



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO. E049 OF 2022

NANCY NYAGUTHI.....APPLICANT

VERSUS

REPUBLIC thro' THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

R U L I N G

1. Nancy Nyaguthi the Applicant herein brought an application dated 11/3/2022 under the certificate of urgency seeking that the court revises the order of the trial Magistrate made on 2nd February 2022 denying her bond in Shanzu CMC. CR. Case No. E110 of 2022 on the basis that the offence for which she had been charged was serious and that it was for her own safety that she ought to be detained.
2. The applicant was said to have suffered greatly as a result of the ruling denying her bond as she has been unable to attend her place of work or carry out her duties as Director of the School as the head.
3. Prior to accused person being charged, she had been released on police bond and instructed to attend court on 2nd February 2022 and she was surprised that the prosecution objected to her released pending trial.
4. The Applicant averred that she suffers from arthritis and recovering pneumonia and the prison conditions do not favour management of her conditions which has deteriorated. The Applicant said she is a Civil Servant and Director of German Education Centre and she was expected to procure certain information which can only be relayed the Exams Centre Manager to procure specific items for practicals.
5. She said if she is not released to collect the information, it will be detrimental to the student whose future will be affected permanently as their performance will be adversely affected.
6. The Applicant argued that reasons given in denying her bond was not satisfactory as she is being condemned yet she is innocent until proven guilty. The Applicant said she is ready to abide by any terms and conditions set by the court and that she had never interfered with any witnesses and she does not intend to interfere with any witnesses.
7. She said she is not a flight risk as she is a public servant. She said that she could lose her job due to absence from work from 2nd February 2022.
8. The State/Respondent was granted time to file response to application dated 11th March 2022 but they didn't file grounds of opposition or Replying Affidavit.
9. This court perused the lower court records and noted that the trial court denied bond pending further investigation into the matter without capping the period on how long the said further investigations were to be carried out. The prosecution counsel on the other-hand prayed for one week and matter was fixed for 14th February 2022 for directions.
10. Application for review was objected to by the prosecuting counsel on 11th February 2022 and disallowed by the court. The matter was fixed for hearing on 1st April 2022. This court called for Social inquiry report which was filed on 25th March 2022.
11. The Report is favourable for applicants release on bond for reasons that she suffers from ill health namely high blood pressure, arthritis and asthma. This was confirmed by the Prison Warder at Shimo La Tewa prisons that the Applicant has been in and out of hospital while in remand.

12. It was also established that the Applicant is a civil servant and Director of Greman Education Centre a private primary and secondary school in Kadzandani. From the Head Teacher of the Secondary School Section and the Son to the Applicant the school was suffering from financial constraints as the Applicant was the only signatory to school account.

14. From the Report, the Chief & Village elder confirmed that through the incident elicited public outcry relative calm was resumed and the businesses owned by the applicant are still operational and although the applicant does not feel at risk if released back to the community she had indicated that she could change her residence and stay in her former rental house in Kwa Bullo in Bamburi or on her land in Mwakirunge.

14. The Report indicates that the victim was still on treatment in hospital but had completed dialysis and his parents are still very bitter and indicated it would be unfair to release accused on bond yet their child is still suffering. That the parents of the victim felt that chances of applicant interfering with witnesses are high because of her position as the school director and employer.

15. The probation officers said that none of potential witnesses reported having been unduly influenced by the accused. It is also reported that there are no indications that applicant is a flight risk or that she is at any eminent danger and there are unsubstantiated fears on possible witnesses interference.

16. The issues for determination are:

i. Whether it has been proved that the accused is likely to interfere or intimidate key prosecution witnesses if released on bond?

ii. Whether the Applicant is a flight risk?

iii. Whether the Applicant when released on bond will face imminent danger of revenge by the community?

17. Article 49 1(h) of the constitution of Kenya 2010 provides that an arrested person has 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”.

18. Section 123a of the Criminal Procedure Code, provides some of the circumstances to be considered when granting or denying Bail and Bond Policy Guidelines at paragraph 4.9 states the objectives of granting or denying bond i.e. the primary factor considered by the courts in bail decision making is whether the accused person will appear for trial if granted bail.

19. In this instance the Prosecution claimed that the Applicant was likely to interfere with witnesses if granted bail. In *Republic vs William Kipkorir Kipchirchir & Anor (2018) eKLR* – the Court held as follows:-

“...intimidation, interference and threatening of witnesses are serious matter and they are compelling reasons where evidence of such intimidation, interference or threats are provided in the trial court.....in the absence of the evidence to support the same these remain just mere suspicious and fears harboured by the prosecution...”

20. In *Republic vs Joseph Thiongo Wawere & 17 Others*, it was held that the burden is in the prosecution to establish the existence of the compelling reasons in justifying in denial of bail...The kind of evidence needed establishing the compelling reasons is just such evidence presented must be cogent, very strong and specific evidence and not mere allegations suspicion bare objections and insinuation.

21. This court has considered the Application for review the Affidavit in support of the application and annexures thereto, together with bail information report that this court called for and being that the prosecution did not oppose the application I find that the Application is merited and the same is allowed. The Applicant may be released on bond of Ksh.500,000 with a surety of similar amount on conditions that the Applicant will reside away from the scene of crime pending hearing and determination of her trial unless granted leave by the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 5TH DAY OF APRIL, 2022

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel - Court assistant

Mr. Ngiri for state

Accused – No appearance

HON. LADY JUSTICE A. ONG’INJO J

05/04/2022

Order

Ruling to be served upon the Applicant via email.

HON. LADY JUSTICE A. ONG'INJO J

05/04/2022