



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO. E006 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

NANCY NJERI.....ACCUSED

RULING

1. The accused herein, **Nancy Njeri** has been charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the 18<sup>th</sup> day of October, 2020 at Wote town in Makueni sub-county within Makueni County she murdered **Onesmus Masaku**.
2. The accused is represented by Mr Wokabi while Counsels Mr Havi, Mr Makundi, Miss Kamende, Mr Mutua, Mr Kithuku, Mr Kivuva, Mr Muema, Mr Mwithya, Miss Angawa, Mr Mutia, Mrs Kinuthia, Miss Wavinya and Mr Ngolya represented the family of the deceased (watching brief). Mr Mwongera represents the prosecution.
3. On record is an affidavit in support of bail pending trial that is deponed by the accused on 2.11.2020. In the said affidavit the deponent averred that she is a 28-year-old police officer in the rank of police constable with two years in the service and attached to Makueni Police station. She averred that she had no previous conviction and that she is a child of a single parent. She revealed to court that her family's abode is at Kuresoi North of Nakuru County where her mother and family shall take her when released. It was averred that her mother is a business woman; that she has no passport; that she undertakes to abide by the bond terms. It was averred that she sought release on bond so as to fend for herself and her mother. According to the deponent, none of the witnesses or their identities are known to her and she undertakes not to interfere with or influence the witnesses. She averred that she is not a threat to anyone and that there are no compelling reasons to necessitate her continued detention in remand. She pointed out that she had injuries that she was nursing and urged the court to admit her to bail on reasonable terms.
4. The application was opposed vide replying affidavit deponed by Chief Inspector Alenga P. Gimwani, the investigating officer. He averred that the life of the accused may be at risk if she was released as the members of the public are still angered by the death of the deceased. It was averred that the offence committed is serious and that this court ought to find that there are compelling reasons why the accused should not be released on bail.
5. The court was addressed orally in respect of the bail application and there are also written submissions on record filed by counsel for the accused as well as counsel for the prosecution. Mr Mathenge learned counsel for the accused submitted that by dint of Article 49(1)(h) of the Constitution, the accused has a right to be released on bail on reasonable conditions unless there are compelling reasons. While appreciating the right to presumption of innocence of the accused under Article 50(2) of the constitution, it was submitted that the status of the deceased being an advocate had no basis to justify refusal of bail/bond. Reliance was made to the Bail and Bond policy guidelines as well as the case of **Michael Juma Oyamo & Another v R (2019) eKLR** as applicable to the facts deponed by the accused in her affidavit where she averred that she was not likely to interfere with witnesses. Counsel placed reliance on the case of **R v Vigilance Shighi (2020) eKLR** that dealt with detention of an accused in the interests of justice and that the court was urged to consider that the accused was nursing injuries that were inflicted by the deceased and that there would be no reason to curtail her freedom. It was reiterated that the accused was from a humble family background and was well deserving of bail/bond on reasonable terms.
6. Mr Makundi for the family of the deceased supported the prosecution's opposition to bail. It was pointed out that the accused is a trained police officer and even though she is interdicted, she likely to access guns. Counsel distinguished the case of **Jackson Wambua (2020) eKLR** on its facts that related to an accused who was a butcher. It was pointed out that the case of **R v Vigilance Shighi (2020) eKLR** related to an accused who was not a police officer.

7. The state submitted that the right to bail was not an absolute right but subject to compelling reasons that were pointed out as interference with witnesses and security of the accused. It was submitted that the accused was charged with a serious offence.

8. In rejoinder, Mr Mathenge reminded the court of the accused's right to presumption of innocence and that the occupation of the accused was not material to the grant of bail/bond. It was submitted that there was no evidence that the accused would access a fire arm or that she would interfere with witnesses.

9. I have considered the rival affidavits as well as the submissions of learned counsels. The issue for determination is whether the court may grant the accused person bail and bond and on what terms.

10. The bail system was developed during the Middle Ages in Anglo-Saxon England (410-1066) as a way to have an accused out of detention on guarantee that he would not flee but attend trial. See **Pollock and Maitland, History of English Law (2d Ed. 1899) 40-41.**

11. June Carbone in the article "**Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail**, 34 *Syracuse L. Rev.* 517 (1983) wrote that "in Anglo Saxon Britain violence and feuding were a real and socially destabilising route used to correct actual or perceived wrongs. These approaches were originally incorporated into the primitive legal system *via the process of outlawing and "hue and cry" communal vigilantism.* Over time, localised justice was increasingly stripped of violence through the system of 'bots', private payments to compensate grievances, and 'wites', payments to the monarch. As wrongdoing was essentially still a private affair, a value payment was a simple, non-violent solution. As prisons were not a functional system for holding individuals securely at the time, fleeing to avoid justice was a systemic risk. To combat this risk alleged wrongdoers were allowed to pay 'bail', at the exact equivalent value of their bot, in exchange for going free until the date of trial. *Some crimes however, remained so serious that only custody was appropriate.*"

12. In Kenya, the entitlement to bail is subject to compelling reasons by dint of Article 49(1)(h) of the Constitution. Nevertheless, the law is silent on what amounts to compelling reasons. In Hassan **Mahat Omar & Another v Republic**, **Nairobi High Court Criminal Revision No. 31 of 2013**, Lady Justice L.A Achode rendered herself thus:-

**"What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."**

13. In the Ugandan Trial on Indictments Act, exceptional circumstances are defined by section 15 (3) and additional factors are considered by section 15 (4) which are reproduced for ease of reference:

"(3) In this section, "exceptional circumstances" means any of the following-

- (a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;
- (b) a certificate of no objection signed by the Director of Public Prosecutions; or
- (c) the infancy or advanced age of the accused.

