



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 24 OF 2018

EDDLIED MANDI JILANI.....1ST APPLICANT

MAKONDE RUWA BUNI.....2ND APPLICANT

NGIRA KARISA CHARO.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63, Laws of Kenya. The particulars of the offence are that on the 8th day of March, 2018 along Mombasa-Malindi Road within Kilifi County jointly with another not before the court they murdered ISSACK KASSIM JIRAW aka SOKOROW.

2. Subsequently, the Applicants applied to be released on bail or bond pending trial. The application was heard on 9th July, 2018. Mr. Wamotsa appeared for the 2nd and 3rd Applicants. In support of the application, Mr. Wamotsa submitted that the applicants have fixed abodes that are well known to the police. Further, Counsel contended that the 2nd and 3rd applicants are gainfully employed members of the community with the 2nd applicant being a driver and the 3rd applicant a well-known palm wine tapper in Kilifi County. According to Counsel, the applicants have no reason to abscond once admitted to bail or bond.

3. Mr. Wamotsa submitted that the 2nd and 3rd applicants have been in custody for 60 days. He argued that within this period the police should have concluded their investigations. Therefore, there should be no apprehension that the applicants will interfere with the investigations. Counsel also faulted the Respondent for claiming that the applicants would interfere with witnesses scheduled to testify in this matter. Mr. Wamotsa contended that the Respondent ought to have identified the witnesses and the manner of likely interference. Alternatively, Counsel argued that the purported witnesses should benefit from the Witness Protection Programme.

4. Mr. Nabwana, learned Counsel for the 1st Applicant relied on the Supplementary Affidavit of 1st Applicant sworn on 18th June, 2018 to support his application for bail and/or bond. Additionally, Counsel submitted that the 1st Applicant is an employee of Kilifi County therefore she is not a flight risk. Counsel relied on the Bail and Bond Policy Guidelines by the Judiciary at pages 6 and 17 to argue that there was no evidence by the Respondent that the applicant is likely to interfere with the prosecution witnesses.

5. Mr. Jami for the Prosecution opposed the application for bail. In doing so Counsel relied on the affidavit of CPL Ahmed Abdikadri sworn on 12th June, 2018. Counsel submitted that the right to bail is not absolute, and therefore, where the prosecution demonstrates compelling reasons for denial of bail, the court is obligated to deny bail.

6. In relation to compelling grounds for denial of bail, Mr. Jami submitted that the 1st Applicant was a flight risk. To support this assertion Counsel stated that when the arrest of the 1st Applicant was effected she was found parking her belongings which raised reasonable apprehension that she was running away. Further, Counsel contended that the other accused person who could not be found was the brother to the 3rd Applicant. Therefore, there is a probability that the 2nd and 3rd applicants could run away once they are admitted to bail.

7. Mr. Jami submitted that the applicants are charged with a serious crime and the prosecution has substantial evidence against them. Counsel alluded to a confession by the 2nd Applicant which the prosecution intends to use during the trial and an intended plea bargain with the 3rd applicant. According to Counsel these facts create reasonable apprehension that the applicants might prey or harm each other.

8. Mr. Salim who appeared for the victim's family supported the opposition for bail. He urged the court to consider the safety of the victims involved in this matter.

9. In rebuttal, Mr. Wamotsa clarified that the 2nd applicant has retracted his confession made before the Hon. Lewa. Further, he faulted the victim's family for failing to file an affidavit on issues of their safety. Mr. Nabwana on the other hand stated that the 1st applicant was not a flight risk. He sought to clarify the incident that occurred on the arrest day pointed out by the prosecution. He contended that the 1st applicant was moving houses on the day in question and that the police were well aware of the premises that she was moving into.

The Determination

10. Article 49 (1) of the Constitution provides for the rights of arrested persons. At paragraph (h) 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. The right to bail is also enshrined under Section 123 of the Criminal Procedure Code. This provision can be said to be based on the presumption of innocence that is embodied under Article 50 (2) (a) of the Constitution. Article 50 (2) (a) states that every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.

