



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. 22 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BENSON KIMATHI MARANGU.....1ST ACCUSED

FRANCIS OTUNDO.....2ND ACCUSED

RULING

1. **BENSON KIMATHI MARANGU** and **FRANCIS OTUNDO** the applicants herein are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. They have both denied committing the offence and the case is pending for trial. The two accused persons have filed two applications dated 30th October, 2018 and 1st November, 2018 both asking to be released on reasonable bail/bond terms pending trial.

2. The grounds upon which the two applications have been presented are as follows namely:

(i) That the 1st applicant - Benson Kimathi has been in custody since 8th September 2018 and had been in custody for 7 weeks before being formally charged with any offence.

(ii) The 1st applicant has a medical condition of gastritis for the last 3 years that is gradually escalating as a result of continued incarceration and that he has developed arthritis and pneumonia while in remand.

(iii) That both accused/applicants have a constitutional right to be presumed innocent until the contrary is proved.

(iv) That both have a permanent fixed place of abode and therefore are not a flight risk.

(v) That there are no special or peculiar circumstance that bars the accused persons being granted bond.

(vi) That the applicants will not interfere with witnesses if released on bond and that they will abide with all conditions as may be imposed by this court.

3. The 1st applicant has supported his grounds for bail application with an affidavit sworn on 29th October, 2018. He has deposed that he is unwell needs to be released in order to enable help seek for proper medical treatment. He has exhibited medical documents to confirm that he has a medical condition. He further states that he has been cooperating with the investigations and has cooperated with the detectives who investigated this case.

4. The 1st applicant has further deposed that he comes from Kaaga in Meru County and that he has a home in Mpakone where he grew up as a child. Besides his home, he also avers that he has a place of abode in Maua town where he has rented premises where his wife and child resides. He further adds that he is a businessman trading in the name and style of **Maxlab Investment** which deals with supply of laboratory chemicals to schools in Meru and Tharaka Nithi Counties. He contends that the business would suffer and collapse if he is not released and in that event he would suffer and his family would suffer too as he is a bread winner of the family.

5. The 1st applicant opines that the evidence relied on by the prosecution is purely circumstantial and has contended through learned counsel, Mr. Mutuma, that he has a right to be presumed innocent until/unless proven guilty. The defence counsel further submitted that the onus is

for the prosecution to prove that there are compelling reasons to deny bail to an accused person as opposed to accused person proving that he should be granted bond. The 1st accused contends that the Constitution guarantees him that right.

6. The 1st accused further contends that the right to bail and the law presumes that the accused person is being held lawfully and in this case it is the 1st accused's contention that he is being held illegally in contravention of his rights under **Article 49(1)(f)** of the **Constitution**. He avers that he was arrested on 8th September 2018 and was not brought to court until 20th September, 2018. He has further pointed out that the State through the Director of Public Prosecution appeared in court on 10th September, 2018 in his absence and sought for his continued stay in custody. He opines that the ex parte proceedings contravened his rights and the fact that he has been in custody for 4 months shows that his unalienable rights under the Constitution have been denied and he insists those rights are integral part of a democratic state. He further argues that his continued stay in custody is a further violations of his rights and that the same would be a recipe for a mistrial. In his view the State, does not have any moral authority to oppose his application for bail.

7. On his part the 2nd accused/applicant has associated himself with the sentiments of the 1st applicant and added that the only compelling reason pointed out by the Respondent is the victim's allegations that if the accused persons are released on bond, they could intimidate and instil fear to key witnesses in this case. It is the 2nd applicant's contention that the allegations are not true. He avers that he is a family man with a wife and he is unlikely to abscond as such.

8. The state has opposed both applications through the affidavit of Corporal Reuben Mwaniki and a further affidavit from the mother of the deceased. Corporal Reuben Mwaniki in his affidavit sworn on 20th November, 2018 averred that he is one of the investigators in this case and has deposed that the 1st accused is an ex-prison warder well trained and that he poses a threat to witnesses and investigations which he states are on-going.

9. The investigating officer has further deposed that key eye witnesses in this case are children aged between 8 years and 11 years and therefore vulnerable requiring protection bearing that the deceased having been their school mate, the said witnesses are still traumatized.

10. The respondent has further stated that the 1st accused person is temperamental and is known that way by prosecution witnesses.

11. In respect to the 2nd accused, the investigating officer has stated that he has no fixed place of abode.

12. The State has further averred that the deceased's disappearance and murder brought a lot of public outrage and outcry and that it would be in the interest of justice to keep the accused person in custody pending trial.

