



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO. E031 OF 2021

LYDIA JELAGAT KIPNGETICH.....APPLICANT/ACCUSED

-VERSUS-

REPUBLIC.....RESPONDENT/PROSECUTION

RULING

1. The Applicant, Lydia Jelagat Kipngetich is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Upon taking plea on 25th November, 2021, her counsel applied that she be admitted to bail pending trial. The Respondent through the Office of the Director of Public Prosecutions (DPP) sought for time to file an affidavit in opposition to the bail application. Subsequently the Respondent filed an affidavit sworn on 25th November, 2021 by Sergeant Joshua Tobolei who introduces himself as the investigating officer in the matter.

2. In making the application for the release of the Applicant on bail, her advocate submitted that she has a right to bail. According to counsel, the claim that the Applicant is likely to interference with witnesses is a mere allegation as no evidence by way of the device used to generate the messages threatening the witnesses or a printout of the messages had been produced in court. Counsel for the Applicant further submitted that the Applicant is not a flight risk and she had only moved to stay with her sister because she feared for life. Counsel stated that the family of the Applicant was willing to relocate her in order to keep her away from the family of the victim. The Court was therefore urged to admit the Applicant to bail on reasonable terms.

3. Through its affidavit, the Respondent advanced two grounds in opposition to the application for bail; that the Applicant is a flight risk and that she has been sending threatening messages to witnesses. The investigating officer averred that the Applicant went into hiding immediately upon committing the crime and that if released on bail, she would disappear thus making it difficult to trace her.

4. Responding to the contention that no evidence had been adduced to support the averment that the Applicant had threatened witnesses, counsel for the Respondent submitted that the State does not need to prove its opposition to bail beyond reasonable doubt. It was argued that the Respondent was only required to prove the likelihood of interference and not interference *per se*.

5. Following the directive issued by this Court on 25th November, 2021, a probation officer by the name Kiprono M. K. filed a pre-bail report dated 7th December, 2021. The recommends that the Applicant attend trial while in custody on the grounds that there is animosity towards her by the deceased's family and immediate neighbours, and, that she is a flight risk.

6. The question to be answered in this ruling is whether the Respondent has established compelling reasons warranting denial of bail to the Applicant.

7. Article 49(h) of the Constitution entitles every accused person 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.”**

8. Section 123A(1) of the Criminal Procedure Code provides the factors to be taken into consideration in determining an application for bail as: the nature or seriousness of the offence; the character, antecedents, associations and community ties of the accused person; the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and, the strength of the evidence. According to Sub-section (2) of the same Section, an accused person can only be denied bail if he has previously been granted bail and failed to surrender to custody or where it is necessary for him to be kept in custody for his own protection.

9. Similarly, the Bail and Bond Policy Guidelines published by the Kenyan Judiciary also provides for considerations that ought taken into account when determining an application for bail by an accused person. Those factors are: the nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty; the strength of the prosecution case; the character and

antecedents of the accused person; the failure of the accused person to observe bail or bond terms; the likelihood of interfering with witnesses; the need to protect the victim or victims of the crime; the relationship between the accused person and the potential witnesses; the best interest of child offenders; whether the accused person is a flight risk; whether the accused person is gainfully employed; public order, peace and security; and, protection of the accused person.

10. In **Nganga v Republic [1985] KLR 451**, Chesoni, J (as he then was) observed that:

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions (section 72(5)) generally in principle, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that;

(a) the accused will fail to turn up at his trial or to surrender to custody; or

(b) the accused may commit further offences; or

(c) he will obstruct the course of justice.

The primary purpose of bail is to secure the accused person’s attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether or not the accused will attend his trial.”

11. It is the Respondent’s case that the Applicant disappeared immediately after the offence was committed and went to hide at her sister’s place in another county. In reply, the Applicant’s counsel submitted that she fled home in fear for her life. In the pre-bail report, the probation officer confirms that there still exists animosity between the Applicant and the family of the deceased. The scenario painted by both sides before this Court is one of a hostile environment where the life of the Applicant will be at risk if she is allowed back to the community. The right to bail of the Applicant must be viewed alongside her right to life.

12. It is noted that counsel for the Applicant told the Court that the family of the Applicant is willing to relocate her to another area from where they will ensure that she attends her trial. However, no concrete plan has been placed before this Court to support this proposal. In the circumstances of this case, it is therefore apparent that the life of the Applicant may be jeopardized if she is released on bond. The danger to her life may increase the chances of making her a flight risk as the place where she will be residing once released on bond will be unknown.

13. The Respondent has also alluded to the possibility of the Respondent interfering with witnesses in this case. In the affidavit of the investigating officer, the Applicant is alleged to have sent threatening messages to the one of the witnesses. In response, counsel for the Applicant denied the allegation and submitted that no evidence was placed before this Court in support of the allegation. The Respondent in rebuttal argued that the standard required is likelihood of interference and not beyond reasonable doubt.

14. I note that the affidavit filed by the Respondent in opposition to the Applicant’s bail application was not rebutted through cross-examination or a replying affidavit. The Respondent has made its case under oath and without any rebuttal of the same, this Court is inclined to believe the assertions made by the investigating officer in his affidavit. The averments establish the likelihood of the Applicant interfering with the witnesses.

15. The conclusion I arrive at is that the Respondent has established compelling reasons as to why the Applicant should not be admitted to bail. In the circumstances, the Applicant’s application for bail is dismissed. The Applicant is, however, at liberty to renew her application for bail once the threatened witnesses have testified and the hostility against her has subsided.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 24TH DAY OF FEBRUARY, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT