



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. E009 OF 2021

(CORAM: F.M. GIKONYO J.)

REPUBLIC.....PROSECUTOR

-VERSUS-

EMMANUEL OLDUATI SHARKOYIO.....ACCUSED

RULING

Bail Application

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

[2] On 10th August 2021, the accused through his defence counsel **Miss Obondo** orally requested the court to admit the accused person on reasonable bond/ bail terms.

[3] Mr. Karanja, counsel for the prosecution opposes the application for bond/ bail and requested for time for the investigation officer to put in an affidavit.

[4] On 10th August 2021 Onger J. directed as follows;

i. "That the defence counsel to file a formal application for bail.

ii. The probation officer to file a pre bail report.

iii. The prosecutor to supply both defence counsel and the counsel watching brief for the victim's family with copies of the witness statements....."

[5] On 25/10/2021 Miss Obondo opted to make an oral application for bond. My view is that there is no requirement that an accused person should file a formal application for bail. An oral application will suffice and is competent. This is in line with the constitutional desire to see formality in litigation especially criminal cases reduced to the bear necessary minimum.

Compelling reasons according to the prosecution

[6] The prosecution filed an affidavit sworn on 1st September 2021 by **PC Kenneth Kemei** containing reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -

a) Witness intimidation and interference- that the brutal murder of the deceased was committed in the presence of a minor who is a key witness.

b) Safety and security of the accused- that the brutal murder of the deceased has caused much public anger and apprehension. He was also apprehended by his fellow villagers after he had fled the scene. The police rescued the accused from the irate villagers and subsequently took him to Olulunga Sub County Hospital where he received treatment. Therefore security of the accused is not guaranteed.

c) flight risk- the accused person had fled the scene to evade arrest

[7] Ms. Torosi, counsel for the prosecution relied on affidavit filed. She added that the compelling reasons are manifest. That there is likelihood of interfering with witnesses. One of the prosecution witnesses is a minor who could be intimidated. He is also an eye witness. Secondly, security of an accused person is not guaranteed as villagers roughed him up after the incident as evidenced by the accused person's treatment sheets. Thirdly, the accused is a flight risk. He fled after commission of the offence. She therefore urged this court to deny him bail.

[8] Ms. Makori, counsel watching brief associated herself with the submissions by the DPP. She added that right to bail is not absolute. The witnesses are neighbours of the accused person. The accused was almost lynched.

Defence: No compelling reasons

[9] On 10/11/2021 Miss Obondo submitted orally that the right to bail is clear. Article 50 provides for presumption of innocence. The accused has been in custody for a long time which negates that right. That no compelling reason was revealed by the prosecution

[10] She further argued that bond is to procure attendance of accused person during trial. She urged this court to issue the bond that will serve this purpose and that the court should exercise discretion judiciously.

ANALYSIS AND DETERMINATION

[11] Despite the orders of 10th August 2021, no pre bail report was filed by the probation officer. This court is not sure whether the probation office was notified of this orders. Nevertheless, I will determine the question of bail.

[12] Bail is a constitutional right under Article 49 (I) of the Constitution. The right may, however, be limited and denied where there are compelling reasons- reasons that are substantial and bring conviction upon the court to deny bail. Such should be reasons which justify limitation of right in an open and democratic society under Article 24 of the Constitution. The test of proportionality also plays a role in making the decision to grant or deny bail, and determining reasonable conditions of bail. See article 24(1)(e) of the Constitution which require taking into account, *inter alia*:

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

[13] 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.

[14] And in ***R. V. Richard David Alden (2016) eKLR***, Lesiit J (as she then was) 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."

[15] 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 (as she then was) 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

[16] Has the prosecution established compelling reasons not to release the accused on bond?

[17] From the affidavit by the I.O and submissions of the prosecution counsel, bail has been opposed on three main grounds namely;

- i. Interference with witnesses;
- ii. Safety and security of the accused person; and
- iii. Being a flight risk.