13. Mr. Momanyi learned Counsel for the Director of Public Prosecution submitted that the affidavits filed sworn by the investigating officer and Hon. Caroline Kemei, (the deceased's mother) reveal that there are compelling reasons to deny bond to the accused persons. He has argued that the 1st accused person is well trained with the use of firearms as he is a former disciplined officer and that that knowledge sends fear to the witnesses if the 1st accused is released on bond as witnesses may get scared to come and testify during trial especially given that some are minors.

14. The respondent has further submitted that given the serious nature of the offence and the evidence which he states have been supplied to the defence, he contends that the same can be a motivating factor to abscond. The respondent has added that the 2nd accused is a flight risk as he has no fixed place of abode.

15. On the allegations by the 1st accused that he was unlawfully held for far too long before being arraigned in court, the respondent has submitted that the lower court considered the issues at hand at the time and that the 1st accused was duly represented in court on 10th September 2018 by his present counsel.

16. The victim's family through their learned counsel Mr. Kariuki opposed both the applications to release the applicants on bond. He pointed out that the 1st accused was arrested on 8th September 2018 which he says was a Saturday and there the nearest day he could be presented in court was 10th September, 2018 which he says was a Monday. He has further contended that the 1st accused has been in custody since 10th September 2018 pursuant to court orders and that the said orders have not been challenged and that if the 1st accused felt that there is non compliance with **Article 49 (f)** of the Constitution the issue should have been raised and canvassed before the Magistrate's Court. He submits that the 1st applicant simply applied for proceedings but to date he has not challenged those proceedings. He further maintains that it is improper for the 1st applicant to lump together his agitation for his right under **Article 49(1) (h)** and **49(1)(f)**. In his view, the infringement of **Article 49(f)** if any should have been taken as a sustentative issue before the plea was taken in order for this court to investigate the matter fully and it is submitted that even if the court was to find that there was such violations the remedy would not be to release the suspect but order for an appropriate remedy which would be damages against the State.

17. The victim herein has further contended that the right to bail is not absolute and that she has compelling reasons why the accused person should be denied bond and that the test to be applied on whether reasons advanced are compelling or not is on a balance of probabilities. The grounds advanced to deny the accused bails are as follows:-

(i) That the accused persons are likely to abscond because of the nature of the offence.

(ii) That as per the affidavit of Caroline Kemei, the 1st accused is well known to her family and that the witness statements have been supplied to him and that he knows all the witnesses from the victim's family. The victim has also pointed out that the 1st accused has a vast network of friends in Meru and Tharaka Nithi and the possibility of interference is high.

18. Mr. Kariuki cited the authority in the case of *Republic -vs- Joseph Kuria Irungu alias Jwire and Another (Nbi HC Criminal Case No.51/18* where he opines that the court held that there was a possibility of witnesses interference where an accused person was known to the family members of the victim. It was contended that the 1st accused was known to the victim's family.

19. The third reason why the victim opines the accused should be denied bond is that there is likelihood that the accused persons may intimidate witnesses. They have pointed out that some witnesses are young and vulnerable. The victim has further contended that a mere fact of releasing the accused persons on bond will cause a lot of fear and intimidation to the weak and vulnerable witnesses. On this contention, the victim has relied on the decision cited by the 1st applicant in *Republic -vs- Zacharia Okoth Obado and 2 Others [2018]*.

20. The victim's counsel has also pointed out that this case has raised some great public interest owing to heinous manner in which the murder was carried out. He contends that releasing the accused on bond now would create a bad impression about administration of justice by the Judiciary.

21. The application herein and the responses made by both the respondent and the victim's family has raised two issues for determination by this court namely:-

a) Whether the detention of the 1st accused is illegal and if so whether a remedy lies in this application.

b) Whether the reasons advanced by the Respondent and the victim are compelling to deny the accused persons their respective rights to bail.

22 (a) *Whether the detention of the 1st accused/applicant is illegal and if so whether a remedy lies in this application*

This court has noted from the facts presented before me that the 1st accused/applicant was arrested on 8th September, 2018 which as per the calendar of that month was a Saturday. The prosecution through the office of Director of Public Prosecution vide a *Meru Chief Magistrate Court Misc Criminal Application No. 57 of 2018* appeared in Court on 10th September 2018 which was the following Monday and asked the lower court for orders to detain the 1st accused/applicant which application was vehemently opposed by the 1st applicant's counsel. Nonetheless the 1st applicant was ordered to be detained for 3 days. The record does not show why the 1st accused was not produced and the defence counsel did not raise the issue at that stage. The record also do not show how the 1st accused's lawyer was notified and what informed the non-production of the 1st accused on 10th September, 2018. The matter was placed for mention on 13th September, 2018 and the 1st accused was absent but his counsel was present. The State applied to detain him for 7 more days in view of investigations going on and though his counsel opposed, the court ordered for his further detention to enable the police complete their investigations.

