



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL CASE NO.19 OF 2020

SUSAN NJERI WACHIURIAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. The Applicant **SUSAN NJERI WACHIURI** is charged with the offence of **Murder contrary to Section 203** of the **Penal Code**.

The particulars are that:-

“On 9th April, 2020 at White House, Tena Estate area within Kamukunji Sub-county in Nairobi County murdered KELVIN NJENGA NGANGA”

2. The Applicant pleaded “NOT GUILTY” to the charge and through her counsel, **Mr. Kihoro** orally proceeded to apply to be released on bond/bail pending trial on invitation of the court as provided for under **Article 49(1) (h)** of the **Constitution**. The application was opposed by the prosecution vide an affidavit sworn by **Corporal Ali Ibrahim**, an Investigating Officer in this case and highlighted by the prosecution. **Mr. Etole** counsel for the family of the victim submitted that the Applicant had no fixed abode. By a **Ruling dated 28th May, 2020**, Wakiaga, J. declined to release the Applicant on bond and stated as follows:-

“I have taken note of the nature of the offence and the likely sentence in the event that the accused is convicted and without any supporting evidence on the place of abode for the accused during trial, and find that the risk of the accused absconding trial cannot at this stage be mitigated through appropriate bail terms and conditions. I will therefore deny the Applicant bond as at now but grant her leave to file supporting affidavits on her alternative means of accommodation, upon receipt of which the court shall review the decision herein.”

3. By **Chamber Summons** dated **11th November, 2021**, the Applicant sought to be released on bail pending trial. The application is supported by an Affidavit sworn by the Applicant on the even date.

4. In opposing the application, the Respondent relied on the **Replying Affidavit** of **Cpl. Ali Ibrahim** sworn on **11th May, 2020**.

5. At the hearing hereof, **Mr. Kanyonge**, advocate for the Applicant submitted that her family members have promised to ensure that the Applicant attends court throughout trial. He referred the court to **Paragraph 9** of the Applicant’s **Supporting Affidavit** which gave in detail contact and place of residence of the Applicant’s father who is ready to host the Applicant if released from custody. He also submitted that the crucial witnesses in the matter have already testified and thus there is unlikely to be any interaction between them and the accused person. It was further submitted that the accused person has some medical condition which can be better addressed while he is out of custody. It was also his submission that there being no compelling reasons, the Applicant should not be denied her constitutional right to bail/bond pending trial.

6. In opposing the application, **Ms. Gikonyo**, the prosecution counsel submitted that although the Applicant’s father is ready to stand as her surety and give details of where he hails from, there is no letter from the chief to confirm the same. On the submission that the most crucial witnesses have testified, **Ms. Gikonyo** urged the court to let the Applicant remain in custody. She submitted that the family of the deceased are still grieving and that their feelings and position should also be considered in the matter. Further, since the murder weapon is still missing, the Applicant may interfere with the ongoing search of the exhibit as she has refused to cooperate with the investigations. She also submitted that the court had already made orders for the Applicant to seek medical treatment at Mbagathi Hospital. She further stated, being that the right to bail is not absolute but discretionary, the court should not grant the Applicant bail/bond.

7. In response, **Mr. Kanyonge** submitted that **Article 49** of the **Constitution** provides for the right to bail/bond unless there are compelling reasons not to be released, so that the claim that the victims are still grieving is not a compelling reason to warrant denial of bail. Also, in denying Applicant release on bail/bond, the court's concern was that the Applicant had no fixed abode, but circumstances have since changed as the Applicant has indicated that she will reside where her surety resides. Further, the Applicant cannot interfere with investigations being that the presumption is that by the time one is charged with an offence or the matter is fixed for hearing, the police ought to have already concluded the investigations and the ODPP has proved the same by the Applicant being charged.

8. I have considered the application, the affidavits in support thereof and the submissions by both parties.

9. The court has powers to grant bail at any time in the course of trial and to review an order granted by the court in denying the same bail. As was held in the case of **Republic –vs- Fredrick Ole Leliman & 4 Others [2019]eKLR**, where Lessit J, stated as follows;

“16. The court has the power to hear and determine the accused person’s application which is a review of this court’s ruling declining to release on bail or bond pending the conclusion of their trial. It being the second such application it is important to state to because the consideration the court will make at this stage, as stated clearly by the learned Prosecution Counsel are whether the circumstances prevailing in 2016, when the ruling under review was delivered were in existence in this case had changed.”

10. In an application for review of the denial of bail, the Applicant is under a duty to convince the court that there has been change of circumstances from the time when she was denied bail to warrant the court reviewing its earlier orders. This was stated in the case of **Republic –vs- Diana Suleiman Said & Another [2014]eKLR**, this court held as follows:

“The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful Applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.

12. I find nothing in the provisions of Article 49 (h) of the Constitution or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated. If compelling reasons are arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.”

11. Thus, the changed circumstances test is that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful Applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.

12. As submitted by **Mr. Kanyonge**, the compelling reason upon which the court previously denied the Applicant bail is that she had not demonstrated she has an alternative means of abode. I have noted that from the Applicant's affidavit, details and contacts of her father who is willing to host her once released from custody have been provided. In my considered view, this is a demonstration of change of circumstances which warrant a review of the court's earlier Ruling. The prosecution on the other hand has not demonstrated any compelling reason to warrant the accused person's continued incarceration.

13. In the circumstances, the Applicant having demonstrated a change of circumstances, and the prosecution having failed to demonstrate any compelling reason to warrant the Applicant being denied release on bond/bail, the **Ruling** delivered on **28th May, 2020** by Hon. Wakiaga is reviewed. The Applicant may therefore:-

a. Be released on a bond of Kshs.100,000/= with one surety of a similar amount.

b. In the alternative, the Applicant to be released on cash bail of Kshs.200,000/=.

c. The accused to provide full particulars of her contact person and place of residence during the pendency of her trial.

d. Failure to comply with (a), (b), and (c) above, the bond/bail will be rendered cancelled.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL, 2022

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Gikonyo counsel for the State

Mr. Kanyonge counsel for accused

Accused – present

Court Assistant - Gitonga