



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.34 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWIGWI KARIUKI.....ACCUSED

RULING

The accused, David Mwigwi Kariuki is facing the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that at unknown date and time in Umoja II Estate in Nairobi Country, the accused murdered an unknown African female adult. When the accused was arraigned before this court, he pleaded not guilty to the charge. He has applied to be released on bail pending trial. In his application, the accused states that he is a self-employed Kenyan resident of Kayole Estate in Nairobi. He has a fixed place of abode. He is not a flight risk. His rural home is known. He will not interfere with prosecution witnesses. He urged the court to release him on reasonable bond terms. The accused grounds in support of his application were amplified by Mr. Njoroge, his counsel during the hearing of the application.

Ms. Gikonyo for the State opposed the application. She relied on a replying affidavit sworn by the investigating officer. She stated that the accused had no fixed place of abode. Other than the current case, the accused was being investigated for other similar cases which may result in the accused's facing other charges. Ms. Gikonyo submitted that the deceased's decomposing body was found having been dismembered and hidden in a house that the accused had leased. The identity of the deceased was not yet established. DNA samples had been taken to assist the identification of the deceased. Learned prosecutor was apprehensive that if the accused was released on bail pending trial, he would likely interfere with prosecution witnesses who were known to him. One of the witnesses feared being intimidated by the accused taking into consideration the circumstances in which the crime is alleged to have occurred. She submitted that the accused was a danger to society taking into account the gruesome nature the deceased met her death. She was of the view that there were compelling reasons to persuade this court to deny the accused bail pending trial.

This court has carefully considered the rival submission made by the parties to this application. That the accused has the constitutional right to be released on bail pending trial is without doubt. **Article 49(1)(h)** of the **Constitution** provides so. The caveat is however that the court may deny an accused bail if the prosecution establishes existence of compelling reasons. The **Constitution** does not define what constitutes compelling reasons. However, **Section 123A** of the **Criminal Procedure Code** sets out some of the circumstances that the court may consider when deciding whether or not there exists compelling reasons to deny the accused bail pending trial. The **National Council for Administration of Justice** has published the Bail and Bond Policy which sets out some of the considerations that the court ought to take into account when determining whether or not to grant bail. There is also considerable case law on the issue. For instance, Odunga J in **Grace Kananu Namulo -vs- Republic [2019] eKLR** held thus:

*“In **S. vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17 [2017] ZWBHC 262 (31 August 2017)**, the Court held that:*

“The refusal to grant bail and the detention of an accused in custody shall be in the interest of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will:

- *Endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or*
- *Not stand his or her trial or appear to receive sentence; or*
- *Attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
- *Undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system...the ties of*

accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the Court should be taken into account...

In considering any question...the Court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular and prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the Court should be taken into account...

In assessing the risk of abscondment, the established approach is for the Court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be (Emphasis mine).

What is clear from the above is that the courts are under constitutional imperative to lean towards granting the accused persons bail pending trial unless it is established to the satisfaction of the court that the trial would be frustrated by the accused prior conduct or failure to attend court during trial.

In the present application, it was clear to this court that the prosecution established existence of compelling reasons to deny the accused bail pending trial. The accused is still being investigated for allegedly committing similar offences to the one that he has been charged with. The fear expressed by the prosecution that the accused is a danger to the society is not misplaced. For the security of the society, it would serve the interest of justice for the accused to remain in custody pending his trial to prevent the possibility that another similar crime may be committed. Further, it was clear from the affidavit sworn by the investigating officer that the accused is a person of no fixed abode or income. If he is released on bail pending trial, he may likely abscond from the jurisdiction of the court. It will not be safe for the accused to be released on bail pending trial because to do so will ensure that he will not likely attend court for trial when so required.

The accused's application to be released on bail pending trial therefore lacks merit and is hereby dismissed. He shall remain in custody until the conclusion of his trial or until further orders of this court, if the circumstances change. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2020

L. KIMARU

JUDGE