



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO. E004 OF 2021

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

MERCY WANGARI GITIMU.....ACCUSED

RULING

1. **MERCY WANGARI GITIMU** is charged with the offence of murder. She pleaded not guilty. Her trial has not yet commenced. She applied to be released on bail.
2. Mercy's learned counsel relied on the provisions of **Article 49(1)(h)** which provides:-

"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."

3. The learned counsel for the accused relied on written submissions and authorities attached thereof. In the case **MICHAEL JUMA OYAMO & ANOTHER VS. REPUBLIC [2019] eKLR** the court of appeal considered what is meant by compelling reason in the Constitution **Article 49(1)(h)** and stated:-

*"We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in **R V JOKTAN MALENDE AND 3 OTHERS CRIMINAL CASE NO. 55 OF 2009** as follows:*

"... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution."

4. The application for bail was opposed by the victim's family counsel. He submitted that the pre-bail report is fictitious and further that the accused is suffering from depression, therefore needing constant support which the accused's family cannot provide. In support of that opposition, the victim's family relied on affidavits sworn by *John Nderi Waithaka* and *Joyce Wangeci Maina*, both who are representatives of *Nyumba kumi* initiative in the local area where the accused resides. The victim's family also relied on the affidavit of *Shadrack Mundati* an elder of the area. In all those three affidavits, the deponent termed the pre-bail probation report as misleading in its content and that the views of the local community and the local administration were not sought before the pre-bail report was prepared *Shadrack Mundati* deponed in his affidavit as follows:-

"That the Honourable court should refrain from releasing the accused person since she previous(sic) ran away when the investigations were catching up with her and subsequent thereto, she threatened to kill herself the same being public knowledge due to the publication."

5. Those affidavits reveal that the wellbeing of the accused in her area of residence was not assured because the public in the local area of accused's residence was hostile towards her release.
6. An affidavit is filed in this matter by *Pc. Kevin Omanga* a Detective attached to Directorate of Criminal Investigations (DCI) Githunguri.

He deponed in that affidavit as follows:-

“That the villagers are hostile for (sic) the suspect taking into consideration that the deceased was a great helper of the village and thus the security of the suspect may be at risk.

That the siblings of the deceased are not happy with the act and still not aware of the motive behind her death and will not be comfortable with the suspect being released on bond.”

7. To counter the fears of those who swore the affidavits, as seen above, the accused relied on her aunt’s affidavit, namely, Margaret Njoki. Margaret Njoki stated that she resides in Gitaru and she is willing to accommodate the accused at her house in Gitaru. She stated that Gitaru is not near Githunguri the area of residence of accused. Margaret Njoki stated that she is a civil servant and is able to provide for the needs of the accused. She stated that the accused’s family is in favour of accused being released on bail.

ANALYSIS

8. The liberty of an arrested person and an accused is most important and is at the heart of any free democratic society. Bail hearing just like every other stage of proceedings carries the presumption of innocence.

The case **REPUBLIC VS. ROBERT ZIPPOR NZILU (2018) eKLR** considered how a bail application should be approached and stated thus:-

“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 jeopardize 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; ...”

9. I have considered the submissions and the law cited by the parties. In view of the fact that a family member of the accused is willing to accommodate her during the subsistence of this trial there is no sufficient reason shown why accused should not be released on bail. Indeed, I am persuaded by the holding in the case **REPUBLIC VS. NUSEIBA MOHAMMED HAJI OSMAN (2018) eKLR** thus:-

“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”

10. The release of accused on bail shall be conditional.

CONCLUSION

11. **MERCY WANGARI GITIMU** is granted bail pending her trial on the following conditions:-

- (a) That she shall provide bond of Kshs.10million with two sureties of similar amount.
- (b) That throughout her trial, she shall reside with **Margaret Njoki** in Gitaru in Kiambu County and shall not reside or visit Kamwanya village in Githunguri sub-location Kiambu County during the pendency of her trial.
- (c) That she shall surrender to this Court her passport, if any, and if she does not have she shall swear an affidavit to that effect.
- (d) That she shall not interfere with the prosecution’s witnesses.

RULING DATED AND DELIVERED AT KIAMBU THIS 31ST DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For DPP :- Mr. Kasyoka

Accused : Mercy Wangari Gitimu : Present Langata Prison

For Accused :- Mr. Dennis Mgwaro

For the victim's family:- N/A

COURT

RULING delivered virtually.

MARY KASANGO

JUDGE