



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. E012 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN NDUVA MAINGI.....ACCUSED

RULING ON BAIL

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code for which he pleaded not guilty.
2. The Applicant through his Advocate on 25/8/2020 filed an application for bond but instead of filing the same in this file, filed a miscellaneous Criminal Application No. E012 of 2020 in which he sought to be released on bail pending the hearing of criminal case No. E012 of 2020 on the grounds that he had a fixed place of abode within the jurisdiction of this court at Kasarani opposite Kasarani police station.
3. The application was supported by his annexed affidavit in which he deposed that upon arrest, he did not take plea as the prosecution had asked for more time and were granted 21 days and was taken to Buruburu police station for thirty (30) days during which period of time he was tested for Covid-19 which result turned out positive on 7/8/2020.
4. He stated further that he was suffering from pneumonia which required medical review on 30/8/2020 for which he had not received medical attention while in police custody. He contended that he was in gainful employment at Nairobi Water and Sewerage Company and would not jeopardize his job which was the means and sustenance for himself and family. He deposed that he did not possess any travel documents including a passport and as such was not a flight risk.
5. The application was opposed by the State through the affidavit of Cpl. BENSON MUTUA, the investigating officer in which he deposed that on the night of 18/7/2020 the accused and the deceased were involved in a violent altercation at Visa Palace Bar and Restaurant that resulted into the death of the deceased. It was stated that the violent altercation was witnessed by several individuals who were well known to the accused and who had recorded their statement with the police as prosecution witnesses which statements had been supplied to the accused.
6. It was contended that due to the fact that the intended witnesses are known to the accused, there was a high likelihood of interference and intimidation either directly by the applicant or through proxies with the aim of preventing them from giving their testimony in the court and further that the deceased was likely to abscond if granted bail as immediately after the incidence, he tried to run away from the scene and was only captured after hot pursuit by members of the public before being handed over to the police.
7. It was further deposed that there was no confirmation of the accused permanent place of abode nor means of livelihood, who was likely to disturb public order or undermine public peace or security for which pre-trial detention was necessary.

SUBMISSIONS

8. When the matter came up for hearing before me Mr. Osoro for the accused re-stated the contents of his affidavit and submitted that the same is married with one child, duly employed at Nairobi Water and Sewerage Company, in need of medical attention having tested positive for Covid-19 and suffering from pneumonia. It was submitted that he should be granted bail so as to seek medical attention. Ms Kimani for the State in opposing bail, submitted that the accused was a flight risk having attempted to flee from the scene immediately upon the commission of the offence. She contended that he was likely to interfere with prosecution witnesses who were known to him, in addition to disrupting public order as he was almost lynched by members of the public.

DETERMINATION

9. Under Article 49(1)(h) bond is a constitutional right of every accused person which can only be denied where there are compelling reasons advanced by the prosecution to a balance of probability. What constitutes compelling reasons has been captured by the Judiciary in Bail and Bond Policy Guidelines to include but not limited to: -

- a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.*
- b. The strength of the prosecution case.*
- c. The character and antecedents of the accused person.*
- d. The failure of the accused person to observe bail or bond terms.*
- e. The likelihood of interfering with witnesses.*
- f. The need to protect the victim or victims of the crime.*
- g. The relationship between the accused person and the potential witnesses.*
- h. The best interest of child offenders.*
- i. Whether the accused person is a flight risk.*
- j. Whether the accused person is gainfully employed.*
- k. Public order, peace and security.*
- l. Protection of the accused persons.*

10. It must be stated that the sole purpose for bond is to secure the attendance of the accused person to his trial if and when called upon and the Constitution of Kenya 2010 requires that the bond be on reasonable conditions. The accused person has a right to be presumed innocent under Article 50(2) and a right to liberty and that is why the pre-trial detention should be a measure of last resort as per the Bail and Bond Policy Guidelines.

11. In this matter though the prosecution alleged that the accused is likely to interfere with witnesses, they did not indicate the names, the relationship between the accused with those witnesses and the nature of the likely interference. The accused in his response had indicated that he is gainfully employed and has attached to his application his payslip and therefore the allegation by the prosecution that he has no means of gainful employment and fixed abode has no foundation.

12. On the likelihood of interference with witnesses, the courts have held as follows in **REPUBLIC v JOHN BOSCO KYALO & 2 OTHERS Machakos HC Criminal Case No. 31 of 2015 Muriithi J,**

“I agree that interference of likelihood of interference with witnesses may be a compelling reason for denial of bail in the given circumstances of the particular case. However, the interference must be proved by cogent evidence and mere speculation that the accused may have seen the statements recorded by witnesses, contact the witnesses and attempt interference would not suffice. The prosecution must show a relationship between the accused and the witnesses or other circumstances clearly presenting opportunity for the accused to exercise control over or influence the witnesses into withholding or distorting his testimony or failing to adduce material evidence before the court, rather than the mere hailing from the same area. Evidence or circumstances making it conducive to a real likelihood of interference must be demonstrated.”

13. It is further alleged that if released on bond the accused is likely to disturb public order or undermine public peace or security without providing the necessary particulars in support thereof which allegations were not proved by the prosecution so as to enable the court rule in its favour.

14. In this matter I find and hold that the prosecution has failed to provide adequate compelling reasons to enable the court deny the accused his constitutional right and all the issues alleged by the prosecution may be adequately addressed by way of bail and bond terms.

15. Having found that there are no compelling reasons the court is therefore called upon to determine what constitutes reasonable bail terms. It is not disputed that the accused is in the employment as a marketing assistant at Nairobi Water and Sewerage Company and therefore cannot be considered a flight risk. Any bond terms issued must be those that reasonably will make him attend to his trial. I therefore admit the same to bail/bond pending trial on the following terms and conditions: -

- a) A bond of Kenya Shillings five hundred thousand (Kshs. 500,000/-) with one surety of similar amount for his attendance to court for trial.*
- b) In the alternative a cash bail of Kenya shillings two hundred and fifty thousand (Kshs. 250,000/-) with two sureties of a similar amount.*

c) He shall make no contact of whatever nature with any of the prosecution witnesses either known or unknown to himself.

d) The prosecution is at liberty to move the court for review of these terms should the accused violate any of the terms herein.

Dated, Signed and Delivered at Nairobi This 2nd Day of September, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Ms Kimani for the State

Ms Nyakiana for the accused

Accused person present

Court clerk Karwitha