



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

CRIMINAL CASE NO. E007 OF 2021

NELSON WAFULA BARASA *alias* TUPATUPA.....APPLICANT/ACCUSED

-VERSUS-

REPUBLIC.....RESPONDENT/PROSECUTION

RULING

1. The Applicant, Nelson Wafula *alias* Tupatupa, faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Upon taking plea on November 1, 2021, his counsel applied that he be admitted to bail pending trial. Counsel for the Director of Public Prosecutions (DPP) indicated that he would be opposing the application and asked for seven days to file the necessary papers. This Court at the same time directed the Probation Service to prepare and file a pre-bail report on the Applicant.

2. Subsequently, through an undated notice of motion application filed on 1st November, 2021, the State sought what it called an “*order opposing bail and bond terms.*” The application was supported by an affidavit sworn by one Corporal Sabian Odongo who introduced himself as the investigating officer in the Applicant’s case. I will assume that the application and the supporting affidavit are a response to the Applicant’s bail application.

3. A perusal of the State’s pleadings discloses that it opposes the application on the grounds that the Applicant is a flight risk with no fixed abode; that he is facing two murder charges before this Court namely this case and Kapenguria HC Criminal Case No. E008/2021; and that he may be subjected to mob injustice. In the affidavit in support of the State’s case, it is averred that the Applicant went into hiding after committing the first murder. Further, that there was likelihood of the Applicant interfering with witnesses if released on bail.

4. The Applicant did not respond to the State’s averments.

5. In compliance with the Court’s directive, a probation officer by the name B.P. Chongorio filed a pre-bail report on 1st November, 2021. According to the probation officer, the relatives of the Applicant are opposed to his being released on bond for fear that he might be lynched. The officer also observed that no one is ready to stand surety for the Applicant or accommodate him while on bail.

6. Where an application for bail is opposed, the only issue for the determination of the court is whether the prosecutor has demonstrated compelling reason(s) as to why an accused person should not be released on bond or bail. This is because Article 49(1)(h) of the Constitution guarantees the right of an arrested person to be released on bond or bail on reasonable terms pending charge or trial unless there are compelling reasons not to be released.

7. In **Waititu v Republic [2021] KESC 11 (KLR)**, the Supreme Court set down the criteria for granting bond or bail as follows:

“66. Similarly, the High Court in the case of Republic v Joshua Mueke Mutunga & 3 others [2020] eKLR in determining the criteria to be applied on whether to grant bail or not relied on the decision by the Supreme Court of Nigeria in Alhaji Muiahid Dukubo – Asari v Federal Republic of Nigeria, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding 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 24 decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- i. The nature of the charges;**
- ii. The strength of the evidence which supports the charge;**
- 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 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”. [Emphasis added]”.**

8. The Bail and Policy Guidelines published by the Kenyan Judiciary in March 2015 list some of the factors to be taken into account in determining an application for bail as follows:

“(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 on previous occasions is a good ground for denying bail or bond.

(e) Likelihood of interfering with witnesses.

(f) The need to protect the victim or victims of the crime from the accused person.

(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.”

9. The question therefore is whether the State has convinced this Court that there are compelling reasons for denying the Applicant his constitutional right to bail. The State’s averment that the Applicant is a flight risk and that he is likely to be lynched by the members of the public if released on bail has not been rebutted. The pre-bail assessment report supports the claim by the State that the life of the Applicant will be at risk if he is released on bond. It is not in dispute that the Applicant is entitled to bail pending trial. However, the fact that he is charged with the murder of two people is likely to attract the ire of the members of the public were he to be released on bail or bond at this stage. I am therefore convinced by the State that there are compelling reasons for denying the Applicant bond.

10. In view of what I have stated above, orders shall issue as follows:

- a. The application for bail is at this moment in time denied;
- b. The two cases facing the Applicant to be heard on priority basis; and
- c. This ruling shall apply to the Applicant’s application for bond in Kapenguria HC Criminal Appeal No. E008 of 2021.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 3RD DAY OF FEBRUARY, 2022.

W. Korir,

Judge of the High Court



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