



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. E008 OF 2020

REPUBLIC..... RESPONDENT

VERSUS

DENIS NDUBI MAUDA.....ACCUSED

RULING

1. The applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on 4th February, 2020 at unknown place in the Republic of Kenya, jointly with others not before the court, murdered **BEN MAXWELL ANYIRA**.
2. He pleaded not guilty and in opposition to his being released on bail the State through **CPL LUCAS JUMA** filed an affidavit dated 20th August, 2020 in which it was stated that the deceased was murdered and his body dumped in Ngubi forest after he and one **JOSHUA GICHUKI MWANGI** went missing on 3rd February, 2020 with the latter still missing.
3. It was stated that before their disappearance, the accused had visited their respective homes at Riruta in Nairobi, and several members of their household who are listed as witnesses already live in fear and are likely to be interfered with by the accused if released on bond.
4. It was contended that there were on-going investigations aimed at arresting the other perpetrators, who were still at large and the presence of the accused will interfere with the said investigations.
5. It was deposed that the accused who comes from Busia County, was in constant communication with some people in Uganda and should he be released on bond, there was likelihood of the same absconding and fleeing to Uganda, having ran away from Nairobi to Busia immediately upon the commission of the offence, from where he was arrested.
6. It was further contended in response to the accused affidavit in reply, that the same had been supplied with witness statements and was aware of the prosecution intended witnesses. Having been the last person seen with the deceased and the missing man, it was contended that the accused was likely to interfere with the said witnesses, taking into account his conduct of not cooperating with the investigation.
7. The accused in response filed two affidavits, sworn by himself and his sister one **EDNA AYIENGA ADONGO**, in which he deposed that he had no knowledge of the circumstances leading to the death of the deceased or information on the missing person, having parted way with them on 3rd February at 23.00 hours as per his statement to the police.
8. He stated that he had fully cooperated with the police with the **DCI** Kabete arranging meeting between him and the family of the victims and that he was able to account for his day to the satisfaction of the families. He contended that he had no ill will nor malice towards any of the witnesses and had nothing to hide as he did not take part in the death or disappearance of the victims and was only being framed up in a bid to kick-start a dead investigation.
9. He deposed further that his move to his rural area was not an afterthought arising from the on-going investigation but as a result of the economic hardship created by Covid-19 pandemic, which affected his business and that he was not a flight risk as he intends to live with his sister at Embakasi Area pipeline until the case is heard and determined.
10. The accused sister confirmed that she was willing and ready to host the same during the period of trial and further stated that she had on several occasions accompanied him when summoned by the Police, even during the period of his statement writing.
11. In compliance with the Bond Bail Policy Guidelines, the court called for pre-bail report on the accused, wherein it was confirmed that the accused went back to Busia County soon after the murder from where he was arrested, it was stated that the accused had moved all his

household goods from Nairobi. It was indicated that the same used to engage in Miraa business which was adversely affected by covid 19 pandemic and was married with seven children.

12. His family were supportive of his being released on bail, with his wife willing to stand surety for him. On the victim impact, it was indicated that the deceased was aged 50 years and a father of eight children. He was a land broker, through which he supported his family, who had to relocate to their rural home. They feared that if released on bond, the accused would hamper the efforts to find the missing person. They confirmed having not received any threats but feared that it could happen if the accused is released on bond.

13. The wife of the missing man objected to the accused being released on bond on the basis that he knows her home and therefore felt vulnerable together with her children.

14. The Investigating Officer also expressed his reservation at the accused being released on bond, having escaped to busia and was therefore considered a flight risk. The assistant Chief of the accused sub-location stated that he knew the accused and his family and confirmed that the accused was a law abiding, though he could not guarantee his compliance with bail conditions

SUBMISSIONS.

15. Mr. Naulikha on behalf of the State submitted that the accused was a flight risk since his rural home is located along the Kenya Uganda border. It was contended that there were still on-going investigations to arrest the accomplices of the accused and to recover the body of the second victim and therefore if released on bail the same was likely to interfere with those investigations.

16. Ms. Waweru on behalf of the accused submitted that it was not a crime for the accused to come from a border County and that as a business man he had a right of association and to communicate with his business associates. It was contended that if the witnesses have a real fear, they can be placed on witness protection. It was submitted that the accused had provided an alternative place of abode during his trial.

DETERMINATION

17. Bail is a constitutional right of every accused person under the provisions of Article 49 of the constitution which may only be limited where there are compelling reasons. What constitutes compelling reasons are now well settled in Kenya and have been captured in the Bail and Bond Policy Guidelines and several decisions of the Superior courts.

18. In this case the prosecution has advanced as a compelling reason, that the accused is a flight risk on account of the fact that the same comes from Busia County, which is a border County and that the same had immediately relocated to his home county upon the commission of the offence. As submitted by Ms. Waweru, the mere fact that the applicant is coming from a border county alone is not an adequate ground to deny him bond.

19. The accused has offered an explanation as to why he relocated to his home county which, reason had independently been confirmed by the pre-bail report, further the applicant has offered an alternative place of abode which has been confirmed through an affidavit sworn by his sister and I therefore find that there is no ground to support the allegation that the accused is a flight risk. If the constitution wanted to lock out those coming from border counties from the enjoyment of right to bail, nothing would have been easier than to say so.

20. The other ground advanced by the state is the likelihood of the applicant interfering with witnesses, however this is contradicted by the pre-bail report which has confirmed that there have not been any threats directed towards the intended witness. On the issue of the accused interfering with investigations, the state failed to place before me, the nature of the alleged interference and the progress they had made while the accused was in custody.

21. The fear of the intended prosecution witness without evidence of an attempt by the accused to contact them either directly or through agents, cannot be a ground to deny an accused person his right to bail. See the case of **REPUBLIC v DWIGHT SAGARAY**.

22. I am therefore satisfied and hold that the prosecution has not placed before me adequate compelling reasons to enable me deny the accused his constitutional right to bail, as all the issues raised can be adequately ring fenced through bail terms and conditions.

23. I would therefore grant the accused bond on the following terms and conditions;

A) Bond of Kenya shillings five Hundred Thousand (Ksh. 500000) with one surety of similar amount.

B) In the alternative cash bail of Kenya shillings two hundred thousand (Ksh 200000) with three sureties of similar amount.

C) The accused sister one EDNA AYIENGA ADONGO shall execute and sign a personal bond confirming and guaranteeing to accommodate the accused and to continue providing the said accommodation throughout the period of trial.

D) The accused shall not make any contact of whatever nature with any of the intended prosecution witnesses either directly or indirectly throughout the period of his trial.

E) Upon release on bond the accused shall register himself with the Chairman of the Nyumba Kumi Committee of the area where his sister resides and shall not leave that area without written consent of the Deputy Register of this court.

F) In default of any of the terms herein this bond shall stand revoked without any further orders of the court.

Dated, Signed and Delivered at Nairobi This 7th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Mr. Naulikha for the State

Mr. Waweru for the accused

Accused absent (in isolation)

Court clerk Karwitha