



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 49 OF 2019

WILFRED LITUNYA NAMAI.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Accused, Wilfred Litunya Namai is facing a charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on the night of 22nd July 2019 along Southern Bypass, near Kibera slums in Nairobi County, he murdered Johnson Alukwe. When the Accused was arraigned before this court, he pleaded not guilty to the charge. He has applied to be released on bail pending trial. A pre-bail report was ordered prepared. It has been prepared and filed in court. Mr. Nyachoti for the Accused urges the court to release the Accused on bail pending trial. He asserts that under **Article 49(1)(h)** of the **Constitution** and **Section 123** of the **Criminal Procedure Code**, the Accused is entitled to be released on bail pending trial. There were no compelling reasons put forward by the prosecution why he should not be so released. The pre-bail report was favourable. The victim's mother had been interviewed and had no objection to the Accused being released on bail pending trial. Mr. Nyachoti explained that the deceased was the child of the Accused.

The application is opposed. Ms. Gikui for the State opposed the application. She relied on a replying affidavit sworn by the investigating officer. She submitted that all the crucial witnesses were related with the Accused since the deceased was the Accused's child. She pointed out that it was likely that the Accused would interfere with the witnesses if he is released on bail pending trial. Learned prosecutor urged the court to take into consideration that the prosecution had a strong case. It was likely that the Accused will be convicted and serve a long stretch in prison. He was therefore likely to abscond if he was released on bail pending trial. She pleaded with the court to allow the proceedings take place without the likely interference of the prosecution witnesses by the Accused. She urged the court to take into account public perception on the delivery of criminal justice in reaching an appropriate determination to deny the Accused bail pending trial.

This court has carefully considered the rival submission made by the parties to this application. The court is cognizant of the fact that the Accused is presumed innocent until proven guilty by a court of law. The prosecution objects to the release of the Accused on bail pending trial essentially on the ground that he is likely to interfere with the prosecution witnesses since most of the crucial witnesses are his close relatives. The Accused denies that he would interfere with the witnesses and in the process jeopardize his liberty. He was willing to relocate to his rural home during the pendency of the trial. **Article 49(1)(h)** of the **Constitution** grants an accused person the right to bail pending trial unless there are compelling reasons. What constitutes compelling reasons has not been defined or stated in the **Constitution**. The courts have however set out some of the grounds that may be considered to constitute compelling reasons in the various decisions that have been rendered since the promulgation of the **Constitution**. Odunga, J in **Grace Kananu Namulo -vs- Republic [2019] eKLR** held thus:

“In S. vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17 [2017] ZWBHC 262 (31 August 2017), the Court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interest 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:

- Endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or***
- Not stand his or her trial or appear to receive sentence; or***
- Attempt to influence or intimidate witnesses or to conceal or destroy evidence; or***

- *Undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of 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 and 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 defence 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 (Emphasis mine).

In the present application, it was clear to this court that the Accused is not a flight risk. The fears expressed by the prosecution that the Accused will likely interfere with the prosecution witnesses, while real, cannot in the present case constitute compelling reason to deny the Accused bail pending trial. The Accused cannot be denied bail pending trial just because some of the prosecution witnesses are his relatives. The pre-bail report is clear. Some of those relatives have no objection to the Accused being released on bail pending trial. The prosecution's fear will be addressed by a condition that will be attached to the release of the Accused on bail pending trial.

In the premises therefore, the Accused shall be released on bail pending trial on the following conditions:

I. He shall post bond of Kshs.500,000/- with one surety of the same amount.

II. In the alternative, he shall deposit a cash bail of Kshs.200,000/- with one surety, a relative, who shall ensure his attendance during trial.

III. The Accused shall not discuss or interfere with the prosecution witnesses during his release on bail pending trial. In that regard, if any of the prosecution witnesses who are his relatives refuses to testify or turn hostile, the Accused's bail pending trial shall be cancelled.

IV. The Accused shall attend trial without fail on the date that it shall be scheduled.

It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JUNE 2020

L. KIMARU

JUDGE