be of a nature that brings conviction upon the court to impose and 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.”**

[21] It was aptly put in **Republic Vs. Danson Mgunya & Another** by Ibrahim J (as he then was) that 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.

[22] And in **R. V. Richard David Alden (2016) eKLR**, Lesiit J succinctly summarized some of the important considerations by the court in an application for bail in the **Bail and Bond Police Guidelines** 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.”**

[23] On the balancing of rights and obligations of the accused, on the one hand, and interest of justice and rights of victims on the other hand for purposes of bail, Lesiit, J in the case above cited, further stated: -

**“Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these 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**

[24] Has the prosecution established compelling reasons not to release the accused on bond? From the affidavit by the I.O and submissions of the prosecution, it is apparent that the bond application has been opposed on three main grounds namely; interference with witnesses, safety and security of the accused person and flight risk. I will consider these issues beginning with accused’s own safety and security.

### **Accused’s own safety and security.**

[25] The investigating officer in his affidavit stated that the life of the 1<sup>st</sup> accused is in danger as it is evident that the local community is angered by the killing of the deceased. The defence has not responded to this issue.

### **Taking law in own hands**

[26] Arguments such as I am hearing, depicts a society of the ruffians or Mahocks whose talent was to use all manner of cruel and torturous methods to inflict as much pain as possible and to kill anyone found in their way. Such was a society without law and order. The community herein is within the territorial jurisdiction of the Republic of Kenya- a nation governed by law and order under the Constitution of Kenya, 2010. I wonder where the said community would derive the authority to harm or kill a suspect under trial. No one is above the law or should take the law in their hands. All are bound by the Constitution which reigns. See article 2 of the Constitution which states: -

### **[27] Supremacy of this Constitution**

**(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.**

[28] At this age and time, it is disheartening and depressing that a community or group of people will haughtily express desire to harm or kill

a person under trial who is by law innocent until proven guilty. Is not such an epitome of a criminal mind? Can one notice any difference between such persons and avowed criminal? Any such act to harm or kill a suspect, should be liable to prosecution in criminal law. I have stated before, and I will state it again, that such actions are unlawful, barbaric and uncouth without any place in law and the 21<sup>st</sup> century. The community in question should let the law punish the accused. This should stop and my view is that, the ground that the security of the accused is threatened by the members of the public or victim family, should never be encouraged to be a ground for denial of bail; otherwise courts will inadvertently promote or condone violence, disorder and usurping of law by individuals or group of people.

[29] In any case, it is the duty of the state to ensure safety and security of its citizens including the accused person. The police should take appropriate measures to ensure security of the accused person. I therefore find the argument that the accused be detained for his own safety and security to be without any legal or factual basis and I reject it.

### **Interference with witnesses**

[30] The prosecution alleges likelihood of interference with prosecution witnesses. On this ground the court in **R. V. Jaktan Mayende & 3 others**, stated 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.”***

[31] See also **R. V. Patius Gichobi** where the court held that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of the Constitution. Accordingly, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence as to persuade the court to deny the accused bond. More jurisprudence on the point is found in **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 familiar relationship between the accused and witnesses among others.”***

[32] As the law stands, it is the duty of the court to give effect to the rights of victims expressed in Section 10 of the Victim Protection Act No. 17 of 2014, as follows: -

***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.***

[33] Interference with witnesses has another facet. It undermines the criminal justice system and dents the integrity of the criminal process. This would in turn interfere with the administration of justice or prejudice the trial. It is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in **R. V. Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR** where she succinctly stated 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.”***

[34] In the present case the prosecution stated in their submission that the 1<sup>st</sup> accused is likely to interfere with witness who are his close relatives. The likelihood of interferences of witnesses is not far-fetched. The pre-bail report has indicated that victim was a first cousin to the accused persons. The community and the victim's family are opposed to the accused persons release on bond. The family of the victim recommend that the accused persons remain remanded until the families reconcile and they will advise the court accordingly. The probation officer recommended that the bond be withheld for a while until the two families reconcile. The relatives of the accused persons are worried if the accused are released. These are the witnesses who will expected to testify against him at the trial. It is more likely that they may be scared stiffly by the presence of the accused amongst them.

[35] In **Republic v Fredrick Ole Leliman & 4 others [2016] eKLR**, the Court held: -

*"In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the Kiteme Maangi case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety."*

[36] Similarly in K K K v Republic [2017] eKLR, the Court held: -

*"... In considering the question of bail in this matter, the court must balance the right of the accused pursuant to presumption of innocence to be released on bail pending his trial against the public interest in prevention of crime and access to justice by the victims of crime by successful prosecution of offences, which would no doubt be adversely affected by interference with witnesses and evidence relied on by the Prosecution to prove its case. The key is in adopting a path that ensures prosecution of the offences in a manner that is least restrictive of enjoyment of the accused's right to bail. Where an expedited hearing is possible, the same should be ordered; where the witness protection measures guarantees no interference of the complainant or other witnesses by the accused, he may be released on bail as with where the evidence may be secured; and where the witnesses are prone to interference by the accused or other persons for his benefit, the testimony of such witnesses should be taken before the accused is released on bail ...". [Emphasis mine]*

[37] I agree with the above sentiments and reiterate them here. The circumstances of this case, being that the witnesses are close relatives of the accused and live together, the likelihood of interference of witnesses is not farfetched.

#### **Flight risk.**

[38] The prosecution made arguments in the affidavit of PC Kenneth Muriuki in support of the ground that the 1<sup>st</sup> accused person was a flight risk; the 1<sup>st</sup> accused person like his accomplices who are still at large is a flight risk. That he is likely to escape to a neighboring country, Tanzania, which is currently locked down in efforts to combat COVID 19 pandemic. That if granted bail risks joining his accomplices to abscond. This argument is neither here nor there, for the concerned witnesses were not named so as to provide the argument with power and grace. No attempt was made to show that the accused was planning to leave the jurisdiction of the court or had attempted or made arrangements to leave the country. For the above reasons stated, that ground is not sustainable. I reject the argument.

[39] As for the 2<sup>nd</sup> accused person, the prosecution argued that the 2<sup>nd</sup> accused person with other accomplices after escaping switched off their mobile phones making all efforts to trace them futile. The 2<sup>nd</sup> accused was arrested following a tip off by members of the public operating a boda boda within Narok Town on 19<sup>th</sup> October 2021 at around 1000hrs. The warrant of arrest had been in force for a period of one year. If granted bail is likely to interfere with efforts of apprehending the other suspects who are his close relatives. Since he may be having information as to their whereabouts. The fact that it took police almost a year to apprehend he raises the reason that he may disappear again.

[40] In conclusion, this court based on the above, finds that based on the evidence of likely interference and intimidation of witnesses especially the close relatives and victims' family owing to the manner in which the murder was carried out there are compelling reasons to keep the accused person in custody at least until the said witnesses have testified. The trial Court may reconsider the accused's bail thereafter having regard to the circumstances of the case in accordance with the guidelines set out above.

[41] The Court directs that the hearing of this case be heard on priority basis.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021**

.....

**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

1. Accused persons
2. Karanja for Respondent
3. Ms. Nchoe for 1<sup>st</sup> Accused person

4. Ms. Cheruto for 2<sup>nd</sup> accused person

5. Kasaso - CA