



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 25 OF 2019

MULI MUKONZI MATHEMBO Alias KALIANDO APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

The applicant herein **MULI MUKONZI MATHEMBO** alias **KALIANDO** is facing a charge of murder contrary to section 203 as read with section 204 of the Penal code. On 17.7.2020, the applicant, through his advocates, Mrs. Omung'ala made an application for bail. The application, made orally in court, was terse and on the basis that the applicant is not a flight risk. The application for bail was opposed by the prosecution side.

Relying on the sworn affidavit of the investigating officer, corporal Ruth Kihara, the learned prosecutor submitted that the accused is in fact a flight risk. That he faces a serious offence which is an incentive for him to abscond. Also, that he has other accomplices who are still at large and if released on bond, he would easily also go into hiding.

Counsel went further that the state has a strong case against the applicant with a likelihood of conviction. It was also submitted that the applicant does not have a fixed place of abode and he was arrested by members of public. It was also maintained that the applicant is likely to interfere with witnesses if he is released on bond since he knows the eye witnesses.

And lastly, the court was urged to deny the plea for bail, on the basis of accused's own safety and security. That as a result of this incident, irate numbers of the public went on rampage and in the process lynched one of the accomplices of the accused. That there is still invest and release of the accused would lead to disruption of public order and put accused himself to risk.

On a brief reply, counsel for the applicant only maintained that though this is a serious offence, the same remainsailable and that there is no evidence that he is a flight risk.

I have considered the submissions of both sides. Under Article 49(1) (h) of the constitution, an arrested person has a right to:

“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 above constitutional provision clearly guarantees the right to bail to all accused persons irrespective of the nature of the charges they are facing in court. The right however, is not absolute. The right to bail may be denied should the prosecution side prove the existence of any compelling reason. In other words, should the prosecution side show or justify that there exists reasons good enough for a denial of the right to bail, then the accused would be denied the right to bail pending trial.

In the bail-bond policy guidelines of the Judiciary of Kenya, some of the factors that could constitute compelling reasons (paragraph 4.9) include:-

- **The nature of the charge or offence and the seriousness of the punishment in case of conviction.**
- **The strength of the prosecutions case.**
- **Character and antecedents of the accused.**
- **Failure of accused to observe bond terms in previous cases.**

- **Likelihood of interference with witnesses**
- **Whether the accused is a flight risk.**
- **Public order, peace and security**
- **Accused own safety.**

In our instant case, the prosecution has objected to release of the accused on bail and cited the following reasons;

i) That accused is a flight risk and has no place of abode.

It was submitted that the accused has no known place of abode and so is a flight risk. That he was only arrested on the street and no-one knows his place of abode. The pre-bail report filed herein confirms the position that the residence of the accused or that of his known relatives is known. If this is the case, then the question that comes to mind is now the court will ensure the attendance of the accused to court should he be released on bond

In Julius Mutemi Kamotho Versus Republic (2012)eKLR, the court held that the probability of the accused person turning up for his trial is a major consideration in grant or denial of bail. In our case, the place of abode of the accused is unknown. Similarly, there is no known places of abodes of any of the accused's relatives. There is also a claim by the prosecution that some of the accomplices of the accused are still at large. These factors put together persuades this court that in fact the accused is a flight risk, who is likely to abscond never to turn up in court for his trial. I therefore agree with the prosecution that this is a viable compelling reason.

ii) Seriousness of the offence

There is no doubt that the accused is facing a serious offence of murder which could possibly attract death sentence on conviction. But can this alone be a compelling reason. I do not believe so in view of the express constitutional provision above which guarantees the right to bail to all accused persons irrespective of the nature of the charges they are facing. This ground raised by the prosecution therefore fails.

iii) Likelihood of interference with witnesses

It was submitted by the prosecution that the accused knows well the witnesses herein. And that some of these witnesses have continued to receive threats from the alleged accomplices of the accused who are still at large. The fear of the prosecution is that such interference would even increase should the accused be released on bond. This court notes that there was no specific proof of the nature of the threats alludes to by the prosecution. It must not be a mere fear. And in the absence of any specific proof of the alleged threats, this ground lacks any feet to stand on. I am guided on this point by the decision of the Hon. Lesiit J. in Republic Versus Richard David Alden (2016)eKLR that

“for the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference At least some facts must be placed before court. Otherwise it is asking the court. Otherwise, it is asking the court to speculate.”

I sincerely do not find any merit in this objection. I dismiss it.

iv) Public order and security and accused's own security

From the submissions made herein, following this incident, members of the public went on the rampage in violence. One of the alleged accomplices of the accused was lynched by the mob. There were submissions that accused's own security and safety would be at risk if he is released on bail. I have considered the serious nature of these allegations and I am convinced that it would be best in the circumstances to remand the accused in custody. His release could easily lead to a breach of security within the residence of Mukuru Kayaba.

As postulated by the Hon. Justice E. C. Mwitia in Republic Versus Godfrey Madegwa & 6 others (2016)eKLR, the purpose for release of an accused person on bail is to secure his attendance to court for his trial. It is not a licence for him to run away to escape facing his accusers. I am in the circumstances not convinced that release of the accused on bail would achieve this primary purpose.

I therefore find that the prosecution has proved the existence of compelling reasons good enough to make this court deny the accused the constitutional right to bail. I accordingly dismiss the application of the accused for bail and order that accused be remanded in custody pending the hearing of this case.

HON. JUSTICE D. OGEMBO OGOLA

13TH OCTOBER 2020

Court:

Ruling read out in court in presence of the appellant and Ms. Kimani for the state and Mrs. Omungala for accused.

HON. JUSTICE D. OGEMBO OGOLA

13TH OCTOBER 2020

Mrs. Omungala:

We ask for early date.

HON. JUSTICE D. OGEMBO OGOLA

13TH OCTOBER 2020

Court:

Hearing date to be fixed. Hearing 23rd/24th November 2020.

HON. JUSTICE D. OGEMBO OGOLA

13TH OCTOBER 2020