REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER CASE NO. 3 OF 2016

REPUBLIC.....PROSECUTOR

V E R S U S

GRACE NJERI GICHIRA.....1ST APPELLANT

DENNIS IRUNGU WAWERU.....2ND APPELLANT

ROBERT NYAGA JOSEPH.....3RD APPELLANT

RULING

The application pending before court is dated 1st December 2017 seeking bail pending trial for the 1st accused person. The 1st accused was charged with murder contrary to section 203 as read with Section 204 of the Penal Code.

The 1st accused states that:

She was arrested and presented before court on 26th March 2017 where she pleaded not guilty to the offence. The deceased was her husband and the father of her three children two of whom are minors. The minors live with her first born daughter Caroline Wawira hence they require care and attention since they are still in school. That she shall adhere to the bond terms and shall always attend court wherever required.

The prosecution filed a response statignthat she is likely to be harmed by the neighbours and family members who wanted to lynch her after the deceased met his death. That if she is released she may interfere with the witnesses especially her first born daughter Caroline Wawira and Cyrus Gichobi Gichira who is a brother to the accused. That she can renew her bond application once the witnesses related to the accused have testified.

The court called for a prebail report from the probation officer.

Pre-bail report is available in the file.

Bail pending Trial.

Republic –v- Stephen Robi Marwa & Another (2014)eKLR

The court in dismissing the application for bail pending trial in a murder case stated;

In the case of *Republic –v- David Nyasoro Nyamongo – Criminal Case No. 90 of 2010* (ureported) in the High court sitting at Kisii, Makhandia –I (as he then was) stated:

> **"At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the Constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail."**

The issue in this application then is whether there are compelling reasons why the applicants should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons.

In the case of ***Republic –v- Danson Ngunya & Another (2010)eKLR*** , the court adopting the reasoning in the ***M. Lunguzi –v- Republic CMSCA Appeal No. 4 of 1995*** the learned Judge stated:

> **"……. In my Judgment the practice should rather 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 be deprived of his right to be released from detention. The burden should be on the State and not on the accused. He who alleges must prove. That is what we have always upheld in our court. 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……"**

The crucial factor for consideration in this case is that one of the witnesses includes her child and whether there is likelihood of her interference with their testimony.

In **State –v- Lydia Mwango Moseti & 2 Others (2013) eKLR**

The court in dealing with a similar case stated:

> **In considering the allegation of likely interference with witnesses some of who are said to be children of the 1st accused aged 8, 3 and 1 ½ years, there appears to be some citation as the 1st accused states that her children are aged 18, 16, 12 and 6 years. However, the danger of interference which may exist with regard to an accused over her minor children witnesses must be weighed against the constitutional right to bail to determine whether there are less restrictive ways of preventing such interference without infringing on accused's right to bail. I consider that, if there existence real danger of such interference, the remedy maybe in taking witness protection measures including seeking temporary custody, care and control of the children from a Children Court rather than refusing the accused's right to bail.**

A mother has great influence on her children and therefore the prosecution's concern of interference is understandable. However, due to the fact that an accused is deemed innocent until proven guilty it will be unfair to deny her bond and the possible option will be to review the bond terms after her daughter has testified. The prosecution should schedule an early hearing date and prioritize the testimony of the daughter whereupon the application for bond can be revisited. For now I find that there is a compelling reason not to consider bail at this stage. I disallow the application.

Dated and delivered at Kerugoya this 1st day of August 2018.

L. W. GITARI

JUDGE