I will consider these issues beginning with accused's own safety and security.

Safety and security of Accused

[18] The investigating officer in his affidavit stated that the life of the Applicant is in danger as it is evident that the local community is angered by the killing of the deceased. That the villagers attacked him and injured him. The defence has not responded to this issue.

Taking law in own hands

[19] This ground is disturbing and 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 the rule of law and order under the Constitution of Kenya, 2010. I wonder where the said community derives its 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 declares the **Supremacy of this Constitution** thus: -

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

[20] 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 21st 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.

[21] 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

[22] The prosecution alleges likelihood of interference with prosecution witnesses.

[23] Interference with witnesses and evidence is a direct affront to and undermines the criminal justice system. Such act also dents the integrity of the criminal process and prejudices the trial. This in turn is interference with the administration of justice. Thus, the law has bestowed on courts the duty to preserve the integrity of the trial by making such orders as are necessary including denial of bail to a person engaged in such conduct that compromises the trial. For these reasons, interference with witnesses and evidence is regarded as and has been proclaimed by courts to be a justifiable reason to limit a person's liberty under article 24 and 49(1)(h) of the Constitution.

[24] See what was stated in ***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.”

[25] 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.

[26] 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.”

[27] In addition, amongst the rights of victims expressed in Section 10 of the Victim Protection Act No. 17 of 2014, is: -

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

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

(c) To have their property protected.

[28] The prosecution should, nonetheless, provide the specific instances or likelihood of interference with witnesses with such succinct detail or evidence as to persuade the court to deny the accused bond.

Applying the test

[29] In the present case the prosecution stated in their submission that the accused is likely to intimidate and interfere with vulnerable witness. The prosecution has indicated that one of witnesses is a minor. Young children, due to their young age are vulnerable and feel most vulnerable in situations that produce fear. In this case, the minor is said to be a key witness to the brutal murder. The chilling details of how the deceased was murdered is still vivid in the child’s memory. In such situation, the minor would feel threatened and fearful to learn that the accused person has been released and freely roams about within the minor’s vicinity.

[30] See also the case of Republic -vs- Fredrick Ole Lehman & 4 Others [2016] eKLR the court was faced with the same allegations of likely intimidation of witnesses in view of the character and training of the accused persons and the court had this to say;

"Undermining the criminal justice system includes instances where there is likelihood that witnesses may be interfered with or intimidated, the likelihood that the accused may interfere with the evidence, or may endanger an individual or individuals or the public at large, likelihood that the accused may commit other offences. In these 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 terms 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 custody. Apart from the rights of the accused, and public interest issues, there are other categories of rights which the court is mandated not to lose sight of. These are the rights of the victims of the crime. The Victim Protection Act gives a broad definition of who the victims are. They include the families of the ones against whom the offence was committed It is not disputed by the defence that 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 is a real possibility....."

[31] The prosecution’s argument therefor that release of the accused would cause fear to vulnerable witnesses such as the minor witness is compelling reason in law. The witness is likely to be afraid to testify freely if he/she learns that the accused person is walking about freely. The court cannot in the interest of justice turn a blind eye to such grave matter which can impact negatively on the administration and dispensation of justice.

Flight risk.

[32] The prosecution made an argument in the affidavit of PC Kenneth Kemei that the accused person was a flight risk; that the accused had fled the scene to evade arrest when he was apprehended by members of the public. 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.

[33] In conclusion, this court finds that that there is evidence of likely interference and intimidation of witnesses especially the minor witnesses and victims family owing to the manner in which the murder was carried out. This is a compelling reason 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.

[34] 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 6TH DAY OF DECEMBER, 2021

.....

F. GIKONYO M.

JUDGE

In the presence of:

- 1. Ms. Obondo for the accused
- 2. Makori watching brief
- 3. Accused person
- 4. Karanja for Respondent

