



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.38 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

WINFRED NDUKU KILONZO alias WINNIE.....ACCUSED

RULING

The Accused, Winfred Nduku Kilonzo alias Winnie, has been charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. According to the information, the particulars of the offence are that on 2nd May 2020, at Busy Simu Area Kayole within Nairobi County, the accused murdered AN and JA. When the accused was arraigned before this court, she pleaded not guilty to the charges. Pending trial, she had filed an application to be released on bail. In the affidavit in support of the application (sworn on her behalf by Newton M. Isaac, her learned counsel) the accused stated that she is the sole breadwinner of her family; is a person of fixed abode; is not a flight risk; has no prior criminal record; promises and undertakes not to interfere with prosecution witnesses; and has been co-operative with investigators in the duration that the case was being investigated.

In addition, Mr. Musembi for the accused, during the virtual hearing of the application, urged the court to take into consideration the current COVID-19 pandemic which may adversely affect the health of the accused person should she be denied bail. He further submitted that the accused was willing to abide by any terms that the court may impose to secure her release on bail pending trial. However, he urged the court to impose lenient terms that the accused will be in a position to meet. For added measures, he submitted that under Article 49(1)(h) of the Constitution, there were no compelling reasons upon which the prosecution can rely on to seek denial of the accused's constitutional right to be released on bail pending trial.

The Application is opposed. One of the investigating officers, Cpl. George Wamai, swore an affidavit in opposition to the application. He deposed that there existed compelling reasons to deny the accused bail. The accused is charged with killing her two children, the victims in the information. He set out the circumstances which the prosecution alleges the offence was committed. He was of the view that the accused will likely interfere with the prosecution witnesses, many of whom were her close relatives. They included her mother and parents' in law. He pointed out that the accused attempted to commit suicide after allegedly committing the offences. He was apprehensive that, taking into consideration the nature of the charges the accused is facing, and the likely punishment in the event she is convicted, she was likely to abscond from the jurisdiction of the court. She has no fixed abode. He was fearful that the members of public will harm the accused if she is released on bail pending trial. He was convinced that the evidence that the prosecution has gathered will in most probability result in the accused's conviction. In this regard, he urged the court to exercise its discretion to deny the accused bail pending trial as there exists compelling reasons.

Mr. Naulikha, the Learned Prosecutor, amplified these grounds by the investigator by stating that the right to bail, though guaranteed by the Constitution was not absolute. He pointed out that the risk of releasing the accused on bail pending trial was not worth the compelling reasons that the prosecution set out in the affidavit in opposition to the application. He was of the view that the prosecution established a case for the accused to be detained in remand custody while awaiting trial.

This court has considered the rival submission of the parties to this application. The issue for determination is whether the prosecution established compelling reasons for this court to deny the accused her constitutional right to bail as stipulated under Article 49(1)(h) of the Constitution. The other principle that the court must have in mind in determining the application is the legal presumption of innocence; the accused is presumed innocent until the contrary is established by the court (See Article 50(2)(a) of the Constitution). In R vs John Muchira Gatimu [2017] eKLR L. Gitari J. held thus;

“The right to bail can only be denied if the State proves that there are compelling reasons not to grant bail. The burden is on the prosecution. In the case of the Republic -vs- Danson Ngunya & Another [2010] eKLR High Court, the Court adopted

the reasoning in M. Lunguzi -vs- Republic CMSCA Appeal No. 4/995. The Learned Judge stated:-

“In my judgment, the practice should never be to require the State to prove to the satisfaction of the Court that in the circumstances of the case the interest of justice requires the accused to be deprived of his right to be released from detention. The burden should be on the State and not the accused. He who alleges must prove. That is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is up to the State to prove when the Court should make such an order...”

In the present application, it was the prosecution’s averment that the accused has no fixed abode; was a flight risk on account of the incriminating nature of the evidence that the prosecution will present before the court and therefore the likelihood of her conviction; that the accused may be a danger to herself and the public if she is released on bail pending trial; she may likely harm herself or be harmed by members of the public if so released; that she may likely interfere with prosecution witnesses. On the other hand, it was the accused’s argument that she should benefit from her constitutionally guaranteed right to be released on bail pending trial as there exists no compelling reasons.

It is this court’s evaluation that indeed there exists no compelling reasons to deny the accused bail pending trial. It is clear that the accused has a fixed place of abode. Prior to being charged with the present offences, she had no criminal record. The circumstances under which it is said the offences were committed may have contributed to her attempted suicide. However, those circumstances were not prevalent at the time the application for bail pending trial was argued before this court. She may require counselling and psychological support to regain her mental balance which can only be possible if she is released on bail pending trial. This court is of the view that the concerns expressed by the prosecution will be addressed by appropriate terms that will be imposed by this court to secure the accused’s attendance before court during trial.

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

- i. She shall post bond of Kshs.500,000 with one surety of the same amount;**
- ii. In the alternative, she shall deposit cash bail of Kshs.300,000;**
- iii. She shall provide two contact persons, one of whom must be a close relative to secure her attendance before the trial court;**
- iv. She shall be required to attend court without fail during the dates that the trial shall be scheduled at the pain of having the bail granted to her being cancelled.**

It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2020

L. KIMARU

JUDGE