



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO 3 OF 2019

AGNES WAITHERA KAJUJU.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. **Agnes Waithera Kajuju**, the applicant, has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 23rd day of December 2018 at Nuat Estate in Rimba Area within Kiserian Township in Kajiado North Sub County, within Kajiado County, she murdered **Clifford Mabeya Mayaka**.
2. The applicant has applied for bail pending trial through a motion dated 25th June 2019 supported by an affidavit of the applicant sworn on the same day. she deposes that she is a single mother of a minor aged three years, that she is the sole bread winner of her child and their family and that she was the only person paying school fees for her young brother who is in standard six.
3. She states that her mother Tabitha Kajuju Mafuta is willing to stand surety for her to enable her fend for her daughter and undertakes to attend court if released on bail.
4. The prosecution has opposed the application for bail through a replying affidavit by PC Philip Bolo, the investigating officer, sworn on 19th July 2019. The PC Bolo deposes that due to the nature of the offence, the accused should not be release on bail; that there is no proof that the accused has a child given that no documents have been attached, including fees payment receipts; that his interaction through phone conversation with the accused's mother did not reveal existence of a child; that the time taken to trace the accused does not favour her release on bail and that there is a possibility that she is a flight risk.
5. PC Bolo further states that the accused's identity cannot be ascertained since she was found with a fake identity card; that the accused was found to have 3 mobile numbers registered using false identity card details which are still pending under investigations and that the prosecution is in the process of pressing more charges against her.
6. Miss Nginia, learned counsel for the applicant, in moving the application, urges the court to release her on reasonable bail terms. Counsel argues that Article 49(1)(h) of the Constitution grants an accused person the right to be released on bail on reasonable terms and that bail should only be denied if there are compelling reasons. According to counsel, the same position obtains with regard to section 123(2) of the Criminal Procedure Code.
7. Miss Ngania argues that it is for the prosecution to establish compelling reasons for an accused person not to be released on bail; that the replying affidavit by the investigating officer has not raised compelling reasons and that the allegations that the accused's identity cannot be ascertained is not a compelling reason since the documents relied by the prosecution are for a different person and not the accused.
8. According to counsel, the accused was arrested in her house which is a known abode and that she has a child, a fact she has deposed in her affidavit and which the court should take into account. Learned counsel submits that bail is a constitutional right which should not be denied on the basis of prosecution's contention that more charges may be preferred against the accused. In counsel's view, that is not a compelling reason to deny the accused bail. She argues that there is no likelihood that the accused will interfere with witnesses or investigations since the case is now part heard and for that reason, she urges the court to grant the accused bail.
9. Mr. Njeru, learned State Prosecutor, opposes the application for bail and relies on the affidavit of the Investigating officer. Counsel argues that the state has shown sufficient reasons why the accused should not be released on bail; that the accused may jump bail and fail to attend court if released; that it had taken the police two months to trace the accused; that whereas the offence was committed in Kajiado County the accused was arrested in Kiambu County and that the accused's identity is in doubt and that she is using false names.

10. I have considered the application and the arguments in support and those in opposition. The applicant is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. The offence carries a death penalty on conviction. The prosecution has argued that there are reasonable grounds to deny the accused bail. These include the argument that she has no fixed abode; that her identity is not clear; that she is a flight risk and that the prosecution is likely to prefer more charges against her. In the prosecution's view, these are compelling reasons sufficient to deny the applicant bail.

11. The defence has on its part argued that these are not compelling reasons given that the Constitution grants every person charged with a criminal offence the right to be released on bail on reasonable terms. In their view, the grounds advanced by the prosecution to oppose bail do not meet the constitutional test as compelling reasons.

12. Bail is a constitutional right granted to every person charged with a criminal offence, regardless of the nature of the offence. This is so because the limit to granting bail in certain cases was removed by the current constitution. The **Constitution** is also clear that bail terms should be reasonable, and the only constitutional caveat to the right to bail is that the prosecution must establish compelling reasons why an accused should not be released.

13. In that regard, therefore, when considering the issue of bail, the starting point must be that every accused person has the constitutional right to be released on bail. A proper reading to Article 49 (1) of the Constitution shows that it is not a must that an accused person has to apply to be released on bail since this is a constitutional right. Rather, it should be the prosecution which should at the very first instance ask the court not to release of the accused on bail and justify their request. For that reason, the constitutional burden is on the prosecution to show to the satisfaction of the court that there exist compelling reasons not to release the accused on bail. It is the duty of the court before which the accused is charged to consider releasing the person on reasonable bail terms unless the prosecution shows otherwise.

