



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO.20 OF 2020**

ZEITUN ABDUL.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**RULING**

The Applicant, Zeitun Abdul was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 15<sup>th</sup> April, 2020 at Lindi in Kibera within Nairobi County, the Applicant murdered Fazal Mohammed Sebit. When she was arraigned before this court, she pleaded not guilty to the charge. She has applied to be released on bail pending trial. In her application before the court, the Applicant states that she has the constitutional right to be released on bail pending trial. The Applicant states that she is a law abiding citizen. She is ready and willing to abide by any terms that may be imposed by this court to enable her secure bail pending trial. She is a mother of a two (2) year old child who emotionally depends on her. She states that if granted bail, she will reside with her grandfather at Mogotio. The grandfather is ready and willing to stand surety. She asks the court to take into consideration the fact that she has cooperated with the investigators since her arrest. She was not a flight risk and had no intention or means of leaving the country.

The prosecution opposed the application. Through an affidavit sworn by Sgt Vincent Batinya, the investigating officer. The prosecution states that there are compelling reasons to deny the Applicant bail pending trial. He stated that the Applicant was likely to interfere with witnesses if she is released on bail since most of the witnesses are her relatives. He urged the court to take into account the circumstances in which the offence was committed. The Applicant assaulted the deceased causing him to sustain fatal injuries in the presence of her infant son. The fact that the Applicant will face the ultimate sentence if convicted, is more the reason why the Applicant should be considered a flight risk. The Applicant was neither employed nor did she have a fixed abode. The likelihood that she will attend the court when called upon to do so was therefore remote. The prosecution further urged the court to take into consideration that if the Applicant was released on bail, there were chances that she would be harmed by members of the community who were aggrieved by the crime. In the premises, it was the prosecution's case that the compelling reasons outweighed the Applicant's right to be released on bail pending trial.

In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial. This point was re-emphasized by the court in **Republic –Vs- Danson Mgunya & Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held thus:

*“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”*

The **Constitution** under **Article 49(1)(h)** grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. The **Constitution** does not define what constitutes “**compelling reasons**”. However, courts have rendered decisions that articulate what constitutes compelling reasons and include the following: *the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.* (See **ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006**). In addition, the **Bail and Bond Policy** recently published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail.

In the present application, it was clear to this court that indeed the Applicant had established a case for her release on bail pending trial. The circumstances in which the offence is alleged to have occurred indicates that it was essentially a domestic dispute. The Applicant has stated that she will not return to her matrimonial home if released on bail pending trial but will go back to her grandfather's home. The possibility that she would interact with the prosecution witnesses (who happen to be related to the deceased) is remote. The distance between her grandparent's residence (at Mogotio) is such that she is unlikely to meet with the prosecution witnesses who reside in Kibera in Nairobi. Mogotio is about 200 kilometres from Nairobi. Furthermore, upon perusing the statements of the prosecution witnesses, it was evident that the Applicant cooperated with the investigators during the investigations. She will not be a threat to society. Neither will she be a flight risk should she be released on bail pending trial.

In the premises therefore, the Applicant has made a case for this court to exercise its discretion to release her on bail pending trial. She is hereby released on bail upon depositing a cash bail of Kshs.200,000/- with one surety who must be a grandfather. In the alternative, she is released on bond of Kshs.500,000/- with one surety of the same amount. The surety must be her grandfather. The Applicant shall attend court during trial without fail. She shall not have any contact with the prosecution witnesses prior to trial. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2020**

**L. KIMARU**

**JUDGE**