Republic v Chebet (Criminal Case 003 of 2022) [2022] KEHC 599 (KLR) (30 May 2022) (Ruling)

Neutral citation: [2022] KEHC 599 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL CASE 003 OF 2022

F GIKONYO, J

MAY 30, 2022

BETWEEN

REPUBLIC ..... PROSECUTION

AND

MERCY CHEBET ..... ACCUSED

RULING

1. The accused herein is facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

2. On February 9, 2022, the accused through her defence counsel Miss Adallah holding brief for Mr. Langat orally applied that the accused be released on bond.

3. Ms. Torosi, counsel for the prosecution opposed the application for bond/ bail and stated that there is a compelling reason; her life is in danger if released as ground is still hostile and family still in grief. Therefore, she may be attacked. She indicated that she will file an affidavit thereto.

4. In a rejoinder, Ms. Adallah stated that in the circumstances the accused may be remanded.

5. This court directed that the accused be remanded at Narok Women Prison.

6. The prosecution filed an affidavit to oppose bond on 17th February, 2022 sworn on the same date by PC Martin Mutwiri containing reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -

    i. Flight risk- the accused person has no fixed abode. The rental houses where she had been living has been deserted and all her items have already been taken away.

    ii. Interference with witnesses- the key witness in this case is her relative and the prosecution is apprehensive that she may interfere.

iii. Safety and security of the accused- that the life of the accused might be in danger as the members of the public were very furious at the time of the arrest and therefore releasing her back to the public who are baying for her blood could be a threat to her life.

7. The accused person responded by filing a replying affidavit filed on March 14, 2022 sworn on March 11, 2022. She averred that she is a married woman raising a young family within Olerai area in Narok North and her family have not deserted her home thus she is not a flight risk. She also undertakes to attend all mentions and trial without fail. She stated that should she be admitted to bond. She solemnly undertakes not to interfere with any of the prosecution witnesses. She stated that her life is not at risk and should she be required to change her residence on security reasons she will inform the court and the surety. In conclusion, she prayed to be released since the offence alleged to have been committed is bailable under Article 47(1) (h) of *the Constitution*.

Analysis and Determination

8. Although the accused faces the grave charge of murder; she is still deemed innocent and is entitled under Article 49 (1) (h) of *the Constitution* to bail pending trial unless there are compelling reasons not to be so released. See *Muraguri v Republic* [1989] KLR 181, and *R. V. Richard David Alden* [2016] eKLR.

9. The overarching objective of bail is to ensure the accused gets his liberty, but also attends his trial (*Muraguri v Republic [supra]*).

10. Relevant matters to be considered by the court include: the nature of the charge; the likely sentence; previous criminal records, the views of the family of the victim, the possibility of interference with witnesses; the temptation to abscond; and, the safety of the accused.

Applying the Test

11. Has the prosecution proved compelling reasons not to release the accused on bond?

12. Three reasons have been advanced by the prosecution as compelling reasons, to wit; flight risk, interference with witnesses and safety of the accused person.

Flight Risk

13. In his affidavit, PC Martin Mutwiri avers that the accused person is a flight risk; that her known place of abode was deserted and therefore, she has no known place of abode. This argument is neither here nor there, for no evidence has been tabled before this court to give it power and grace. Merely that the residents of her known place of abode have shifted is not sufficient as the said place was a rental house. It is not strange for tenants to move out, and in this case, from the scene of crime after such a heinous act. The accused has stated she has a place of abode. No real evidence is tendered to show that the accused is likely to abscond or go into hiding. For these reasons, the ground is not substantiated. I reject it.

Interference with Witnesses

14. The prosecution alleges likelihood of interference with prosecution witnesses. On this ground the court in *R. V. Jaktan Mayende & 3 others*, stated that:

> " - In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of

law in general as envisioned by the people of Kenya in the Preamble to *the Constitution* of Kenya 2010.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused."

15. Accordingly, the specific instances of or likelihood of interference with witnesses including the relationship between the accused and the witnesses or victims, must be laid before the court with such succinct detail or evidence as to persuade the court to deny the accused bond (*R. V. Dwight Sagaray & 4 others*, 2013 eKLR,)

16. It is also important eminent consideration in determining bail; the rights and protection of victims. See Section 10 of the *Victim Protection Act* No. 17 of 2014, that: -

    10 (1) a victim has a right to: -

    (a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

    (b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

    (c) Have their property protected.

17. Interference with witnesses undermines the criminal justice system and dents the integrity of the criminal process. such, in turn perverts the trial into a mock trial, and prejudices the rights and protection of victims. Thus, the court's duty to preserve the integrity of the trial. Here I there is much persuasion in the reasoning of Lesiit J (as she then was) in *R. V. Fredrick Ole Leliman & 4 Others*, Nairobi Criminal Case No. 57 of 2016 [2016] eKLR where she succinctly stated that:-

    "Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."

18. In the present case the prosecution stated in their affidavit that the accused is likely to interfere with key witness who is her relative. The likelihood of interferences of witnesses is far-fetched as the allegations were left at very high level of generalization and devoid of such succinct details which would paint a vivid picturesque of how the witness interference is likely to occur. Accordingly, the prosecution has not proved threats to or possibility of interference with witnesses. It bears repeating that, the court must be satisfied that threats were made and were of a nature that would inter alia, put the witness in a vulnerable position vis-à-vis the accused or put the accused in a position of influence or vantage over the witness or would instill fear in or prevent the witnesses from testifying.

19. After carefully analyzing the opposing views on the issue of possible interference with witnesses, I find no cogent material before court to demonstrate actual or perceived interference with witnesses by

the accused if released. The stringent standard set by *the Constitution* has not been met as to justify limitation of fundamental freedom or liberty of the accused.

Safety and Security of Accused

20. The investigating officer his affidavit has stated that the area is very hostile towards the accused person. The defence has disputed the claims and stated that should there be a threat to her security she will inform the court and the surety.

Taking law in own Hands

21. I have lamented time without number, and I again slide into grief; how and why in this age and time should people take the law into their hands to harm the accused? The community herein is within the territorial jurisdiction of the Republic of Kenya- a nation governed by law and order under *the Constitution* of Kenya, 2010. I wonder where the said community would derive the authority to harm or kill a suspect under trial. No one is above the law or should take the law in their hands. All are bound by *the Constitution* which reigns. The community in question should let the law punish the accused. This should stop and my view is that, the ground that the security of the accused is threatened by the members of the public or victim family, should never be encouraged to be a ground for denial of bail; otherwise courts will inadvertently promote or condone violence, disorder and usurping of law by individuals or group of people.

22. In any case, it is the duty of the state to ensure safety and security of its citizens including the accused person. The police should take appropriate measures to ensure security of the accused person. I therefore find the argument that the accused be detained for her own safety and security to be without any legal or factual basis and I reject it.

23. In the final analysis, I find no compelling reason not to grant the accused bail. He shall be released on a personal bond of Kshs. 500,000/= with one surety of similar amount. She shall not leave the jurisdiction of the court without leave of the court. In light of the circumstances of this case, I will not give an option of cash bail.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF MAY, 2022

F. GIKONYO M

JUDGE