



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 78 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

CYRUS MAINA MWARIRI.....ACCUSED

RULING ON BAIL

1. The Applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He pleaded not guilty to the said charge and on 4/12/2019 through his Advocate on record, he made an oral application to be admitted to bond, bail pending hearing and determination of the cause.
2. The prosecution opposed bail and by an Affidavit sworn on 9th December, 2019 the investigating officer **CPL JACKSON MBITU** deponed that the deceased was murdered on 13/6/2019 at Kiwanju Area in Kasarani in a bush while his motor cycle and personal belongings were recovered at Manyatta area which borders Nairobi and Machakos County, in a house belonging to the accused person, who having known that the police were looking for him, shifted base to Kigumo in Muranga County.
3. It was deponed that the efforts to trace the applicant bore no fruits as he escaped police dragnet for five months until his phone was finally tracked and he was arrested at Kanyonyo area in Kitui County. It was deponed further that the applicant refused to divulge to the police his place of residence, occupation and family members with a view to establishing his place of abode, without which it can be assumed that he intends to abscond from the court's jurisdiction and was likely to vanish to unknown place.

PRE-BAIL REPORT

4. In compliance with the Bail/Bond policy guidelines, the court called for pre-bail report where the following issues were indicated:-
 - a. He was at the time of his arrest residing at Kiamumbi village situated between Kahawa West and Githurai 44 paying monthly rent of Kshs.9000/-
 - b. Occupation; at the time of his arrest he was working as a Uber driver for the last two years having been a boda boda operator before then. His employer described him as a dishonest servant who could not be trusted.
 - c. Marital status:- He was married to two wives with a total of seven (7) children between them.
 - d. He was brought up as Akorino adherent and does not use alcohol and drugs. He acknowledged one past arrest and charges of assault but was acquitted. He suffers from High blood pressure. He was described by his family as a responsible man who diligently provided for his children and father.
 - e. Victim's views were obtained from an uncle who opposed the grant of bail to the accused and stated that the bodaboda community were very agitated by the murder of one of their own and might revenge if the accused is granted bond.
 - f. Community view: He was considered a flight risk having gone under from June to November when he was arrested.

SUBMISSIONS

5. It was submitted by Mr. Jumba that there were no compelling reasons advanced by the prosecution since there was nothing in the committal bundles to confirm the allegations that the accused had been on the run. It was submitted that the applicant had a fixed place of abode and a family to go back to. It was stated that the issues of the likelihood of conflict between the accused and bodaboda operation was not supported by evidence.

6. Mr. Okeyo for the prosecution opposed bail based on the content of the affidavit by the investigating officer and submitted that the accused went under for five months pointing to the fact that he is a flight risk. It was submitted that the ground was still volatile and therefore the accused should be denied bail for his own safety.

DETERMINATION

7. Bail is a constitutional right of every accused person under Article 49(1)(h) of the Constitution which can only be denied where there are compelling reasons as advanced by the prosecution on a balance of probability. What constitutes compelling reasons was stated by this court in the case of **REPUBLIC v DAVID MUCHIRI MWANGI [2018] eKLR** as follows:-

“14. ... What constitutes compelling reasons are now well settled in the Kenya criminal jurisprudence which can be discerned through a ray of authorities one being **REPUBLIC v MGUNYA & ANOTHER (supra):-**

i. The nature of charge.

ii. The strength of the evidence which supports the charge.

iii. The gravity of the punishment in the event of conviction.

iv. The previous criminal record of the accused if any.

v. The probability that the accused may not surrender himself for trial.

vi. The likelihood of the accused interfering with witnesses or that he may suppress any evidence such as incriminating him.

vii. Likelihood of further charges being brought against the accused.

viii. The probability of a finding of guilt.

ix. Detention for the protection of the accused.

x. The necessity to procure a medical or social report pending the disposal of the case.

xi. Accused persons own safety, security and protection – **REPUBLIC V KIMUNYA.**

xii. If the accused person is likely to pose public danger by being released on bail.

xiii. If by releasing the accused on bail public confidence in the administration of justice will be dismissed.

xiv. The character antecedents, associations and community ties of the accused person.”

8. Justice Mativo had this to say on the right to bail in the case of **REPUBLIC v DANFORND KABAGE MWANGI [2016] eKLR**:-

“I hold the view that after considering the circumstances of each case, the court has discretion to grant or refuse bail provided that the discretion is exercised judicially. In Republic vs Milton Kabulit & 60 Others. Justice Emukule in a well-reasoned decision said:-

“My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right to an automatic bond or bail are those charged with offences (which maybe referred to as “petty offences”) the punishment of which {if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”

9. In this cause, the compelling reasons advanced by the prosecution are that the accused went underground for a period of five months and that there were hostility against him on the ground which was still volatile. These grounds were supported independently through pre-bail report presented to court.

10. The question for the court’s determination is whether the said compelling reason may be mitigated through bail/bond terms and conditions? I have taken note of the fact that the deceased was a bodaboda rider and the members of his trade are known to be “*a law unto themselves*”. Whereas it is the duty of the State to provide security and safety to all citizens of the Republic of Kenya, the applicant

inclusive, the fact that the ground is still volatile, in addition to the conduct of the accused before his arrest which portrays him as a flight risk who is likely to abscond when released on bond, are compelling reasons enough to enable me deny the same the enjoyment of his constitutional right at this stage which I hereby do.

11. The accused shall remain in custody until the prosecution witnesses who were bodaboda operators have testified against him then he shall be at liberty to renew his bail application and it is so ordered.

Dated, signed and delivered at Nairobi this 21st day of May, 2020 through Google Teams.

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J. WAKIAGA

JUDGE

In the Presence of:-

Ms. Onunga for the state

Mr. Jumba for the accused

Court assistant: Karwitha

Accused present