23. It is patently clear from the above that the 1st accused was detained pursuant to lawful orders applied for and given by the Subordinate Court. There is therefore no basis for the 1st accused to term his detention in custody illegal. Of course I agree with him that the provisions of **Article 49(6)** required the police to produce him in court on 10th September, 2018 given that 8th September 2018 was a Saturday. Mr. Kariuki, the victim's lawyer submitted that, the circumstances obtaining at the time was such that it was not practical to produce the 1st accused in court but that information though coming from the bar did pose an important question which is whether it is appropriate for this court in determining the application to release the accused's persons on bail pending trial, can simultaneously determine whether the rights of 1st accused under **Article 49(f)** of Constitution were infringed.

24. It is true that accused persons in Kenya enjoys rights as enshrined in the Constitution and those rights must be respected by all State organs. Where a party feels that any of his/her Constitutional rights have been infringed, he/she has liberty to take action against any person or State agency involved. However in taking that action, I agree with Mr. Kariuki learned counsel for the victim's family, that the proper thing to do is to take a substantive action rather than seek to enforce his rights under **Article 49(1) (h)** through a finding on the infringements of his rights under **Article 49(1)(f)**. The basis for this is simple. This court to determine if there was infringement of Constitutional rights under **Article 49(1)(f)** should be substantively moved in order to give all parties a chance to canvass the question of infringement of that Constitutional right. The court would then be in a position, upon interrogating all facts/evidence presented, to make an informed substantive decision over the same and if there is merit make appropriate order for remedy.

25. In my considered view, ordering that the accused persons herein be released on bond purely and solely on the ground that their right (s) under **Article 49(1)(f)** was/were infringed would be akin to using a wrong to right/sanitize another wrong. Why do I say this? The reason for my take is that supposing I was to find basis that there exists compelling reason(s) to deny bail as provided under **Article 49 (1) (h)** but hold the because the accused persons' Constitution rights were infringed when they were arrested they should be released without considering whether there are other compelling reasons to the contrary. That in my view would be wrong and improper and that is why courts in Kenya through several decision in the past have held the question of violations of right if any be handled or canvassed separately. In the case of *JULIUS KAMAU MBUGUA -VS- REPUBLIC [2010] eKLR*, for example, the court stated that the violation of the appellant's right to be produced in court within 24 hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy in damages for the violation of his Constitutional rights. [Also see *Albanus Mwasia Mutua -vs- Republic [2006] eKLR* and *Evans Wamalwa Simiyu -vs- Republic [2016] eKLR*]

26. From the above this court finds that, the question of infringements of the 1st accused/applicant's Constitutional rights is not properly placed before me to determine at this stage because if it was, then the 1st applicant should have included it as one of the prayers in his application or alternatively he could have taken the issue as a preliminary issue before the plea was taken to enable the Director of Public Prosecution and the police respond in order for this court to make a proper determination without clouding it with the issue of bond pending trial. All parties must be given notice and chance to canvass any issue arising in court because one of the tenets of a fair trial is to give all the parties a fair chance to be heard before a court can render a decision that may affect them.

27. This court is therefore not convinced that the only avenue available for the 1st applicant to ventilate for his alleged infringements of his Constitutional rights through the application before me. His remedy or remedies even if I was to find that indeed his Constitutional rights were violated would certainly not lie in his application to be released on bond. They lie elsewhere and the 1st applicant is at liberty to pursue them.

28. (b) ***whether there are compelling reasons to deny the accused persons herein their respective rights to bail.***

It is now trite that accused persons or arrested persons in Kenya are entitled to bond/bail unless there are compelling reasons to deny them the rights. It is also true fundamental rights and freedoms are some of the values that underlie an open and democratic society such as Kenya and it is the duty and mandate of this court to ensure that the bill of rights are upheld and enforced by the State. However the right to bail like some other rights are not absolute as contended by the respondent and the victim in this case. That is why the Constitution provides that instances can exist where those rights can be denied. The law provides that bond/bail can only be denied where there are compelling reasons. Compelling reasons are not defined in law but according to Oxford Dictionary compelling is something that invokes interest in a powerful irresistible way and is convincing. The prosecution are therefore required in law to place before court reasons that are simply irresistible to convince the court to deny the bail to an accused person. Several authorities have been filed by counsel for the 1st accused to urge this court to grant bail and the learned counsel Mr. Mutuma is commended for that because as all counsels here will concede all of them during the hearing of the applications before me, found their fortitude in the authorities filed to advance arguments about the respective positions taken. In all the authorities, rights of the accused versus the rights of victims were discussed at length and for the interest of Judicial time I would not go into them at this stage. It is important to consider the law relating to bail pending trial. **Section 123A(1) of Criminal Procedure Code** provides as follows:-

