



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 13 OF 2019

REPUBLICPROSECUTOR

VERSUS

WYCLIFFE OKOTH NYAKECH.....ACCUSED

RULING ON BAIL

1. The innocence and liberty of an accused person is guaranteed under the **Constitution** and the law.
2. The accused person was charged with the murder of one *John Osiyo Nyapara* (hereinafter referred to as '**the deceased**') on 18/12/2019. It was alleged that the accused person murdered the deceased on 28/12/2017 at Kagito village in Uriri Sub-County within Migori County.
3. The accused person denied the charge and a plea of not guilty was entered. The prosecution opposed the granting of bail to the accused person and it was directed to file an Affidavit to that effect. The prosecution complied and **No. 92559 PC Howard Omwoha** attached at Uriri Police Station swore the affidavit on 18/12/2019.
4. The case came up for the hearing of the bond application on 03/02/2020 where **Miss. Okota** Counsel appeared for the accused person.
5. **Mr. Kimanthi**, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions relied on the affidavit in opposition to the plea to grant bond to the accused person.
6. The application was opposed. Counsel submitted that bail is a fundamental right to an accused person who is presumed innocent in law. Counsel urged the Court to grant bail and bond to the accused person.
7. The foundation of bail and bond in Kenya is the **Constitution** and the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya (hereinafter referred to as '**the CPC**'). **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 a trial, unless there are compelling reasons not to be released.

13. **Section 123(A)** of the **CPC** sets out exceptions to the right to bail. It provides that: -

(1) Subject to Article 49 (1) (h) of the constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all relevant circumstances and in particular -

- a) **the nature of seriousness of the offence;**
- b) **the character, antecedents, associations and community ties of the accused person;**
- c) **the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and**
- d) **the strength of the evidence of his having committed the offence.**

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person-

- a) **has previously been granted bail and as failed to surrender to custody and that if released on bail (whether or not**

subject to conditions), it is likely that he would fail to surrender to custody;

b) Should be kept in custody for his own protection.

14. From the onset I must state that the rationale behind the bail and bond in Kenya is premised on the constitutional imperative that an accused person is presumed innocent until the contrary is proved (**Article 50(2)(a)** of the **Constitution**). In such a case an accused person must be accorded an opportunity to attend the hearing of the case with such freedom as contemplated under the **Constitution** unless there are otherwise compelling reasons.

15. The **Constitution** does not define what '**compelling reasons**' are. Likewise, **the CPC** is silent. **Section 123(A)** of the **CPC** calls upon a Court dealing with an issue of bail and bond to consider all the circumstances of the case and that a Court ought not to be necessarily limited to the circumstances stated in that section. The wording of **Section 123(A)** of the **CPC** (which was an amendment meant to align **the CPC** with the **Constitution**) seems to suggest instances where bail and bond can be denied. Those can therefore be said to be some of the examples of the compelling reasons contemplated under **Article 49(1)(h)** of the **Constitution**.

16. But what does the term '**compelling reasons**' mean? The term has been used in other jurisdictions to mean '**exceptional circumstances**' or '**unusual and extraordinary circumstances**'. Having gone through various statutes, scholarly writings and decisions within and outside our jurisdiction, it appears that the term '**compelling reasons**' (or as the case may be) is not settled since what may amount to such a reason in one instance may not be so in another.

17. The terms '**compelling reasons**' or '**exceptional circumstances**' are hence subject to various opinions. The 10th Edition, Black's Law Dictionary defines '**extraordinary**' as "*beyond what is usual, customary, regular or common.*"

" It also defines '**a circumstance**' as "*an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event*". The dictionary goes ahead to define "**extraordinary circumstance**" as "*a highly unusual set of facts that are not commonly associated with a particular thing or event.*"

18. In Kenya, Courts have as well dealt with the issue (See **Republic vs. Joktan Mayende & 3 Others (2012) eKLR**, **Mohamed Abdurrahman Said & Another vs. Republic (2012) eKLR**, **Wilson Thirimba vs. DPP (2012) eKLR**, among others). In the foregone decisions my Lordships and Ladyships reverted to the meaning of the word '**compelling**' as defined in the *Concise Oxford Dictionary*, 9th Edition which is defined as '*rousing, strong, interest attention, conviction or admiration*'.

19. Admitting the challenge in the term '**exceptional circumstances**', the Constitutional Court of South Africa in **Liesching and Others v S (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (29 August 2018)** quoted with approval the definition in **S v Petersen 2008 (2) SACR 355 (C)** and had this to say;

Meaning of "exceptional circumstances"

[39] The phrase "exceptional circumstances" is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as "ordinary" in one case may be treated as "exceptional" in another. For instance, in Petersen in Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court) observed in relation to an application for bail under section 60(11) (a) of the Criminal Procedure Act:

"On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria."

20. Defining the term, the South African Court in **S v Bruintjies 2003 (2) SACR 575 (SCA)** said;

What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.

... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

18. In **S v Rudolph 2010 (1) SACR 262 (SCA)** at 266 g-h the court dealt with what exceptional circumstance are and reiterated that the Applicant in bail application must, on a balance of probability, demonstrate that "*exceptional circumstances*" in his or her case, indeed, do exist and that they "*in the interests of justice permit his release*". This, according to the Court, involves the balancing "*between the liberty*

interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown by the accused to exist”.

19. In the case of **Antonio Jacobie Snyders –vs- The State (A455/2015) 2015 ZAGPPHC 618**, the High Court in South Africa dismissed an appeal against denial of bail on the basis of the fact that the community was up in arms as it found it necessary to voice its opinion regarding the conduct of the Appellant. The Appellant’s concessions relating to his safety meant that it would not be wise to release the Appellant on bail. Indeed, the Appellant conceded that the community would not accept him back with open arms and that there existed some enmity between him and the community.

21. Given the amorphous nature of the terms ‘**compelling reasons**’ or ‘**exceptional circumstances**’, a Court in dealing with a bail and bond application must ‘*consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release*’ and must also balance “*between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown....*”. In Kenya those ‘compelling reasons’ or ‘exceptional circumstances’ must be demonstrated by the prosecution.

22. The prosecution in this case had only one reason. It was that the accused person disappeared from his home when the offence was committed and that he was arrested 2 years later. The prosecution therefore submitted that the accused person’s attendance at the hearing is not guaranteed once he is released on bond.

23. While I remain alive to the fact that the accused person has denied the murder charge and that he is constitutionally-presumed innocent, I note that the facts as deponed in the affidavit by the police officer were not rebutted by the accused person on oath. In other words, the accused person or his relatives did not swear any affidavit(s) countering the allegations.

24. The hearing of the case has proceeded well. The prosecution closed its case and by a ruling of this Court the accused person was placed on his defense. The defence hearing is scheduled for 17/03/2010.

25. Without determining the issue of whether the accused person disappeared at this point, I am of the considered view that since it took the police 2 years to arrest the accused person and in view of where the trial has now reached, it is prudent that the accused person remains in remand until the determination of the case.

26. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 3rd day of March 2020.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of:

Miss. Okota, Counsel for the accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant