



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO 19 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SUSAN NJERI WACHIURI.....ACCUSED**

**RULING**

1. The Applicant is charged with the offense of murder contrary to section 203 of the penal code the particulars of which are that on 9<sup>th</sup> April 2020 at White House, Tena Estate area within Kamkunji Sub-County in Nairobi County murdered **KELVIN NJENGA NGANGA**
2. She pleaded not guilty and in compliance with the provisions of Article 49(1) (h) of the Constitution invited the prosecution to address the court on the issue of bail taking into account the fact that the accused had been charge during the period of the COVID 19 pandemic and it was not possible to secure pre-bail report.
3. In opposing the release of the accused on bail, the prosecution filed an affidavit sworn by CPL. ALI IBRAHIM an investigating officer attached to the case in which he deposed that the accused and the deceased were close friends involved in a relationship. The deceased had invited the accused to his home and she joined him and friends for lunch and thereafter stayed for the evening and that the prosecution witnesses were well known to accused, including one who was with them in the house during the incidence and if granted bail there is real likelihood of her interfering with their evidence.
4. It was contended that the release of the accused on bond was likely to disturb public peace or undermine public peace or security as at the time of her arrest the tension in the community was high. It was stated further that the accused had not provided details of her place of residence and there was a high possibility of her absconding if released, since one of the possible penalties on conviction is death sentence, it was contended that there were more probabilities and incentive for the accused to abscond.
5. At the hearing of the application, it was submitted on behalf of the prosecution that there were two witnesses who were known to the accused, whose testimony she was likely to interfere with should she be released on bail. It was further contended that tension was still very high in the area and therefore the accused security was not guaranteed. It was the prosecution's contention that one vital exhibit was still missing and since the accused had not cooperated with the prosecution when arrested to avail it, there were likelihood of her interfering with investigations. It was contended that there was a rise in gender based violence amongst couples and therefore the accused should be denied bail in the interest of public order and security to act as deterrence.
6. On behalf of the family of the victim Mr. Etole submitted that the accused had no fixed abode and was therefore a flight risk.
7. On behalf of the accused Mr. Kihoro submitted that there were no compelling reasons tendered by the prosecution for the denial of the accused right to bail. It was contended that the accused did not have a passport and that she voluntarily surrendered to the police. It was contended that she had a family who were very supportive and willing to accommodate her. The advocate submitted from the bar that he had spoken to the sister of the accused who lives in umoja who was ready to account for the where about of the accused. It was further contended that the accused if released would live at Naru Moro.
8. Bail is a constitutional right of every accused person which may only be limited where there are compelling reasons advanced by the prosecution to the satisfaction of the court on a balance of probability. In determining what constitute compelling reasons, the court is guided by the following principles as captured in the Bail and Bond Policy Guidelines:-

*i. nature of the offence,*

*ii. strength of the evidence, which supports the charge,*

- iii. the gravity of the punishment in the event of conviction,
- iv. the previous criminal record of the applicant,
- v. the probability that the accused may not present or surrender himself for trial,
- vi. the likelihood of further charges being brought against the accused,
- vii. the likelihood of the accused interfering with the witnesses or may suppress any evidence that may incriminate him,
- viii. the probability of finding the applicant guilty as charged,
- ix. the detention for the protection of the accused,
- x. the necessity to procure medical or social report pending final disposal of the case.

9. Justice Odunga in the case of **REPUBLIC Vs. ROBERT ZIPPOR NZILU [2018] eKLR** had this to say on what the court has to consider:

*“9. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favor of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. 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 jeopardise 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; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question...the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused’s defense or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In S v Nichas 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in S v Hudson 1980 (4) SA 145 (D) 146 in the following terms;*

*“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”*

*In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also Aitken v AG 1992 (2) ZLR 249 and Norman Mapfumo vs. The State HH 63/2008... The other relevant factor to be considered is the relative strength of the state’s case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case.”*

10. Gravity of the offence as a consideration was appreciated by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

***“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”***

11. I fully associate myself with the above analysis. In this case the prosecution submitted that the accused did not have a fixed abode and that based on the nature of the charge there was likelihood of the same absconding the jurisdiction of the court. In attempting to answer that contention, the applicant’s Advocate submitted from the bar that there were people willing to accommodate the accused but without providing supporting documents or confirming the same by way of affidavit. In the absence of documentary evidence that the accused has an alternative means of abode rather than the house of the deceased where the offense was committed, I am at this stage persuaded that it will be risky to release the accused on bond.

12. 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.

13. 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.

14. The upshot of this ruling is that the applicant shall be remanded in custody for now pending filing of affidavits and supporting documents on the applicant’s alternative accommodation and means of support and it is ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY 2020 through Microsoft Google Teams.**

.....

**J. WAKIAGA**

**JUDGE**

In the presence of:-  
Ms Onunga for the State  
Mr. Kihoro for Mathenge for the accused  
Mr. Etole for the family  
Accused person absent

Court Assistant: Karwitha