11. Courts are called upon to jealously guard an accused person's right to liberty hence the need for compelling reasons to be adduced by the Prosecution as to why an accused person should not be admitted to bail or bond. However, it is important to note that the right to bail or bond is not absolute. This was the position taken by the court in the case of **Republic v. Milton Kabulit & 6 others [2011] eKLR** where the court opined that:

“Firstly, bail is not an inalienable right. The Constitution does not say so. Nor does the International Covenant on Civil and Political Rights say so (Article 9(1)), nor does the African Charter on Human and Peoples Rights say so (Article 6(1)), nor the American Convention on Human Rights (Article 7), nor the European Convention on Human Rights (Article 5). What is inalienable is the right to life. As Andrei Gromyko a long serving former Soviet Foreign Minister says in his "Memoirs" "Without life no other right is enjoyed" or as Jeremy Bentham said - "Liberty without life is "nonsense on stilts." Rights must be balanced as Immanuel Kant said - "with imperfect obligations." And yet, life is alienated through the death penalty - S. 26(3) of the Constitution. The only rights and fundamental freedoms which cannot be alienated are those prescribed under Section 25 of the Constitution, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or ..., the right to a fair trial and the right to an order of habeas corpus. All other rights and fundamental freedoms may be limited under S. 24 of the Constitution.

Secondly the right to bail is alienable except in those circumstances clearly prescribed by the Constitution in respect of petty offences. The Constitution donates to the court the discretionary power to alienate the right to bail where there are compelling reasons. The question or issue as stated above, is whether there are compelling reasons.”

12. While taking into account an accused person's right to liberty, a court should weigh the said right against the interest of justice. Justice should be seen to be done to not only the accused but also the victim's family and the witnesses involved in the matter and the general community at large. In the case of **Republic v Danford Kabage Mwangi [2016] eKLR**, Mativo J opined that a court while considering an application for bail should strike a balance of proportionality in considering the rights of the applicant on the one hand, and the public interest on the other. He went on to state that:

“The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case. Thus in determining bail public good as well the rights of the accused should be kept in mind.”

13. Article 49 (1) (h) of the Constitution obligates the court to release an accused person on bail or bond unless there are compelling reasons why an accused person should not be released. The Black's Law Dictionary, 10th Edition defines the term “*compel*” as “*to convince a court that there is only one possible resolution of a legal dispute*”. This would suggest that this court should be satisfied from the reasons given that there is need to continue holding the applicants in custody pending the hearing and determination of their case.

14. What then are these compelling reasons? The *Bail and Bond Policy Guidelines* published by the Judiciary in 2015 state that the primary factor that a court will consider when granting bail or bond is whether an accused person will attend court for the trial. In making this determination, the Guidelines formulate a list of compelling reasons that have been established by the courts over the years. These include:

- a) **The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.**
- b) **The strength of the prosecution case.**
- c) **Character and antecedents of the accused person.**
- d) **The failure of the accused person to observe bail or bond terms.**
- e) **Likelihood of interfering with witnesses.**
- f) **The need to protect the victim or victims of the crime.**

g) The relationship between the accused person and potential witnesses.

h) Child offenders.

i) The accused person is a flight risk.

j) Whether accused person is gainfully employed.

k) Public order, peace or security.

l) Protection of the accused person.

15. The above list is not exhaustive. In my view there is no uniformity in factors to be considered in granting of bail. This would mean that every bail application presents its own set of unique circumstances. The compelling reasons taken into consideration by one judicial officer may differ from those of another judicial officer. In essence, a judicial officer is to exercise his or her discretion in determining whether to grant bail and if he or she does grant bail the appropriate terms thereof.

16. In the instant case, the prosecution put forward a number of reasons as to why the applicants should not be released on bail pending trial. First, the Respondent opined the applicants were a flight risk. In support of this assertion, the State claimed that when the 1st Applicant was arrested she was found parking her belongings. The State suggested that she was in the process of running away. In relation to the 3rd Applicant, the State contended that the 3rd Applicant is the brother to the 4th accused person in this matter who is yet to be found and arrested. Based on this relationship, the State opined that the 3rd Applicant was likely to abscond once bail is granted.

17. I have considered the submissions by both parties on the flight risk ground. In my view, it is incumbent upon the State to demonstrate that there is convincing evidence that the release of the applicants could present risks and these risks cannot be mitigated by way of appropriate bail/bond terms. On this ground, Counsel for the 1st Applicant denied the assertion by the State that the 1st Applicant was running away on the day that she was arrested. Counsel explained that the 1st Applicant was vacating her premises and moving to a new residence that was well known to the police. The State did not dispute this explanation. Be that as it may, the onus is on the State to tender evidence to the effect that the 1st Applicant was in the process of running away when her arrest was effected. With regard to the 3rd Applicant, I find the reason given by the State to be far-fetched. I do not think that the behavior of the 4th accused (not before court) should be imputed on the 3rd Applicant without any substantial evidence. The State did not give any reasons as to why the 2nd Applicant should be viewed as a flight risk.

