



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.36 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

DUNCAN NDIEMA NDIWAH alias CHAMPES.....ACCUSED

RULING

The accused, Duncan Ndiema Ndiwah alias Champes 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 on 30<sup>th</sup> March 2020 at Kiamaiko area, Huruma within Nairobi Country, he murdered Yassin Hussein Moyo. The accused 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 not a flight risk; he is ready to abide by any terms that the court may impose to secure his release on bail pending trial; that he has cooperated with the police during investigations and had presented himself to investigative authorities when he was so required to do; he told the court that he had neither threatened or attempted to influence the witnesses; he would attend court without fail; there were no compelling reasons to deny him bail pending trial. He asserted that he had a constitutional right to be released on bail pending trial. The law presumed him innocent pending his trial by the court. He was the sole breadwinner of the family and has a fixed abode in Nairobi and was therefore unlikely to abscond from the jurisdiction of the court.

During the hearing of the application for bail, Mr. Omari for the accused amplified the grounds put forward by the accused in support of his application for bail pending trial by stating that the prosecution had not placed any evidence before the court to support its contention that there existed compelling reasons to deny the accused bail pending trial.

Ms. Gichohi for the State and Mr. Kiprono for the family of the deceased opposed the application. Ms. Gichohi relied on the affidavit sworn by the investigating officer in opposition to the application while Mr. Kiprono relied on an affidavit sworn by the father of the deceased. In essence, the grounds in opposition to the application were: that the accused was a flight risk, and since his ancestral home borders the Kenya-Uganda boundary, he would be tempted to abscond from the jurisdiction of the court; that the accused being a police officer, was an influential person, and is likely to interfere with the prosecution witnesses through his office or by intimidating them; that the sentence that is likely to issue is stiff and therefore the accused may be tempted to abscond; that the public interest and the interest of justice demanded that the accused remains in custody until the conclusion of the case. On his part, the father of the victim indicated to court that he was fearful of his life since he had seen suspicious characters milling around his house. He was of the view that his safety would only be guaranteed by the accused being placed in pre-trial detention. If the accused was released on bail pending trial, the father of the accused asserted that it would traumatize the community where the deceased was resident. He asserted that the accused's past behaviour and conduct precluded the court from favourably considering his application for 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 the court that the fears expressed by the prosecution and the family of the victim that the accused will not likely attend court during trial is not supported by evidence. From the time the incident that led to the charge being laid against the accused occurred, the accused has not made any attempt to abscond from the jurisdiction of the court. There is evidence that he was called several times in a span of three months prior to being charged, to appear before the investigating authorities and he did so without fail. The accused has not given any cause to this court to form the view that he would interfere with prosecution witnesses or fail to appear in court if he is released on bail pending trial. Some of the fears expressed by the prosecution would have been valid if the accused remained an active police officer during his trial. However, he will not. This is because he will be administratively interdicted from service pending the conclusion of the trial. He will not therefore have the influence expressed by the prosecution. He will not be in the same police station during the period of the trial. As regard whether the accused will abscond from the jurisdiction of this court, this court will address the fears of the prosecution by imposing appropriate conditions to his release on bail pending trial.

In the premises therefore, the accused's application to be released on bail pending trial shall be granted on the following conditions:

- I. The accused shall post bond of Kshs.2 million with two sureties of the same amount.
- II. In the alternative, the accused shall deposit a cash bail of Kshs.1 million.
- III. The accused shall provide two contact persons who shall ensure his attendance before court. The contact persons must include a close relative.
- IV. The accused is prohibited from stepping into the area which comprises the jurisdiction of Huruma Police Station or get into contact with any of the prosecution witnesses at the pain of having his bail pending trial cancelled.
- V. The accused shall attend court without fail on the dates scheduled for hearing.

It is so ordered.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY 2020**

**L. KIMARU**

**JUDGE**