"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 in particular nature and seriousness of the offence, the character, antecedents, association and the community ties of the accused person the depts record in respect of the fulfillment of obligations under previous grants of bail the strength of the chance of his having committed the offence"

Now to go back to the authorities cited by the 1st accused is that this court has perused through the following authorities;

- (i) ***Republic -vs- Richard David Anden [2016] eKLR***
- (ii) ***Republic -vs- Danford Kabage Mwangi [2016] eKLR***
- (iii) ***Republic -vs- Joseph Kuria Irungu & Another (Nbi HCC CR. NO.51 OF 2018) &***
- (iv) ***Republic -vs- Zacharia Okoth Obado & 2 Others [2018] eKLR.***

From the above authorities reference are made to the guidelines in determining the compelling issues affecting grant of bail/bond and they are as follows:-

- a) Nature of the charge and seriousness of the punishment
- b) The strength of the prosecution's case.
- c) Character of the accused and likelihood of interference with witnesses.
- d) The need to protect the victims of the crime.
- e) The relationship between the accused and the potential witnesses.
- f) Whether the accused is likely to abscond or not
- g) Whether the accused is gainfully employed.
- h) Public order, peace and security
- i) Protection of the accused persons.

The above guidelines clearly touches on the issues that have been brought up by the prosecution and the victims family in urging this court to deny the applicants herein bail.

29. On the question of public order, peace and security, this court was urged to consider the fact that the murder of the victim in this case stirred up a lot of public outrage and led to demonstrations by the public particularly in Meru Town. The prosecution was therefore of the view that if the accused persons are released on bail, there will be public unrest. The victim's lawyer went ahead and added his voice that the public confidence in the judiciary will take a hit if the accused person are released. However while this court takes Judicial notice of the fact that there was a public outcry owing to the heinous manner in which the victim was murdered, I have perused at the social inquiry report, which I must say is comprehensive in nature, and I have noted the demonstrations were organized by various groups and cannot be

termed merely as a creature of the general public. Additionally when the 1st accused person was arraigned in court on 20th September, 2018, there was no incident created by the public to show/express outrage against the 1st accused person or cause a potential breach of peace. The accused persons have appeared in this court on few occasions now and I have not witnessed incidents of demonstrations or unrest in or outside court. I therefore do not have reasons to believe that the accused persons *per se* are in danger if released or that there will be a civil strife or unrest following their release. In any event, it is their Constitutional right to be admitted to bail whether the public approves or disapproves. It would be a travesty of justice, in my view if the courts were to apply the edict used in biblical times which I can describe as "**Pontius Pilate's edict**" (ie. leaving the fate of a suspect in the hands of a crowd). If this court was to go that route the Constitutional rights of accused's persons would seriously be violated. That is not tenable in an open democratic society that cherishes the rule of law. The judicial independence demands that courts makes decisions based on the law and the evidence presented. We cannot be called upon to make decisions based on affection or ill will of the public. To do so is not only against oath of office but is akin to subjecting parties in court to "**public**" mob justice. That obviously is not tenable and a court of law should stand firm to the fidelity of the law. I am therefore not persuaded that accused persons should be denied bond merely to please the public.

30. On the question of being a flight risks, the fact that persons are facing a murder charge with a potential death penalty may indeed increase chances of absconding but the same cannot be said with certainty that it will happen. However this factor cannot be considered in isolation. It must be considered with other factors as held in **Okoth Obado case (supra)**.

31. The 1st accused person is not employed in gainful employment as the social inquiry indicates that he is an ex prison warder. He has stated through affidavit that he is now a businessman with new business which is said to be struggling. As much as his parental home and where he was born is ascertainable, it is still possible that he can and may relocate if granted bail to a different location and hamper trial as opined by the probation officer. The weight of the same opinion is however less and in my view on the face of it one would not certainly say that the reason or opinion is irresistible particularly in regard to the 1st accused.