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors-

- (a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;
- (b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;
- (c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and
- (d) whether there are other charges pending against the accused."

14. According to the Judiciary bail and bond policy guidelines it is indicated thus;

"4.26 The following procedures should apply to the bail hearing:

(a)The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

- a. That the accused person is likely to fail to attend court proceedings; or
- b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

- c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
- d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e. That the accused person is likely to interfere with witnesses or evidence; or
- f. That the accused person is likely to endanger national security; or
- g. That it is in the public interest to detain the accused person in custody.

(b) The accused person shall be entitled to the disclosure of any information relied upon by the prosecution in objecting to bail, provided that there is no good reason for withholding such information, such as the protection of witnesses or the preservation of national security.”

15. What this court understands from the opposition to the accused’s release on bail is the likelihood for her to threaten and interfere with witnesses as she is a former police officer and that her continued detention is for her own safety. There are no pre-bail reports on record so as to inform this court that the safety of the accused is at risk; neither is there anything to convince me that she would interfere with the witnesses. What has been presented by the prosecution regarding that particular issue borders on speculation as no tangible evidence has been availed to court.

16. The bail/bond trial is an interlocutory proceeding that does not point to the guilt of an accused person and where the rules of formal proof can be relaxed and where the court is obliged to take the initiative if the parties are silent then the court still has to be pro-active in establishing the relevant factors. More pertinently, the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the seven broad considerations in the Judiciary bail and bond policy guidelines. It would therefore be apparent that in regard to the grant or refusal of bail the focus primarily is on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of the case.

17. I have considered the legal authorities including those cited by counsel for the victim. The Judiciary Bail and Bond Policy Guidelines have listed a number of factors to be considered by the court when making a decision whether or not to grant bail and bond; the same have been reproduced in paragraph 16 above. Various authorities have established the principle that the court must be satisfied that the applicant will appear for trial and not abscond. If facts come to light that there is a substantial likelihood of the applicant offending bail, it is advisable to reject the application. In **Republic v Danson Ngunya & Another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then the state must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond. I note that the accused in her own affidavit dated 2.11.2020 indicated to the court that her abode is in Kuresoi North in Nakuru County where her family will take her in and that as a police officer she understands the purpose of bail pending trial and undertakes to attend court when required to do if she is released on bail/bond.

18. In the instant case I have considered the following factors: -

- a. The need to give the accused the full benefit of her constitutional rights and freedoms that would be subject to the limitations under Article 24 of the Constitution.**
- b. The fact that the applicant has a known place of abode in Kuresoi North in Nakuru County.**
- c. The pledge by the accused that she would attend court when required to if released on bond.**
- d. The seriousness of the charges against the accused.**
- e. The Constitutional requirement that the accused must be presumed to be innocent until proved guilty or plead guilty.**
- f. The caution that bail should not be refused as a form of punishment to the accused.**
- g. Absence of concrete evidence that there are other charges pending against the accused person.**
- h. The likelihood that the accused will interfere with witnesses.**
- i. The possibility that the life of the accused may be in peril if released on bond.**

19. Considering all the foregoing factors, rival affidavits and the submissions by learned counsels, I am convinced that no compelling reasons have been furnished to warrant a denial of bond to the accused person. Indeed, the prosecution did not avail any affidavit from any witness who has or is likely to be interfered with by the accused if released on bond. It is also noted that the accused has already been interdicted by her employer and hence has no ability to threaten witnesses. Again, the court will place water tight conditions of bond to put a leash on the accused. I find the justice of the case tilts in favour of allowing the requests for bond by the accused person as her right to be presumed innocent until proved guilty is sacrosanct even though the court of public opinion has a contrary view due to the stature and profession of the deceased. This court is now enjoined by Article 49(1) (h) of the constitution as well as the Judiciary Bail and Bond Policy Guidelines to proceed to grant bail/bond on reasonable terms and conditions. The accused is hereby released on bond on the following conditions:

- a. Bond of Kshs 1,000,000/ plus two sureties of similar amount who shall be approved by the Deputy Registrar of this court.
- b. Upon release, the accused should not in any manner reach out to witnesses directly or by proxy or interfere with them during the pendency of the case.
- c. The accused should not leave the jurisdiction of the court without the authority of the court during the pendency of the case.
- d. The accused shall attend court at all times scheduled until the final determination of the case.
- e. In default to observe the terms of bond then the bond shall be cancelled and she together with her sureties called to account.

It is so ordered.

Dated and delivered at Machakos this 15<sup>th</sup> day of December, 2020.

D. K. Kemei

Judge