**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 14 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ROBERT ZIPPOR NZILU.....ACCUSED**

**RULING**

1. The accused, **Robert Zippor Nzilu,** faces the charge of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya for which a plea of not guilty was entered.

2. In her ruling dated 15th March, 2016, **Mutende, J** declined to release the accused on bond pending trial on the ground that the deceased was the accused's wife and two of their children were to testify in the case. Subsequently an application for review of the said decision was made and in her ruling dated 11th January, 2017, the Learned Judge once again declined to release the accused on bond on the ground that amongst the people who were lined to testify were the accused's son and sister and that there was a possibility of the accused interfering with them if released back to the same abode that they reside. Accordingly, the Court ruled that there were compelling reasons to warrant the accused being incarcerated until the said persons testify in the Court.

3. Undeterred the accused once again renewed his application for release on bond. By her ruling dated 20th February, 2018, the Learned Trial Judge found that since a total of eight witnesses had testified, she allowed the application and permitted the accused to be released upon payment of a cash bail of Kshs 2,000,000.00 with a surety of Kshs 3,000,000.00.

4. By an application dated 20th June, 2018, the accused person now seeks that this Court be pleased to review the bond terms granted by the Learned Judge on 20th February, 2018 aforesaid.

5. According to the accused he is prison warder and has no financial wherewithal to deposit cash of Kshs 2,000,000.00 though he is able to secure a surety in the said sum. It was therefore his case that he terms imposed by the Court were harsh and excessive considering his economic situation.

6. In the replying affidavit, the prosecution contended that the accused is facing the charge of murder which is still pending. It was deposed that the bond terms were set by the Court upon hearing the evidence adduced in order to secure the attendance of the accused. It was deposed that from the evidence the accused can be a flight risk hence likely to abscond once the bail terms are reviewed.

7. I have considered the application, the affidavits in support thereof, the submissions made and the authorities relied upon.

8. Article 49(1)(h) of the Constitution provides that:-

> ***An accused 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.***

9. It follows 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 not necessarily a reason for denial of bail. 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 determine the amount 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 his release. See **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**. In that case the 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* v *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* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;**
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> > **"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."**
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> **In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *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."**

10. Gravity of the offence as a consideration was appreciated by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

> **"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."**

11. Although it is true that some evidence has been adduced, the accused is yet to be heard hence his guilt cannot be decided at this stage. To say that based on the evidence adduced, the accused person may be a flight risk amounts to judging the accused before he is heard. Secondly, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, it is nolonger mandatory that those found guilty of murder must be sentenced to death.

12. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

> **"…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:-**
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> **(i) The nature of the charges;**
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> **(ii) The strength of the evidence which supports the charge;**
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> **(iii) The gravity of the punishment in the event of conviction;**
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> **(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.**

13. While agreeing with **Justice Ibrahim Tanko Muhammad's** judgement, **Justice Niki Tobi** gave an illuminating and persuasive decision when he said:

> **"The main function of bail is to ensure the presence of the accused at the trial…Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria. The Working Party on bail procedure in Magistrate's Courts in the United Kingdom said in paragraph 22 of the Report:-**
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> > **'There are a number of other considerations to be taken account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicators of the likelihood or otherwise of the defendant's appearance.'**
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> **As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion ids the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this is not invariably true. For instance, an accused charged with a capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital and non-capital offence is one way crystallised from the realisation that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to the qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This however does not apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison term of life."**

14. However in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> **"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."**

15. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail 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—***
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> ***(a) the nature or seriousness of the offence;***
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> ***(b) the character, antecedents, associations and community ties of the accused person;***
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> ***(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;***
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> ***(d) the strength of the evidence of his having committed the offence;***
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> ***(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—***
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> ***(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;***
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> ***(b) should be kept in custody for his own protection.***

16. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

**"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."**

17. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail 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.***

18. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

**"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."**

19. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. In **Clive Macholewe vs. Republic 171 of 2004 (2004) MWHC 53, the Malawi High Court (Justice J. Katsala)** stated:

**"In my judgement the practice should rather b to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires that the accused be deprived of his right to release from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If he state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order."**

20. In my view since the primary objective of release on bond is the attendance at Court by the accused person, the terms to be imposed ought not be such that it amounts to denial of bail. In this case, the fact that the Learned Judge did in fact release the accused on bond is an indication that she was nolonger satisfied that there existed compelling reasons to deny him bail. The only question for consideration was on what terms.

21. It is also my view that in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to ***Thesaurus English Dictionary*** is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and griping evidence in order to amount to compelling reasons.

22. In the circumstances of this case, it is my view that the bail terms imposed herein on 20th February, 2018 ought to be reviewed. In the circumstances, I make the following orders:

**a. The accused shall not leave the jurisdiction of this court without court's prior permission.**

**b. The accused shall be released on a bond of Kshs. 3 Million with two sureties of the like sum.**

**c. The accused shall not threaten harm or interfere with the case/witnesses and shall attend court without fail whenever required to do so.**

**d. The accused person shall appear in Court every month for the mention of his case unless directed otherwise.**

23. Orders accordingly.

**Ruling read, signed and delivered in open court at Machakos 17th day of September, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Accused present in person**

**Ms Mogoi for State**

**CA Geoffrey**