



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM; R. MWONGO, J.**

**CRIMINAL CASE NO. 17 OF 2019**

**REPUBLIC.....COMPLAINANT**

**VERSUS**

**PETER KINYANJUI WAINAINA.....ACCUSED**

**RULING**

1. This is a ruling on an application for bail. The accused is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. According to the charge sheet, the particulars of the offence are that on the 17<sup>th</sup> day of October, 2019, at about 8.30 pm at Kiungurururia village in Gilgil Sub County within Nakuru County, he murdered Edith Muthoni Njoki. On arraignment, the accused pleaded not guilty, and applied for bail.
2. It is noteworthy that the accused is separately charged in the lower court in CMCC No 1531 of 2019 with attempted murder. The charge is that on 17<sup>th</sup> October, 2019 at about 8.30 pm at pm at Kiungurururia village in Gilgil Sub County within Nakuru County, he attempted to unlawfully cause the death of one Rufus Mutuma, he pleaded not guilty and was released on bail of 500,000/=.
3. This court having ordered a probation officer's pre-bail report, the same was availed on 18<sup>th</sup> November, 2019. It concluded that there were weighty concerns by the victim's husband, mother and their employee touching on their security and safety; and he recommended that the matter of bail be revisited at a later date.
4. The victim's mother filed an affidavit on 21<sup>st</sup> November, 2019, opposing bail on the ground that on the day the accused killed her daughter, he also attempted to kill her herds-boy, one Rufus Mutuma. She therefore feared that the accused would commit another offence if released on bond.
5. Rufus Mutuma also filed an affidavit on 14<sup>th</sup> January, 2020 opposing bail on the ground that the accused attempted to kill him so as to wipe away any evidence; that the accused will compromise evidence; and that he was aware that the accused had pledge to the employer and or the husband of the deceased.
6. The prosecution filed an affidavit through Corporal James Kimani who is the investigating officer. He said that the only eye witness who saw the accused commit the alleged murder was Rufus Mutuma; and that the accused is likely to eliminate the said Rufus Mutuma; or that the accused may jump bail and disappear, never to come to court again.
7. In submissions, defence counsel reiterated that Article 49(1)(h) of the Constitution avails an accused the constitutional right to be released on bond or bail on reasonable conditions; that the accused is deemed innocent until proven guilty; that none of the reasons given in opposition to bail were compelling; and that the accused was not shown to be a flight risk.
8. The prosecution's submissions opposing bail were essentially that he would likely interfere with witnesses, and might even seek to eliminate the sole eyewitness Rufus Mutuma. They rely on the affidavit of Corporal James Kimani.
9. The victim's family opposed bail and submitted that it had not been controverted or denied that the fact of the existence of the lower court case was a confirmation of the fear that the accused would interfere with either witnesses or with the security of the deceased family. They urge that if accused ii granted bail, he should keep away from Bahati area
10. I have carefully considered the application and the documentation availed and submissions of the parties, including the authorities supplied by the applicant's counsel.
11. I first note that none of the deponent's assertions in their affidavits were tested by cross examination. Thus the averments are just that,

averments. Further there was no evidence tendered of facts to support the fears cited for opposing bail.

12. The principle rationale for bail is to secure the attendance of the accused at the trial. (See **Nairobi Misc Crim Applic No 254 of 2006 Joyce Ambasa Arwa v R**). If it is shown that the accused is a flight risk, then the consideration of bail will be less probable because of the incentive to abscond. Such fear may however, be taken care of by stringent bail terms

13. In **Nganga v Republic [1985] KLR 451**, Chesoni J (as he then was) considered bail under the CPC and stated as follows:

***“1.The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors:***

***In principle, because for 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:***

***i. The accused will fail to turn up at his trial or to surrender to custody;***

***ii. The accused may commit further offences; or***

***iii. He will obstruct the course of justice.***

***b. The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;***

***i. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;***

***ii. The strength of the prosecution case;***

***iii. The character and antecedents of the accused;***

***iv. The likelihood of the accused interfering with prosecution witnesses”***

14. Further, the learned Judge dealing with bail pending trial under the repealed constitution said:

***“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 ... 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 there are substantial grounds for believing that;***

***a) the accused will fail to turn up at the 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 for bail is to secure the accused person’s attendance to 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 the accused is likely to attend trial.”***

15. It is now trite that **Article 49(1)(h)** of the Constitution makes bail pending trial a constitutional right without exception to the type of offence committed, and it can be denied is where there are compelling reasons. Those compelling reasons must be clear and demonstrable by evidence provided by the prosecution, but should not hinge on mere speculation.

16. In **R v Danson Ngunya & Another [2010]eKLR** Ibrahim, J (as he then was) stated:

***“Liberty is precious and no one’s liberty should be denied without lawful reason and in accordance with the law. Liberty should not be taken for granted”***

## **Disposition**

17. Having carefully considered the information before me, and for the reasons stated herein, I am not satisfied that there are compelling reasons for denying the applicant bail.

18. I therefore grant the accused bail on the following terms:

- a. The accused may be released upon depositing cash bail of Kshs 600,000/= or on his own bond of the same amount with a surety of 600,000/= to be verified by the Deputy Registrar;
- b. The accused shall report to Bahati Police Station or such station agreed with prosecution by defence every Friday and a record of his attendance shall be recorded in a book to be availed to the court on demand;
- c. The accused shall make no contact with or interfere with any witnesses or investigations involving any of the crimes for which he has been arraigned;
- d. Failure to comply with bail terms will result in their automatic lapse/withdrawal.

**Administrative directions**

19. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Ruling has been rendered through Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this Ruling shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

20. A printout of the parties' written consent to the delivery of this Ruling shall be retained as part of the record of the Court.

21. Orders accordingly.

**Dated and Delivered at Nairobi this 30<sup>th</sup> Day of April, 2020**

***Signed***

**RICHARD MWONGO**

**JUDGE**

Delivered via Zoom video-conference in the presence of:

1. Ms Langat for the Prosecution
2. Ms Moenga, h/b for Mr Mongeri for accused
3. Mr G Kimani for the Victim(s)
4. Accused present in person
5. Court Clerk - Quinter Ogutu