



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 73 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

DORCAS JELAGAT RUTO.....ACCUSED

RULING

[1] On the **11 December 2018**, the Court was informed by the Director of Public Prosecutions on behalf of the Republic that the Accused herein, **Dorcas Jelagat Ruto**, (hereinafter, "the Applicant"), had been charged with Murder Contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the night of **14th day of April 2018** at Cheptingting Village in Nandi East Sub-County within Nandi County, jointly with others before court, she murdered **Benjamin Koech**. She was accordingly arraigned herein to answer the Charge, which she denied. She thereupon sought, through her Advocate, **Ms. Ayugi**, that she be admitted to bail pending the hearing and determination of her case.

[2] It was the submission of **Ms. Ayugi** that no justifiable grounds, by way of compelling reasons, had been given by the Prosecution to warrant the continued incarceration of the Applicant. She asserted that bail is a constitutional right; and that the Applicant did not have to demonstrate why she should be released on bond. Counsel relied on **Articles 20(1), 24(1) and 49(1)(h)** of the **Constitution** to support her submissions and added that the onus of proof was upon the Prosecution to show that there are compelling reasons to necessitate the limitation of the Applicant's right to bail; which in her view had not been done. Counsel therefore urged the Court to release the Applicant on reasonable bail terms.

[3] **Mr. Mulamula** for the State opposed the application. He relied on the Replying Affidavit filed on **13 February 2019** sworn by **IP Maxwell Otieno**. It was averred by **IP Otieno** that there is a high likelihood that the Applicant may abscond and may not be traced in light of the very serious charges facing her. It was further alleged that the Applicant is a well-known chang'aa brewer in her village; and that, being well known to most of the witnesses, there is the likelihood of her interfering with or intimidating the witnesses. In addition to the foregoing, **IP Otieno** averred that the situation on the ground is still volatile; and that there is a possibility of the Applicant being subjected to retaliatory attacks. The Prosecution also pleaded for time and space to complete their arrangements to have some of the witnesses placed under witness protection, contending that this can only be done while the Accused is in custody.

[4] The Applicant responded to the averments of **IP Otieno** vide her own affidavit sworn on **14 February 2019** in which she averred that she has no intention of absconding and therefore that she is not a flight risk. She took exception to the allegation that she is a known chang'aa brewer contending that no evidence was presented to prove the allegation. She similarly denied that she is well-known to the Prosecution witnesses, adding that there was no basis at all for such an allegation. She also denied that she might be subjected to retaliatory attacks if released on bail. She postulated that, the Court has powers to issue conditions that can sufficiently address these concerns, which were in any case unsubstantiated. She therefore asserted that she is entitled to bond as a matter of right and that no compellable reason has been given by the Prosecution why that right should be curtailed. Counsel for the Applicant relied on the cases of **Republic vs. Zacharia Okoth Obado [2018] eKLR** and **Joseph Kuria Irungu alias Jowie and Jacqueline Wanjiru Maribe [2018] eKLR** for an explication of the applicable principles and considerations in an application of this nature.

[5] I have considered the application, the averments in the two affidavits filed herein as well as the submissions by Learned Counsel. The principal enabling provision pursuant to which the bail application was made is **Article 49(1)(h)** of the Constitution; which provision is explicit that, unless there is some compelling reason, an accused person ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. Where, as in this case, an objection has been raised to the release of the Accused person on bond, the Court must be satisfied that the applicable considerations are met. In **Nganga vs. Republic [1985] KLR 451**, for instance, **Chesoni, J.** (as he then was) had the following to say which I find instructive:

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions ... generally in principle and because of the presumption that a person charged with a criminal

offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless there are substantial grounds for believing that;

- a) the accused will fail to turn up at the trial or to surrender to custody or;
- b) the accused may commit further offences; or
- c) he will obstruct the course of justice.

The primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time."

[6] And in the **Bail and Bond Policy Guidelines**, the following considerations are set out as relevant factors that ought to be taken into account by courts when faced with an application for bail:

- [a] whether the accused *person is likely to fail to attend court proceedings; or*
- [b] whether the accused person is likely to commit, or abet the commission of, a serious offence; or
- [c] whether the exception to the right to bail stipulated under **Section 123A** of the **Criminal Procedure Code** is applicable in the circumstances; or
- [d] whether the accused person is likely to endanger the safety of victims, individuals or the public; or
- [e] whether the accused person is likely to interfere with witnesses or evidence; or
- [f] whether the accused person is likely to endanger national security; or
- [g] whether it is in the public interest to detain the accused person in custody.

[7] **Section 123A** of the *Criminal Procedure Code* on the other hand stipulates that:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

- (a) the nature or seriousness of the offence;**
- (b) the character, antecedents, associations and community ties of the accused person;**
- (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;**
- (d) the strength of the evidence of his having committed the offence;**

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

- (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;**
- (b) should be kept in custody for his own protection.**

[8] The Prosecution's apprehension is that the Applicant is unlikely to turn up for their trial and that the Applicant is likely to interfere with their key witnesses. There was however no specific evidence of the Applicant's antecedents, associations and community ties of the accused person; or her record in respect of the fulfilment of obligations under previous grants of bail. In the same vein, no specific evidence was adduced to demonstrate the strength of the evidence that the Applicant committed or the likelihood that she might interfere with the witnesses or tamper with that evidence. All that was stated at Paragraph 8 of **IP Otieno's** affidavit is that:

"...the deceased's property which includes her clothings, pair of shoes and a pair of his red rosary were recovered in her house and her employees are witnesses hence the likelihood of the accused interfering with the said witnesses."

[9] It is noteworthy however that the offence is alleged to have taken place on **14 April 2018**, almost one year ago. There is no indication that the necessary recoveries, if any, have not been done; or that the statements of witnesses have not been recorded and if so why. There is likewise no indication as to when the witness protection process was initiated and what stage it is at; and why the delay. In effect, none of the grounds relied on by the Prosecution has been proved satisfactorily to warrant the continued incarceration of the Applicant. To the contrary, a

Pre-Bail Report filed herein on **12 February 2019** by the Nandi County Probation Officer was to the effect that:

"Most of the relatives of the deceased are people who are well informed and they do understand that bond can be given to any accused person pending the hearing of the case, as such they cannot be hostile to the accused or make revenge. Most of the neighbours also are of the opinion that she may be granted bail or bond..."

[10] Indeed in the Bail and Bond Policy, it is acknowledged as follows regarding any fear that an accused person may interfere with witnesses:

"... this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice."

[11] Accordingly, I would agree with the position taken by **Odunga, J.** in **Republic vs. Robert Zippor Nzilu [2018] eKLR** that:

"...in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to *Thesaurus English Dictionary* is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons."

[12] In the premises, I would allow the applicant's application and admit her to bail on the following terms:

[a] That the Applicant shall be released on a bond of **Kshs. 200,000/=** with one surety standing for her in like sum to be approved by the Deputy Registrar.

[b] That the Applicant shall refrain from making any contact whatsoever with any of the Prosecution Witnesses.

[c] That the applicant shall henceforth attend mentions before the Deputy Registrar of this court at least once per month during the pendency of this case or as otherwise required by the court and must be present during the hearing of this case unless such attendance is dispensed with by the Court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH, 2019

OLGA SEWE

JUDGE