



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 34 OF 2020

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

FRANCIS OMONDI OPWONDO.....1ST ACCUSED

STANLEY IMBIAKHA.....2ND ACCUSED

SIMON EFUMBI.....3RD ACCUSED

KEVIN WAKHANU IMBIAKHA.....4TH ACCUSED

AND

CRIMINAL CASE NO. 35 OF 2020

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

ANTHONY OSANYA NDEGE.....1ST ACCUSED

BENRAD WAKWAUVI.....2ND ACCUSED

ALI KEYA MULINGALA.....3RD ACCUSED

HENRY NDEGE OPWONDO.....4TH ACCUSED

GODFREY ANAKUTA OPWONDO.....5TH ACCUSED

DAVIS MUGANDA SAYA alias ANDREW EKUTU.....6TH ACCUSED

AND

CRIMINAL CASE NO. 36 OF 2020

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

DENSHAS OPONDO IMBIAKHA.....1ST ACCUSED

KEVIN WAKHANU IMBIAKHA.....2ND ACCUSED

FRANCIS OMONDI NDEGE.....3RD ACCUSED

SIMON KAVA EFUMBI.....4TH ACCUSED

STANLEY IMBIAKA.....5TH ACCUSED

RULING

1. The ruling herein is composite, as it relates to three separate criminal cases, which are related, and in respect of which similar applications were made by the Republic, that the accused persons, in the three cases should not be considered for release on bond pending the hearing and disposal of the matters. In the three cases, the accused are charged with murder contrary to section 203 of the Penal Code, as read with section 204 of the Penal Code, Cap 63, Laws of Kenya. They pleaded not guilty to the charge. After pleas were taken on 17th September 2020, Ms. Omondi, prosecution counsel, applied that the accused be not released on bail pending trial. She relied on an affidavit on record, sworn by the investigating officer, Chief Inspector of Police, Leonard Kurgat, on 17th September 2020.

2. The application was opposed by the advocates appearing for the accused persons in the three cases, Mr. KÓmbwayo, Mr. Ombito and Mr Amasakha. They submitted that no compelling reasons had been cited by the State to deny bail, and relied on Article 49(1) of the Constitution, to support that contention. They argued that the fact that the accused persons were neighbours with or related to the witnesses proposed to be called by the Republic, was not a good reason enough to deny the accused bond. They submitted that if the State feared that the accused were likely to interfere with witnesses, then the State should seek to have the witnesses placed on witness protection. They further argued that it had not been disclosed the manner in which the accused were said to be likely to interfere with witnesses. They further submitted that the main consideration, on whether or not to admit a witness to bond, was the likelihood of the accused attending court as and when required to by the court. They stated that accused were persons of fixed abode, since it was known where they resided and worked, and that it was unlikely that they would leave their families and investments and disappear into thin air. The court was invited to also consider, among other factors, the respective ages of the accused persons. They submitted further that it was a principle of law that accused persons were innocent until proven guilty, and not admitting them to bond would be tantamount to him being assumed to be guilty before being proven so. The court was urged to release the accused persons on favourable bond terms, adding that the court could impose any conditions of whatever nature it pleased to ensure that they attended court.

3. Ms. Omondi, in her rejoinder, stated that the constitutional right for admission to bail pending trial was not absolute, as it was subject to discretion of the court. She stated that denial of bond did not amount to denial of a fair trial. She submitted that court could deny bond if the State convinced it of the necessity to do so. In the instant cases, she asserted, the State had convinced the court that there existed compelling reasons for denying the accused bail.

4. I have perused the affidavit of CIP Kurgat. In it the deponent avers that the accused persons were related to the witnesses, and were close neighbours to the said witnesses. He deposes that when the body of Ernest Opwondo Ndege, was brought home, the accused persons, and others not before the court, went on rampage and killed the deceased persons the subject of the charges, and set their houses on fire. He states that the presence of a large contingent of armed police officers did not deter them from committing the heinous crimes. The police were forced to throw teargas canisters and shoot in the air to disperse them, but the accused, and their accomplices, responded by hurling stones at the police, with the result that a number of police officers sustained injuries. He deposes that investigations were ongoing and more suspects could be arrested. He states that release of the accused could compromise the investigations. He further avers that the accused persons had been looking for one of the witnesses, and had even abducted her son, who was saved by members of the public. He further avers that a section of the population had been displaced on account of the acts of the accused, and others, and if they were to be released on bond there was probability that witnesses may be eliminated. He states further that some witnesses had been threatened.

5. Release of an accused person on bond or bail is a constitutional right. Article 49(1)(h) of the Constitution of Kenya provides that an arrested person has the right:

“to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

6. The constitutional provision on right to bail is replicated in section 123A of the Criminal Procedure Code, Cap 75, Laws of Kenya, which provides as follows:

“(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.”

7. The above provisions are further amplified in the *Judiciary’s Bail and Bond Policy Guidelines*, March 2015, at page 25, paragraph 4.26(a), where the judicial policy on bail is set out as follows:

“The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.”

