



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE 21 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

MUSA IBRAHIM SADI.....ACCUSED

RULING

1. The Accused was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on the 18th of April, 2020 at Karanja Area in Kibera within Nairobi he murdered Ali Hamisi. He sought to be released on bail pending hearing and determination of the case.
2. The prosecution, through an affidavit sworn by PC Stephen Kibei, force number 91843, the investigating officer, dated 11th May, 2020 urged the court to refuse the accused bail. Counsel Mr. Solomon Naulika, learned State Counsel on behalf of the State further buttressed this position through his oral submissions.
3. It was PC Stephen Kibei's submission that compelling reasons existed to bar the accused from being released on bail. He submitted that the accused was likely to interfere with witnesses. As well, that he was likely to abscond owing the stiffness of the penalty for the offence of murder. He was also likely to abscond as the nature of injuries disclosed a guilty mind. This, he submitted, was further compounded by the fact that he had neither a known place of abode nor gainful employment. Further, that the release of the accused would risk undermining both public peace and order and safety and security of the accused. This was because his arrest was initiated by the intervention of an Imam against a mob that had attacked him on account of the murder.
4. The defence counsel, Miss Irene Mungala responded to the submissions by prosecution in the affidavit. It was her submission that there was no evidence to support the assertion that the accused would interfere with witnesses. Further, she asserted that the accused had a place of abode which was with a cousin in Kikuyu. She also responded to the submission on the nature of the injuries disclosing a guilty mind. It was her submission that the prosecution raised issues meant to be ventilated during hearing.
5. Counsel for Prosecution Mr Naulikha reiterated the submissions in the Affidavit. It was his submission that the right to bail is not absolute and may be limited under Article 24 of the Constitution. He urged that the right to life must be protected and balanced against the right to bail. It was his submission that victims look to the court for justice. Further, he urged that the likelihood of the accused to interfere with witnesses was real since he knows them all. Further, that the affidavit pointed to the fact that the nature of injuries and the weapons spelt out a guilty mind was not speculative. This was because the investigating officer was present at the scene of crime, at the post mortem. As such, the information given was well within his knowledge.
6. He rejected the assertion that the accused person had a known place of abode. It was his submission that, while the accused person was said to live with a cousin in Kikuyu, if he chose to abscond then it would be difficult to trace him. Further, owing to the fact that the accused was almost lynched it would be prudent to secure his life and safety by not granting him bail. Miss Mungala, in rejoinder, reiterated that the accused should be granted bail as he would reside in Kikuyu and not in his house in Kibera.
7. The question that must be answered by the submissions of the respective counsels is whether the accused should be granted bail or if there are compelling reasons to warrant limiting this right.
8. Article 49(1)(h) of the Constitution provides for the right of the accused to be released on bail unless there exist compelling reasons to limit this right. The Judiciary Bail and Bond Policy Guidelines cements some the factors a court ought to consider as compelling reasons. Some of the factors include but not limited to, the likelihood of the accused person to abscond, lack of fixed place of abode, the stiffness of the penalty, likelihood of interfering with witnesses, the risk of undermining both public order and the safety of the accused person. The omnibus of them is the likelihood of the accused to abscond if bond is granted

9. Back to the submission by counsel for the State that the accused person had a guilty mind when he murdered the deceased, and is therefore likely to abscond is an assertion that cannot be raised at this stage. The accused is no doubt charged with murder. Hence, the issue of his guilt or otherwise is a matter for determination at the trial. Before the trial, the accused must always be presumed innocent until other proven. See: **Republic vs. Danson Mgunya & Another [2010] eKLR**, the court while appreciating the various criteria to determine suitability to admit accused on bail:

“...the criteria ...the strength of the evidence which supports the charge ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence.”

10. Therefore, a guilty mind being an element of the offence can only be established after a full trial. It is certainly improper to base that as a ground to deny the accused bail when the trial has not even commenced.

11. The stiffness of the penalty was as well raised as a ground to incentivize the accused to jump bail. It is clear that according to the Supreme Court decision in the case of **Francis Kariokor Muruatetu v R[2017]eKLR** the death penalty is no longer the only penalty applicable when an accused is convicted for the offence of murder. This ground thus fails to substantiate a denial of bail.

12. It was the further submission of the prosecution that the accused did not have a known place of abode. The defence argued that the accused would reside with a cousin in Kikuyu and not in Kibera. Whereas it was not specified the actual place of residence of this cousin or his identity, I find solace in the fact that Kikuyu is within the jurisdiction of this court. The fear by the State can be mitigated by ensuring that the accused's cousin comes to court at the point of bond approval to make necessary material disclosures and give an undertaking that he/shall ensure that the accused avails himself in court at all times. I thus find this ground as insufficient in denying the accused bail.

13. The prosecution further raised the ground that the accused is likely to interfere with the witnesses. The prosecution supported this assertion by stating that the accused knows the witnesses. Counsel for the defence Miss Mungala argued that there was no evidence to substantiate this claim. I am inclined to agree with the defence. It is not sufficient to make a claim without any tangible evidence. The assertion by the State that the accused will interfere with witnesses is a farfetched presumption. After all, the accused has said he will not continue living in Kibera, the place of the alleged murder. The latter position further mitigates the State's submission that the accused's life would be in danger if is released from custody. True, he was rescued by the police from a mob that was beating him. However, he has clearly stated that he henceforth shall live in Kikuyu. Thus, his continued stay in custody is not in the interests of justice.

14. This case is clearly distinguishable from the persuasive authority in the case of **Republic v Naftali Njami Kinuthia [2019] eKLR**. In that case, Githinji, J while sitting at the High Court in Eldoret, denied the accused bail for, among other reasons, that his safety and security would be compromised. The reasoning therein was that there existed overwhelming media coverage that had exposed the accused person's name. Further, that there were university student leaders and County Government official's rhetoric insinuating that the accused's safety was not guaranteed. In this case, however, the accused by residing in Kikuyu will have less exposure to elements that may threaten his safety and well-being. Further, there is no evidence that there is a continuing threat on the life of the accused.

15. Incarceration is a last resort, particularly in these times when the Covid-19 pandemic has rocked the country; it is a further mitigating circumstance to admit the accused on bail. I find that the prosecution has failed to advance compelling reasons to warrant the denial of bail to the accused person. In the end, I allow the application. The accused is admitted to a bond of Ksh. 500,000/ with two sureties of similar amounts or a cash bail of Ksh. 300 000/. In addition, he shall provide the name of the person he shall be living with in Kikuyu together with his detailed contacts including his physical address. The said contact person must present himself to the Hon. Deputy Registrar of this court who shall assess his suitability in that capacity and confirm his undertaking to avail the accused person any time he is required in court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND JUNE, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Irene Mung'ala or the Accused/Applicant.
2. Miss Akunja For the State/ Respondent.