18. Second, the victim's counsel urged the court to protect the victim's family by denying bail. Protection of the victim's family is a legitimate ground for denial of bail. However, there should be evidence or reasonable apprehension that the victim's family is in real or perceived danger if the Applicants are admitted to bail. There has been no evidence of threats or intimidation of the victim's family by the Applicants or any other persons related to the Applicants.

19. Third, there was apprehension that the Applicants may interfere with the investigations and with witnesses in this matter. This ground was however rebutted by the Applicants. Also, there was no evidence tendered by the State to suggest that the Applicants were or were likely to interfere with the investigations or with potential witnesses.

20. Fourth, the State contended that the evidence against the Applicants was strong. Based on the strength of the evidence, the State urged this court to deny bail. The State argued that there was a confession on record by the 2nd Applicant and the 3rd Applicant was plea bargaining with the State. The State pointed out that the 2nd and 3rd Applicants have implicated one another in the crime. Subsequently, the State suggested that the Applicants may turn on each other once released on bail.

21. CPL Ahmed Abdikadir, who is an Investigating Officer in this matter swore an affidavit filed on 12th June, 2018 in opposition of the application for bail. In the said affidavit, the deponent avers that the 2nd and 3rd Applicants had made confessions. I have carefully read through the affidavit. Annexed to the affidavit and marked as "AA 1" is a document titled "CHARGE AND CAUTIONARY STATEMENT". A perusal of the document reveals that it is the alleged confession made by the 2nd Applicant. The alleged confession was made before the Hon. L.T. Lewa, Senior Resident Magistrate, Shanzu Law Courts on 11th May, 2018. There is also an apparent confession by the 3rd Applicant annexed to the affidavit marked as "AA3". Mr. Wamotsa, Counsel for the 2nd Applicant contended that the 2nd Applicant had retracted his confession made before the Hon. Lewa.

22. I find the circumstances herein to be unique and deserving examination by this court. Where there is strong evidence against the accused persons the court may opt not to admit them to bail. The evidence on record which is being relied on by the State are the confessions of the 2nd and 3rd Applicants. However, the 2nd Applicant purports to have retracted his confession. It is a common principle of law that retracted confessions should be handled with caution. I have keenly perused the court file. There is no record to show that the 2nd Applicant did retract his confession.

23. Be that as it may, this court does not wish to go into the details of the said confessions as this would be tantamount to condemning the accused persons unheard. This court, however, notes that existence of the said confessions is well within the knowledge of the 1st Applicant who is alleged to be the brains behind the alleged murder. This court is left to question what would happen if the Applicants are admitted to bail. What would stop the 1st Applicant from harming the 2nd and 3rd Applicants who have mentioned her adversely in their alleged confessions? Also, now that the 2nd Applicant claims to have retracted his confession, what stops him from harming the 3rd Applicant who has allegedly implicated him in the crime? This court cannot take it for granted that the Applicants will be civil and cordial with each other

throughout the trial period while there are allegations within their knowledge that some have turned against the other.

24. As earlier stated, protection of an accused person is a compelling reason to deny bail. This court taking into account the existence of the confessions finds the safety of the accused persons, and in particular, that of the 2nd and 3rd Applicants to be in jeopardy if the application is allowed. Further, the State suggested that the 3rd Applicant was willing to plea bargain. This assertion was not disputed by the Applicants. If the 3rd Applicant does enter into a Plea Agreement with the State, this may not anchor well with the other accused persons. If released on bail, this court cannot guarantee the safety of the 3rd Applicant.

25. For these reasons, this court denies the application by the Applicants to be admitted to bail. The Applicants shall be held in custody at the G. K. Prison, Shimo La Tewa Mombasa pending the hearing and determination of this case or until further orders of the court.

Dated, Signed and Delivered in Mombasa this 20th day of September, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Isaboke holding brief for Jami for State

Mr. Nabwana for 1st Accused

Mr. Wamotsa for 2nd Accused

Ms. Oyier for 3rd Accused

Mr. Salim for Family

Mr. Kaunda Court Assistant