



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL CASE NO. 36 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KILONZO SAMMY.....ACCUSED

R U L I N G

1. The accused herein **Anthony Kilonzo Sammy** faces two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the first count are that on the 26th October, 2019 at Katani – Kambi area in Athi river Sub-County within Machakos County jointly with others not before the court he murdered **Purity Wanjiru Nyaga alias Alice**. The particulars of the second count are that on the 26th October 2019 at Katani – Kambi area in Athi River Sub-County within Machakos County jointly with others not before the court he murdered **Ann Ndegi Gatitu**.

2. Upon entering a plea of not guilty the accused's learned counsel Mr. Mulei filed an application dated 14/04/2020 seeking for an order that the accused be released on bail pending trial. The application is supported by an affidavit of the accused sworn on even date. The applicant's case *inter alia* is that there are no compelling reasons advanced against his being admitted to bail/bond.

3. The application is opposed by the prosecution. The investigating officer No.93501 Oliver Nabonwe vide an affidavit sworn on 25/02/2020 made several averments *inter alia*: that the accused was involved in the shooting of the two deceased persons as well as injuring another who is still undergoing treatment; that the accused is a police officer based at General Service Unit at Embakasi and well trained and thus a threat to the witnesses and the public; that there is enough and overwhelming evidence against the accused and who may be sentenced to death thereby raising a likelihood that he will abscond once released on bond; that the accused will interfere with witnesses some of whom are his relatives if released on bond.

4. Learned counsel for the prosecution Mr. Mwangera filed an unsigned affidavit dated 27th April, 2020 wherein he claimed that the nature and seriousness of the offence as well as the severity of the sentence provided for in law are compelling reasons as to why the applicant should not be released on bail.

5. Parties agreed to canvass the application via written submissions. However, it is only the unsigned submissions dated 27th April, 2020 by the prosecution that is on record and which were filed on 28/04/2020. Mr. Mwangera learned counsel for the prosecution submitted that even though bail is a right under Article 49(1) of the Constitution the same can be denied by the court once compelling reasons have been furnished by the Prosecution. It was submitted that the accused being a well-trained GSU Officer can interfere with the witnesses in the case. Reliance was placed in the following cases:

(i) **Republic –vs- Ahmed Mohammed Omar & 6 others** ([NRBI Cr. No.14 of 2010].

(ii) **Republic –vs- Ahmad Abolfathi Mohammad & Another** [HC NRBI Cr. Rev. No. 373/2012].

(iii) **Republic –vs- Fredrick Ole Leliman & 4 others** [HC NRBI Cr. No.57 of 2016].

6. I have considered the application as well as the rival affidavits. I have also considered the submissions and the authorities cited.

7. Article 49(1)(h) of the Constitution provides that:

An accused person has the right

(a) To be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.

From the above provision, it is clear that the right to bail is not absolute since the court can decline to grant bail once it is satisfied that there are indeed compelling reasons to be availed by the prosecution. The onus therefore lies upon the prosecution to satisfy the court that the interests of the case warrants a denial of bond. What then are the compelling reasons advanced by the prosecution in the present case? The two affidavits filed in opposition to bail have dwelt mainly on the circumstances leading to the death of the two deceased persons and the role played by the accused herein. The only thing different is on the issue that the accused being a well-trained GSU officer is likely to interfere with witnesses. The other issue relates to the nature of the charge and the likelihood of conviction.

The above reasons notwithstanding, I am alive to the fact that the real and major consideration that concerns a court is on whether the accused will be able to attend the trial. If an accused is able to convince and satisfy the court that he will strictly observe his court attendance, then the court will have no reason not to grant him the bail sought. Even though the prosecution has claimed that the accused is likely to interfere with witnesses, this court has not been given evidence of such interference on witnesses. There is no affidavit from any such witnesses to the effect that the accused or his agents have attempted to interfere with them. The court in balancing the concerns of the prosecution and the defence must also have regard to the Kenya Judiciary's Bail and Bond Policy guidelines March, 2015 which sets out judicial policy on bail 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 bail, including the following:

(i) that the accused person is likely to fail to attend court proceedings; or,

(ii) the accused person is likely to commit or abet the commission of a serious offence; or

(iii) that the exception to the right to bail under section 23 A of the Criminal Procedure Code is applicable in the circumstances; or

(iv) that the accused person is likely to endanger the safety of the victim, individuals or the public; or

(v) that the accused person is likely to interfere with witnesses or evidence; or

(vi) that the accused person is likely to endanger national security; or

(vii) that it is in the public interest to detain the accused person in custody.

Looking at the above conditions, I am not satisfied that the prosecution has presented credible evidence to warrant a denial of bond to the accused person herein. The accused has indicated his willingness to abide by all the terms to be imposed by the court. The business of a court is in the hearing of cases and making determinations thereon and thus the key factor for consideration should be the question whether or not the accused will attend court for his or her trial. If there is such a commitment and or assurance from the accused, then a court will be obliged to grant bail. I wish to associate myself with the view held by Muriithi J in the case of **Kelly Kases Bunjika –vs- Republic [2017] eKLR** where he stated as follows:

***“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must therefore be a compelling reason if it is demonstrated that the accused person is likely to fail to attend court proceedings. The question in this matter becomes whether there is on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his constitutional right to be granted bond/bail on reasonable and favourable terms.*”**

8. Looking at the reasons advanced by the prosecution, I am not satisfied that the same amount to be compelling in any way. First and foremost, the claim that the accused is a well-trained GSU officer who is likely to be a threat to the witnesses and the public is not convincing for the simple reason that the police and all other security agencies are on top of their game in securing the security of all and sundry in Kenya and hence the possibility of the accused becoming a threat is almost nil. The alleged fear about the accused is not founded since he might turn out to be just a paper tiger in comparison to the security agencies currently in place who are always at hand to deal with any threats. Suffice to add that Kenya has a top notch security system in place to deal with all manner of threats posed if any in the protection of the citizens. Secondly, none of the witnesses supposedly to be interfered with have sworn affidavits to back the prosecution's assertions. Thirdly, the alleged possibility of the accused absconding once released in view of the charge is minimized by the watertight bail conditions to be imposed roping in his sureties whose responsibilities are to secure the accused's attendance in court. Hence the assertions raised by the investigating officer herein do not meet the stringent threshold of what amounts to compelling reasons under Article 49(1) (h) of the Constitution. This court must ensure that the accused's right of innocence until proved guilty is upheld as sacrosanct.

9. In the result, I find merit in the application dated 14/04/2020. The same is allowed in the following terms:

(a) The accused is released on bond of Kshs. 1 million plus two sureties of like sum.

(b) The sureties to be approved by the Deputy Registrar of this court.

(c) Upon release the accused shall attend court at all times during hearing and mention dates without fail until the final determination of the case or until further orders of the court.

(d) In default to observe the terms herein the bond shall stand cancelled and he together with his sureties called to account.

Orders accordingly.

Dated and delivered at Machakos this 14th day of May, 2020.

D. K. Kemei

Judge