



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. E071 OF 2021**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**DAKITARI LOKOMBAYO.....ACCUSED**

**RULING**

1. Before the Court is an application for bail pending trial brought by the accused who is charged with the offence of Murder contrary to Section 203 as read with 204 of the Penal Code.

2. The right to bail pending trial is recognized under Article 49 (1) (h) of the Constitution of Kenya, and Section 123 of the Criminal Procedure Code. The right is available even to accused persons charged with capital offences. The Court recognizes that an accused person has the right to be presumed innocent until proven guilty, and this explains why the right to bail exists. The grant of bail pending trial is, however, not automatic. In accordance with Article 49 (1) (h) of the Constitution, it may be denied where the Prosecution demonstrates compelling reasons for refusal.

3. Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 sets out the judicial policy on bail and bond at page 25 thereof as follows: -

***The following procedures should apply to the bail hearing:***

***(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:***

***a) That the accused person is likely to fail to attend court proceedings; or***

***b) That the accused person is likely to commit, or abet the commission of, a serious offence; or***

***c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or***

***d) That the accused person is likely to endanger the safety of victims, individuals or the public; or***

***e) That the accused person is likely to interfere with witnesses or evidence; or***

***f) That the accused person is likely to endanger national security; or***

***g) That it is in the public interest to detain the accused person in custody.***

4. The Prosecution opposed the application for bail by the replying affidavit of No. 83878 CPL Guylord Amayamu of DCI Samburu East sworn on 12<sup>th</sup> November 2021. He explains the circumstances of the deceased's death. He urges that the deceased was shot by armed bandits on the left chin and the bullet exited from the right chin making him to lose control of the vehicle he was driving. He urges that at the point of the shooting, the deceased was rushing other victims of an earlier shooting incident to hospital. He urges that the accused person was arrested by Sera Conservancy Rangers while armed with an M16A1 rifle serial number 5395508 with one M16AL Magazine loaded with 19 rounds of 5.56 calibre. He urges that the deceased was killed in a very cruel manner. He urges that the accused has no fixed place of abode.

He further urges that the accused has warned some arresting officers and clan elders that he will kill them when he is released from prison and that there is a likelihood of witness interference owing to the severity of the charge. He urges that the accused may be lynched by members of the public as members of the public previously demanded for the accused person and it took the intervention of officers to save his life from the irate mob who wanted to lynch him. He urges that the police were even forced to transfer the accused from Wamba Police Station to Maralal Police Station and that the accused is facing 5 other charges at Maralal Law Courts.

5. The accused filed a replying affidavit in response to the Prosecution's affidavit. He urges that he has 2 fixed places of abode, one at Lerata Shopping Centre and the other at Kirish Village, where he has built homes for his 2 wives and 9 children. He has set out the particulars and names of his wives and children and the schools that his children attend. He urges that the Chief, Mr. Ndege Lenayasa from Archers Post can verify that he is a family man with 2 homes. He urges that he is a full time boda boda rider and has done so for 10 years but owing to an injury he sustained 2 years ago, he has scaled down his boda boda business and he currently does more of herding. He urges that if granted bond, he will faithfully attend Court. He urges that he is a law abiding citizen and has never been charged or been a suspect of any criminal offence other than those he is currently facing. He urges that it is at Wamba Police Station where an irate crowd were hostile towards him. He urges that his home, Lerata, is about 50 km from Wamba and thus his security cannot be threatened. He urges that though he was charged with the related crimes of being in possession of firearms in Maralal, he was granted bond and his bond application was not opposed. He urges that he is the sole breadwinner as both of his wives are housewives and he needs to take care of them and his 9 children.

### ***Determination***

6. The accused person has extensively urged that he has 2 fixed places of abode where his 2 wives respectively live with his 9 children. The Court, however, appreciates that the fact of having a fixed place of abode is not the only consideration to be made in applications for bail.

7. The Court observes that the accused has been charged with other offences in Maralal. The Prosecution identified a total of 5 other charges relating to the offences of unlawfully being in possession of firearms under the Firearms Act and the Wildlife Conservation and Management Act. The accused has urged that the fact that he was granted bond in those other cases should persuade the Court herein to similarly grant him bond. The Court does not consider this argument to be a sound basis to grant bond herein. In such applications for bail or bond, each case is to be decided on its own merits, depending on the circumstances of the case. To this end, the Court considers that the accused faces 5 other charges relating to being in possession of firearms. While this is not a reason for denial of bail as the accused is presumed innocent in all cases, at all times, until he is proved guilty and convicted, the possibility of multiple penalties in the cases readily gives the accused a greater incentive to abscond, so as to avoid punishment if eventually found guilty.

8. The Court also considers that the safety of the accused is a priority. His safety is a priority, not only to preserve his life for his personal interests, but also to ensure his attendance in Court during trial, which is the primary consideration in applications for bail. The accused person has admitted to having experienced hostility from the locals at Wamba, where the deceased hailed from. Although he urges that if granted bail, he will not set foot in Wamba, which he urges is a whole 50 km from where he stays at Lerata, this Court does not underestimate the possibility of the angry locals finding their way to the accused's home. The Court considers that without the intervention of police officers who transferred him from Wamba Police Station to Maralal Police Station, the accused could have been lynched by the angry locals. The Court considers that court proceedings including the instant bail application is open to the public and it is thus not practical for the accused to urge that his release will go unnoticed for as long as he avoids going to Wamba.

9. The Prosecution has also urged that the accused has previously issued death threats to the arresting officers, to be executed upon his release. Although the source of this information has not been specified, this Court considers that this is a possibility.

10. Taking into account the fact that the deceased died while helping victims of a previous and recent attack, this Court considers that the successive attacks caused a lot of public outrage in the local communities within Wamba. To avoid any further public outrage, building up from the previous attacks, which happened as recently as October 2021, and are thus still fresh in the minds of the locals, the Court finds it best to deny bail. The security of the nation, which includes the local communities, the victim's family and that of the accused person himself are key considerations to be made under Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015.

11. The Court, therefore, finds that the Prosecution has set out compelling reasons for refusal of bail, in the fact that the accused has a greater incentive to abscond in view of the severity of the charge of murder that he faces, and the multiple other cases he is charged with in Maralal. The Court also considers that the accused has a high chance of being lynched owing to public outrage, which may endanger his safety as well as those of other members of the community. This eventuality will also, inevitably contribute to his non-attendance during trial. The Court has also considered the likelihood of witness interference and intimidation.

### **ORDERS**

12. Accordingly, for the reasons set out above, this Court makes the following orders: -

***i) The Applicant's application for bail pending trial is hereby declined.***

***ii) The Applicant may renew his application for bail in the future, in the event of changed circumstances.***

*Order accordingly.*

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF DECEMBER 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S KIRIMI MBOGO, Advocates for the Applicant.

Ms. Nandwa, Prosecution Counsel for the Respondent.