8. The courts have, in a number of cases, had occasion to consider the provisions that I have referred to above. In *Papayei Sumungen Nangunye vs. Republic* [2017] eKLR, for example, the court stated that:

“Courts have now embarked upon defining this term ‘compelling reasons’ and towards that effort I am content to cite decisions by Odero & Nzioka JJ, and Majanja J in separate decisions in Msa HCCR Appl. No. 66a & 66b of 2011 Mohamed Abdulrahman Said & Another vs. Republic [2012] eKLR, and NBI HCJR Misc App No 271 Of 2011 Wilson Thirimba vs. DPP [2012] eKLR, respectively, where it was observed;

“Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as ‘rousing, strong, interest attention, conviction or admiration.’”

9. The court, in *Papayei Sumungen Nangunye vs. Republic* (supra), went on to say:

“... As I have stated in past decisions, real danger to the accused, would amount to compelling reason not to release the accused person. In this case, the fear is not unfounded; there is high possibility of real danger to the accused person. Accordingly, taking into consideration all the circumstances in this case and the reasons alluded to above; I find that there are compelling reasons not to release the accused person on bail.”

10. It was said, in *Daniel Wambua Kisilu vs. Republic* [2020] eKLR, that:

“19. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release.”

11. The court, in *Priscilla Jemutai Kolonge vs. Republic* [2002] eKLR, considered gravity of the offence as a factor to be taken into account, and said:

“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious

and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”

12. In *Nicholas Kipsigei Ngétich & 2 Others vs. Republic* [2011] eKLR, the court took into consideration safety of the accused person, that he be kept in custody due to hostility on the ground. Such a ground may constitute a compelling reason for denial of bail, so long as satisfactory material has been placed before the court. The court said:

“...it is the duty of the State in terms of Article 29(c) and 238 of the Constitution to ensure the security and safety of the applicants, a duty which the State cannot run away or abdicate. It cannot be in the mouth of a State official charged with this duty to imply that Kenyans will only be safe in prisons. Thirdly from the statements annexed to the replying affidavit, it is not in doubt that some of the witnesses have been threatened. However, the police have not linked the applicants with those threats. The police have the means and technical know-how to be able to trace the source of the threats.”

13. In other African common law jurisdictions the courts have espoused similar principles. In *Alhaji Mujahid Dukubo- Asari vs. Federal Republic of Nigeria* SC 20A/2006, for example, the Nigerian Supreme Court said:

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -

(i) The nature of the charges;

(ii) The strength of the evidence which supports the charge;

(iii) The gravity of the punishment in the event of conviction;

(iv) The previous criminal record of the accused if any;

(v) The probability that the accused may not surrender himself for trial;

(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;

(vii) The likelihood of further charges being brought against the accused;

(viii) The probability of guilty;

(ix) Detention for the protection of the accused;

(x) The necessity to procure medical or social report pending final disposal of the case.”

14. In *S vs. Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), a South African court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interests 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 (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the 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 the 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. In *S vs. Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S vs. Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also Aitken vs. AG 1992 (2) ZLR 249 and Norman Mapfumo vs. The State HH 63/2008... The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

15. I have scrupulously gone through the affidavit sworn by CI Leonard Kurgat, on 17th September 2020, and the minutes of the submissions made before me by Ms. Omondi, as against the principles stated in the cases that I have mentioned above, and I am not satisfied that the prosecution has made a serious effort to demonstrate that compelling reasons exist upon which I should exercise discretion to deny bail/bond. Before the State embarks on the effort to apply that the court denies an accused person bail, it ought to marshal and place sufficient material before the court to support any such application. It should not be assumed that the mere making of the application would suffice.

16. I have, however, gone through the record before me, and perused through the witnesses' statements and other material in the committal bundle, and considered them as against the oral submissions by the prosecutor. The circumstances of and the background to the case are that a person known as Ernest Ndege Opwondo had been shot dead on 5th August 2020, by persons whose identities the police are yet to establish. His body was brought home on 14th August 2020, for burial. Chaos erupted at the family home, with those waiting for the body turning hostile and violent, and attacking the police officers who were present with stones. It would appear the police were overwhelmed, and at the end of it three persons were killed, being Calistus Wandera, Peter Ndege Opwondo and Fredrick Opwondo. The accused persons in the three criminal cases, the subject of this ruling, were arrested as suspects for the killing of the three persons named above. The fact that three individuals, from the same family as the person killed on 5th August 2020, could be killed almost simultaneously, on the the same day, and despite heavy police presence, no doubt, means that the environment on the ground was, and probably still is, volatile, and it would be imprudent to have the accused persons released into such a poisoned environment. It may expose them to danger, or they may themselves be a danger to others. There is also strong possibility, on account of that volatile environment, that witnesses may be interfered with, by the accused persons, should they be released on bond at this stage. It would be in public interest that they remain in custody for now, to allow for tempers to cool and anger to subside. The Republic did not advance that argument, but the court, as guardian of public interest, can take such factors into account, so long as the same are discernible from the facts, as they emerge from the material on the record before the court.

17. Consequently, the accused persons in the three criminal cases are hereby denied bail/bond, for the reasons given above. They shall remain in custody, but may renew their applications for bail/bond after three months. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1ST DAY OF OCTOBER 2020

W MUSYOKA

JUDGE