



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. E038 OF 2020

JOYCLIFF MUTHOMI GITHINJI.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Joycliff Githinji** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on 13th day of April, 2016 at Umoja 2 Estate, in Buruburu area, within Nairobi County murdered Daniel Irungu Maranga.

2. In a Notice of Motion dated 19th November, 2020 the accused through **M/s Ng'ayu Kioni** Advocate has applied to be admitted to bail/bond, on reasonable terms pending trial of this case.

In the grounds the accused/applicant states that he is not a flight risk and he has been in custody for more than ten (10) days.

3. He has also filed an affidavit to support the grounds. He has deposed that the offence he is charged with is bailable. That he has been a Police Officer now for 12 years with no record of jumping bail. He is a law abiding citizen and even presented himself to the Police Officers after being ordered to do so. He is a family man and has a fixed abode in Nairobi and Ndaragwa. He avers that he is ready to abide by any condition the court will impose for grant of bail/bond.

4. **Mr Ngayo** for the accused/applicant has submitted and reiterated the grounds and the averments in support of the application. He submits that the accused/applicant is a law abiding citizen who has never been disciplined professionally, arrested or charged with any offence. That he has potential sureties if granted bail.

5. In response to the affidavit relied on by the respondent in opposing bail he submits that there is no material before the court to explain the fear of interference with witnesses. That there is no demonstration of actual or perceived interference. To him this is mere suspicion which is not sufficient.

6. It is his submission that the court must balance the rights and liberties of the applicant against alleged public interest. He further submits that our jurisprudence has now been settled to the effect that when individual liberties come into conflict with national security it's the latter which must give way and not the vice versa.

7. Counsel argues that the applicant is presumed innocent until proved otherwise and so the issue of his guilt does not arise at this point. Finally, he submits that the prosecution has not availed compelling reasons for denial of bail to the accused.

8. The prosecution filed an affidavit opposing bail through an officer from **IPOA No. 298 S.I.O Farah Ibrahim** which learned counsel **M/s Ogweno** relied on in her submissions. The officer has averred that the accused/applicant should not be released on bond/bail because the prosecution has strong and irrefutable evidence against him. She further avers that the scene is not far from the accused/applicant's place of work.

9. She deposes that the accused/applicant is well known since he is a police officer and the witnesses know him well. Therefore, there is a real likelihood of interference with witnesses by intimidation. She asks the court to protect the interests of the immediate family members of the deceased by denying him bail/bond.

10. She depones that since the occurrence of the incident in 2016 there has been tension in the community with a lot of animosity towards the police.

11. **M/s Ogwen**o in her submissions has reiterated what the investigating officer has averred. She has submitted that the State did not know the accused/applicant's place in Ndaragwa, and if granted bond he could go anywhere.

12. In response **Mr. Ngayo** submits that had the accused been in a position to interfere with witnesses he could have done that long ago since the case started in 2016. That suspicion and fears without cogent evidence is not enough to deny the accused/applicant bond.

Analysis and determination

13. The 2010 Constitution of Kenya makes provision for every arrested person to be released on bond/bail. This right is however not absolute. There are instances when bond/bail can be denied. **Article 49(1)(h) of the Constitution** provides:

“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.”

14. Since an arrested or accused person has a right to be released or admitted to bond/bail, it means any person or body opposed to the same must state the compelling reasons for any denial of the bond/bail. It is therefore clear that in denying an accused person bond/bail it must be demonstrated with convincing evidence that his/her release will present risks and that such risks cannot be managed even where appropriate conditions can be made.

15. **Section 123A of the Criminal Procedure Code** gives the parameters for the grant of this right.

It provides:

“123A. (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 fulfillment 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.”

Also see **R. v. Richard David Alden [2016]**.

16. The law as stated above sets out the circumstances under which bond/bail may be denied. This then forms the cluster of compelling reasons the court would consider in a situation such as this. Compelling reasons therefore depend on the circumstances of each case. The same should be considered cumulatively and not in isolation.

17. My view is that bond/bail should not be denied unless there are sufficient grounds to make the court believe that the accused will not honour the conditions of the bond, and that he/she will not attend court when required.

18. In the instant case the investigating officer has sworn that there is sufficient evidence against the accused which will result in a conviction. I find that to be dangerous ground for this court to trade on by trying to evaluate the evidence and the hearing is yet to start. I will therefore leave it at that.

19. She has further averred that by virtue of his position as a police officer and having trained in the use of firearms he will use the same to intimidate the witnesses and also interfere with them. This is a general statement with no specifics. The offence the accused is charged with is said to have occurred on 13th day of April 2016 at Umoja 2 Estate Buruburu while the accused was stationed at Umoja 2 A.P. camp. He is currently attached to SGB Uhuru Camp within Nairobi. The deponent has not indicated whether Umoja 2 A.P. camp and SGB Uhuru camp are neighbouring each other. It is therefore not clear how the witnesses will be interacting with the accused person. This is a case which the police have been investigating since the year 2016. Indeed if there were any instances of interference with witnesses or intimidation, the investigating officer would have placed the evidence before this court.

20. Faced with a similar issue the court in the case of **Republic v Gerald Mutuku Nyalita & Anor [2015] eKLR** held as follows:

“...In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49(1)(h) of the Constitution of Kenya, the prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses as eye-witnesses or circumstantial is also relevant ...”

21. I am in agreement with the above observation by the court. In the instant case there is no evidence of interference with witnesses which has been placed before this court. The conclusion is therefore that despite his position as a police officer the accused/applicant has not been shown to have interfered with or intimidated any witness for the four (4) years the case has been pending.

22. The prosecution has also raised issue with the accused's second place of abode called Ndaragwa which is not known to the prosecution. This still goes to the period this matter has been pending since its alleged commission. The prosecution has failed to show by way of evidence any attempt by the accused to run away or disappear from his home or place of work.

23. It is true murder is a serious offence carrying a maximum sentence of death. The issue here is whether the accused if released on bond will attend court as required. **Paragraph 4.9 of the Bail and Bond Policy Guidelines** provides:

“In terms of substance the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.

...the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial”

24. From the affidavit of the investigating officer nothing has been mentioned about any fear of the accused/applicant not attending court for the trial.

25. After considering all the material before me, I have come to the conclusion that the prosecution has not clearly established any compelling reasons that would make this court deny the accused/applicant bond/bail.

I therefore grant the accused/applicant bond of **Kshs 2 million** with **one surety in the sum of Kshs 1 million**.

- In the alternative he may be released on a cash bail of Kshs 500,000/=.
- If released on bond he will be reporting to the DCIO at the Central Police Station Nairobi every 4th day of each month until the final determination of the case unless the order is set aside.
- He should also not set foot at Umoja 2 A.P Camp until finalization of this case.
- The Deputy Registrar to examine any surety presented by the accused.
- Mention on 19th January 2021 for pretrial conference.

Delivered, signed and dated this 4th day of December 2020 in open court at Nairobi.

H. I. ONG'UDI

JUDGE