31. The 2nd accused's case on the question of being flight risk on the other hand is different. His own family as per the social inquiry have had little contact with him since he left home in Western Kenya and moved to Nairobi. In Nairobi he has been in various abodes within short stint of time and though the 2nd defence counsel Miss Magara pointing out his wife in court during the hearing of this application, there is every reason to believe that the 2nd accused is a potential flight risk. He had fallen out with the adoptive centre that raised him because it is reported that he obtained money from the sisters through false representations and simply vanished. The 2nd accused has no known house and no ties to his family who reportedly do not want to get involved with this case. The social inquiry also shows that his wife relocated back to her parents home and this court could not tell whether the lady shown in court was that wife or another. Besides this, the 2nd accused describes himself as a freelancing businessman and is said to mostly broker of cars and other properties on social media. In this regard he has no known place of business or employment. All these factors on their own lead to an irresistible conclusion that there is a compelling reason to deny him bail because the 2nd accused is a flight risk.

32. On the question of possible intimidation of vulnerable witnesses, it is not contested that the 1st accused/applicant is a former trained uniformed/disciplined officer. He is trained in handling of various types of firearms. While it is true that, it would be wrong to condemn one owing to this chosen career path, there are some facts that were brought to the attention of this court that cannot be ignored. The prosecution has indicated that some of witnesses are children aged between 8 years and 11 years. Young children as a matter of fact are vulnerable and feel vulnerable owing to their ages and sizes. In this instance the children who are witnesses in this case knew the deceased well as they schooled with her. The vivid details on how she was kidnapped and murdered is certainly in fresh in their minds and this court has been told that the minors would feel threatened and fearful if they are made aware that the accused person have been released on bond and roams about within their vicinity. The contention of fear and the basis in my view sounds convincing. The witnesses are likely to be afraid to testify freely if they know that the accused persons are walking about freely. To further compound that fear, is the fact that the accused knows the school where the deceased and the minors attend. Additionally the other witnesses like the victim's mother is well known to the 1st accused and she has sworn an affidavit stating that the 1st accused is temperamental in character. I have considered the probation officer's report which indicates that the victim's fears may be real and well grounded. The social inquiry reveals that one Catherine Mutugi, said to have had a relationship with the 1st accused was forced to seek several restraining orders against him after they parted ways. The 1st accused counsel faulted the probation officer for not interviewing the said Catherine Mutugi but the fact that the 1st accused did not deny the existence of the relationship with the said Catherine Mutugi and the restraining orders indicates that there is basis to believe that the 1st accused may be temperamental in character as averred by the victim's mother. The potential to intimidate is therefore real as his character is one that cause trepidation to witnesses. The court cannot in the interest of justice turn a blind eye to such grave allegations because the same can impact negatively on the administration and dispensation of justice.

33. On the question of treatment, this court is persuaded that proper treatment can be administered to the 1st accused while in custody. The 2nd accused is said to have attended the primary school where the minor witnesses are currently attending. He therefore knows the area well. He also knows the names of witnesses since the witness statements have been supplied to them. The 1st defence counsel contended that the witnesses should instead be put into state protection of witness program but given the number of witnesses in this case and the fact that some are minors, the primary consideration is the best interest of the minors and I find that it is in their best interest to be left undisturbed where they have been living and studying. In the case of **Republic -vs- Fredrick Ole Lehman & 4 Others [2016] eKLR** the court was faced with the same allegations of likely intimidation of witnesses in view of the character and training of the accused persons and the court had this to say;

"Undermining the criminal justice system includes instances where there is likelihood that witnesses may be interfered with or intimidated, the likelihood that the accused may interfere with the evidence, or may endanger an individual or individuals or the public at large, likelihood that the accused may commit other offences. In these instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail terms or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial custody. Apart from the rights of the accused, and public interest issues, there are other categories of rights which the court is mandated not to lose sight of. These are the rights of the victims of the crime. The Victim Protection Act gives a broad definition of who the victims are. They include the families of the ones against whom

the offence was committed It is not disputed by the defence that the accused persons hail from the same locality as the potential witnesses and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased is a real possibility..... "

The court then went ahead and found that there were compelling reasons to keep the accused persons in custody. Those circumstances obtains in this case.

In conclusion, this court based on the above, finds that both the applications by both accused persons lack in merit. This court finds that based on the evidence of likely interference and intimidation of witnesses especially the minor witnesses and victims family owing to the manner in which the murder was carried out there are compelling reasons to keep the accused persons in custody at least until the said witnesses have testified. The first accused/applicant is at liberty to move this court at a later stage of trial but the 2nd accused for the aforesaid reasons will be kept in custody pending trial and determination of this case.

Dated, signed and delivered at Chuka this 7th day of February, 2019.

R .K. LIMO

JUDGE

7/2/2019

Ruling dated, signed and delivered at Chuka this 7th day of February, 2019.

R.K. LIMO

JUDGE

7/2/2019