REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO 42 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

PRISCAH JEPKOECH KIRWA .....1ST ACCUSED

ELVIS KIPYEGO LAGAT .....SUBJECT

RULING

1. **PRISCAH JEPKOECH KIRWA (1ST ACCUSED) and ELVIS KIPYEGO LAGAT (SUBJECT)** are jointly charged with the murder of **WILSON KIPTUM SAINA** which is alleged to have occurred between 30th June and 7th July 2020 **at SOY sub-county within UASIN GISHU COUNTY.** The deceased was the husband to the 1st accused, and a father of the subject. When their counsel applied for their release on bond, at the first instance, the prosecution had no objection, but no sooner had the ink dried on paper when Mr Bulbul who is watching brief for the family of the deceased raised an objection to their release on bond on ground that they were likely to interfere with the prosecution witnesses and their security would be at risk

2. This prompted the court to call for a pre-bail report. The report dated 24th August 2020by **Phanice Wanyonyi** indicated that the home environment is hostile, and although the 1st accused had strong social ties, these had been dented and her sisters in law and maternal aunt had camped at her matrimonial home in a very bitter state against her, and are categorical that they cannot withstand her presence.

3. The subject is a 19-year-old young man who is described as a school drop-out with no significant social role nor is he in gainful employment. He however has been helping his parents with home activities and he had strong community ties, which have been shaken as a result of the offence he is accused of. His maternal uncles are willing to take him under their wings and live with him away from his parent's home

4. The greatest fear is the safety of the two persons charged, especially stemming from the attitude of the deceased's nuclear family. From the tone of the DPP and the counsel watching brief, what is being confirmed is that should the two set foot in their home within Nandi County, they are likely to catalyse high emotions which may place their lives at risk. That is echoed by the elders as well as the local administration. The not so thinly veiled message is that the deceased's immediate family members are baying for the blood of the 1 st accused and the subject to the extent that they are likely to carry out revenge attacks. In-fact the investigating officer **MADEGWA** has no fears for the witnesses and nor is he unduly unsettled with the suggestion that the pair would have any impact on the apprehension of the other suspect who is at large, his only concern is their security.

5. **Article 49** of the Constitution provides that

> **An arrested person has the right—**
>
> **(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

The primary rationale for this constitutional requirement is that every accused person shall be presumed innocent **(article 50(2) of the constitution)**, and this is what dictates that accused persons should be released on bail or bond whenever possible. Indeed, this presumption of innocence also means that pre-trial detention should not constitute punishment, and should be reflected in their treatment and management.

Unlike in the past, now judicial officers are required to consider the views of victims before making decisions that affect them particularly, the safety of victims and victims' families in fixing the amount of bail and the release conditions for suspects and accused persons

Courts have used some of the following parameters when considering bail applications:

(a) The nature of the charge or offence and the seriousness of the punishment to be meted if the person charged is found guilty.

(b) Character and antecedents of the accused person.

(c) The failure of the accused person to observe bail or bond terms on previous occasions

(e) Likelihood of interfering with witnesses if there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted

The burden of proof lies on the prosecution to establish the existence of compelling reasons that would justify the denial of bail, or the imposition of suitable bail terms and conditions.

In **Republic v Danfornd Kabage Mwangi [2016] eKLR** the court observed that ***"There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the constitution and courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned ...***

The "relevant and sufficient" reasons which may permit the accused to be remanded in custody rather than being granted bail include the fear that the accused would be at risk of harm (from himself/herself or from others) against which they would be inadequately protected if released on bail.

Analysis and Determination

In the present case the nature of the charge and the seriousness of the punishment to be meted if the accused person is found guilty is certainly grave and that is not lost to this court. However, the characters of the two individuals are favourable, both being described as having strong community ties. However, in the court of the victim's family members, they have already been convicted, and it is apparent that they regard denial of bond as some form of punishment which will make them get even with the persons charged. That if the court declines to grant the prayer sought, then somehow they will feel that the deed has been avenged. This of course makes a total mockery of the legal proposition that one is presumed innocent until otherwise pronounced by a court of law.

While there can be no denial that emotions are running high especially on account of an already formed belief that the two persons charged had a hand in the deceased's death, I take note of the observation in the pre-bail report that the relatives of the 1st accused and the subject are willing to take them under their wings and host them in a different county which is far away from the place where the incident took place. That the pair have also undertaken to keep away from the area where they could easily meet the vengeful relatives. They have been held in custody for close to 2 months now, and while it is within the rights of the deceased's siblings to rant and rave and grieve, it surely cannot be to the extent that their threats of roaming the surface of Kenya in a bid to avenge the death of their brother paralyses the wheels of justice

Minors: Where the person charged is a minor, the key issue to be considered is what is in the best interests of the child – this has a constitutional underpinning in **Article 53 (2)** to the effect that:

2) A child's best interests are of paramount importance in every matter concerning the child.

Indeed, for children in conflict with the law the Constitution further provides under **Article 53 (1) f) that they shall not to be detained, except as a measure of last resort, and when detained, to be held—**

(i) for the shortest appropriate period of time;

This in my understanding is not restricted to sentencing, but to any detention whether while awaiting trial or after completion of trial, and I do not consider it in his best interest to remain in custody especially with the marauding C19 virus which pervades every nook and cranny, but especially confined, crowded places such as remand homes and police station cells.

I therefore find it appropriate grant bond of Kshs 200,000/- for each with one surety each of a like amount. They shall keep away specifically from **Soy sub-county and Uasin Gishu County** in general (except when attending court in relation to this matter).

E-Delivered and dated this 1st day of September 2020 at Eldoret

H. A. OMONDI

JUDGE

Miss Okok Present

N/A for defence counsel

N/A for counsel watching brief for victim's family

1st Accused and the subject present