14. The question that I must answer in this application is whether the prosecution has satisfied the constitutional requirement of compelling reasons for this court to decline to release the accused on bail.

15. The prosecution filed a replying affidavit sworn by the investigating officer, setting out what they consider to be the compelling reasons why the court should not release the accused on bail. PC Bolo identifies among other grounds for denying the accused bail, the fact that it took them three months to trace the accused and, therefore, if released, she may abscond. The prosecution is not contending that the accused was hiding on learning that the police were looking for her. What is clear is that they traced her to her house in Kiambu County and arrested her.

16. They also argue that the accused's identity is not clear and for that reason she should not be released on bail. Once again, the prosecution is not suggesting that the accused is not a Kenyan whose abode is unknown. In fact PC Bolo deposes in his affidavit at paragraph 6 as follows:

“That my interaction on phone with the mother of the applicant (accused) after her arrest could not give a history of birth, education or any traceable history of the applicant.”

17. The deponent seems suggest that he contacted the accused's mother who is known although she could not tell of the birth, education or any other information. It is not clear from this deposition whether the birth was in relation to the accused or any other person. The deponent is not categorical that the accused is an unknown person given that he was able to talk to her mother. He does not give further details regarding her home or her place of residence. As a matter of fact, the investigating officer does not depose that the accused is not a Kenyan citizen. Even if she was not, she is still entitled to be released on bail since the Constitution does not reserve the right to bail to citizens only.

18. The prosecution further seems to advance the argument that the accused may not have been registered which should disentitle her to the right to bail. The right to bail is not limited to persons who have been registered only. There are many unregistered Kenyans who are often arrested and charged with offences; are entitled to bail and are so released. If the prosecution's argument was to be sustained as a compelling reason, all accused persons not registered would not be entitled to be released on bail. It is not clear why the accused may have not been registered and since that is not a matter before this court, I will say no more.

19. Article 49(1) (h) provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released. In determining whether or not to release an accused on bail, the primary consideration should be whether the accused will attend court and will be available during trial. It is the duty of the prosecution therefore, to demonstrate to the satisfaction of the court that the accused will not attend court during trial because of one reason or another to enable the court consider whether that amounts to a compelling reason to deny him or her bail.

20. Even in the days of the old constitution, Porter, J was clear when he stated in Watoro v Republic [1991] KLR 220, at P.283:

“... I think I have made it clear over a number of rulings in bail application that I take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for his trial”(emphasis)

21. The prosecution has argued that the accused may not be available during trial. It has the burden to adduce evidence to support their claim that the accused will not attend court during trial. It is not enough for the prosecution to merely state that the accused will not attend court or is a flight risk without empirical evidence. That, in my view, will not satisfy the constitutional requirement of a compelling reason.

22. In our criminal justice system there is a presumption of innocence and, therefore, an accused is presumed innocent and may not be denied bail without compelling reasons. This is so because an accused has the right to liberty which should not be taken for granted and unreasonably denied without justification simply because he/she is charged with a criminal offence such as the one the accused faces. As the Court observed in Republic v Danson Mgunya & another [2010] eKLR, liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law and it should not be taken for granted.

23. Where it is shown that it will not be in the best interest of the accused to be released on bail, the court may consider not releasing him/her on bail if this may endanger his or her own life or safety. The prosecution has not argued that the accused will interfere with investigations or witnesses, which on its own may not amount to compelling reasons since the court can issue directions to mitigate such an eventuality instead of denying an accused his or her constitutional right to bail. Happily, that is not the prosecution's contention in this application.

24. I have carefully considered the application and the circumstances of this case. I have also taken into account the fact that the accused faces a serious charge which on conviction carries a maximum sentence. The bottom line however is that bail is a constitutional right and should be denied only in exceptional cases which the constitution has labeled "**compelling reasons.**"

25. Having considered all the circumstances of the case including the arguments for and against, I am not satisfied that the prosecution has established compelling reasons to deny the accused bail. Consequently the application dated 25th June 2019 is allowed as follows:

1. ***The accused is hereby released on bond of Kenya shilling One million with one surety of a similar sum.***
2. ***While on bond, the accused shall attend court at all times when required without fail.***

Dated Signed and Delivered at Kajiado this 24th Day of September 2019

E C MWITA

JUDGE