



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 1 OF 2019

REPUBLIC PROSECUTOR

VERSUS

JAMES NDEGWA MWANIKI 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 25th day of December, 2018 at Tasia stage in Embakasi sub-county within Nairobi County murdered **PC CHARLES NYAMBARIA OIGORO**.

2. He pleaded not guilty to the said charge. By an application dated 11/11/2019 the same sought to be released on bond pending trial, which application was supported by his affidavit, in which he stated that he was a law abiding citizen and undertook to abide by all the terms and conditions set by the court.

3. The application was opposed by the prosecution, through a replying affidavit sworn by **CPL NICHOLAS WARUI**, in which it was deposed that, the applicant was aware of the weight of the prosecution case against him and therefore there will be temptation for him to abscond from the jurisdiction of the court. It was deposed that he was charged with a very serious offence of murder, where he allegedly killed a police officer and being a person with no fixed abode, there was a likelihood that he will abscond.

4. The court ordered for a pre-bail report which was filed on 21/2/2019 and in which it was stated that the family of the accused had indicated that he had exhibited some personality disorder, though without any criminal record. It was indicated that the family was not in a position to secure his release on bond, should one be granted. On the victim's impact statement, it was indicated that the deceased was a police officer based at Tasia police post at the time of his death, further that his family members refused to avail themselves for interview, on the ground that the accused had committed a capital offence, so the issue of bond/bail should not be considered.

5. Based upon this report, the court deferred the hearing of the application herein but directed that the matter do proceed for hearing. At the time of this application, the court had heard and recorded evidence from five (5) prosecution witnesses, leaving a total of seven (7) more witnesses to testify, then covid-19 came, leading to closure of courts and down scaling of in person-hearing, which led to the delay in hearing the matter further.

SUBMISSIONS

6. At the hearing of the application, Mrs. Gulenywa, appeared for the accused and submitted that the issue raised in the pre-bail report, and the affidavit in opposition were not grounds for denial of the accused's constitutional right to bail. It was submitted further that whether the evidence tendered so far was overwhelming or not was not a ground for denial of bail, as it was for the court to decide on the nature of evidence tendered.

7. On behalf of the prosecution, it was submitted that the deceased was a police officer and the accused knowing that he murdered a police officer, there was likelihood of fear of reiteration, which may lead to a temptation and incentive to abscond, should he be granted bail. It was submitted that the offence was committed in the presence of witnesses, who pointed the accused out and since the said evidence was so strong, the accused will have fear of possible conviction.

8. It was further submitted that the accused was a flight risk, since at the time of the commission of the offence he was a handcart pusher with no fixed place of abode.

DETERMINATION

9. Bond is Bail/Bond is a constitutional right of every accused person which may only be denied under Article 49(1)(h) where there are compelling reasons, advanced by the State to the satisfaction of the court. What constitutes compelling reasons are now well settled in

Kenya to include:-

- i. The nature of change.*
- ii. The strength of the evidence which supports the change.*
- 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 that he may suppress any evidence such as incriminating him.*
- vii. Likelihood of further charges being brought against the accused.*
- viii. The probability of a finding of guilt.*
- ix. Detention for the protection of the accused.*
- x. The necessity to procure a medical or social report pending the disposal of the case.*
- xi. Accused persons own safety, security and protection – REPUBLIC V KIMUNYA.*
- xii. If the accused person is likely to pose public danger by being released on bail.*
- xiii. If by releasing the accused on bail public confidence in the administration of justice will be dismissed.*
- xiv. The character antecedents, associations and community ties of the accused person.”*

10. In this matter, it is not in dispute that the same is part-heard before the court wherein five (5) prosecution witnesses have testified and their evidence is on record. Whereas the accused remains and must be considered as innocent, throughout his trial, where a matter has proceeded for trial and the case of the prosecution has been presented, then the apparent strength or weakness of the prosecution can be taken into account, when determining whether or not to grant the accused bail as was stated by **NGUGI, J in REPUBLIC v JANE MUTHONI MUCHERU [2017]eKLR.**

11. As I stated in the case of **REPUBLIC v RAPHAEL MUOKI KALUNGU [2020] eKLR**, since the court has no means to know the effect of the testimony of witnesses who have testified against the accused will have on his mind, I am prepared to find that the risk of the accused absconding trial is real and may not be wished away, coupled with the fact that the same is charged with the murder of a police officer, the court takes judicial notice, that there are not so good elements within our police force, who might advantage of the accused presence out of custody to cause harm to the same, in reiteration for the death of the colleague which may not be wished away.

12. Having taken into account the totality of the material present before me, it is clear that the accused should be held in custody for his own safety and protection and coupled with the strength of the prosecution case so far presented before the court.

13. I am therefore satisfied that there are compelling reasons, advanced by the prosecution, to enable me deny the accused the enjoyment of his constitutional right to bail at this stage, which I hereby do. The upshot of this is that the applicant’s application for bail is denied. The accused shall therefore remain in custody until further orders by the trial court.

Dated, Signed and Delivered at Nairobi This 11th Day of November, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE