



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 42 OF 2017

(FORMERLY ELDORET HCCR NO. 52 OF 2016)

REPUBLICPROSECUTOR

VERSUS

CHEMUKEY LONGOR KITKITILIT.....ACCUSED

RULING ON BAIL

1. By an Affidavit sworn by the Investigating Officer P.C Ben Chesangon 18th April 2017, the Director of Public Prosecution (DPP) opposes the release on bail of the accused herein on two primary grounds: (1) that she is a flight risk and (2) that she is likely to interfere with prosecution witnesses if released. Counsel for the DPP points out that the accused has no fixed abode in view of the security operation by the joint security forces of the Kenya Defence Forces and the Police which has resulted in the movement of residents of the areas of East Pokot gazetted in the Kenya Gazette as Disturbed and Dangerous Areas by Gazette Notice No.. 20 of 28/2/2017.

2. At paragraph 6 of the Affidavit of the Investigating Officer it is disclosed as follows:-

“6. That since the month of February 2015 efforts were being made to trace and have the accused arrested. It was not until the month of May, 2016 she was traced. Due to the terror of East Pokot and the nomadic nature of the Pokot people there is no fixed place of abode for the accused.”

3. As regards the likelihood of interference with witnesses, it is urged that the accused will likely interfere with the prosecution witnesses who are the accused’s biological children. The prosecution therefore urges that the accused be held in custody until the key witnesses including the two children have testified and until the existing situation in the area which she said was not permanent, changes.

4. In response, Counsel for the accused objected that the allegation that the accused was a flight risk was not substantiated by police Occurrence Book (OB) indicating when accused was arrested, and the two minors who were said to be prosecution witnesses were in the custody of relatives. As regards the gazettelement of the accused area residents of residence as Disturbed and Dangerous area, counsel pointed out that the GazetteNotice was valid for only 30 days of 28/2/2017 subject to revised and extension, which had not been shown to have been done. It was submitted that, in any event, it is for the sureties to avail the accused and not for police to trace an accusedwho jumps bail.

5. Upon examination by the Court for purposes of establishing her circumstances, the accused urged the Court to release her on bond to enable her take care of her children. She said that the deceased was her husband and she had nine children(none of whom is married) and she was a resident of Amaya area of

East Pokot.

6. The right to liberty and to bail respectively under Article 29 and 49 of the Constitution are so fundamental and should not be lightly curtailed by an unsubstantiated allegation of flight risk. The Investigating Officer ought to have detailed the police efforts of arrest of the accused and any frustrations by reason of the accused's going into hiding to escape arrest.

7. To deny an accused bail because of alleged want of fixed abode because of the terrain of the area of his residence and nomadic nature of his community would be an infringement of his constitutional right to equal protection and benefit of the law under Article 27 of the Constitution making bail only available to non-nomadic communities living in friendly terrains.

8. Although the likely interference with witnesses is a lawful consideration from grant of refusal of bail under section 123A of the Criminal Procedure Code, as circumstances surrounding the case, the present case where the two minor children live with relatives ameliorates the situation.

9. Moreover, the respective ages of the children are not disclosed and the Court is unable to gauge the true likelihood of the accused's interference by reason of her maternal or filial control and influence, which is more probable in case of children of tender years than over older children.

10. The security situation in the area, whether extended by gazette or not, may only make it difficult but not impossible to trace an accused person who jumps bail and a warrant for her arrest is granted. Difficulty in re-arrest rather than impossibility does not in the circumstances of the case warrant a curtailment of the right to bail.

11. As observed by counsel for the applicants, the primary duty to grant the accused is upon the sureties and the police will only be called upon to trace the accused when a warrant and arrest is issued by the court. A suitable condition as to sureties should be a general safeguard.

12. I have considered that the accused is a mother of nine children who require her care and even though two of them are in the care of relatives, there are still seven who will benefit from the presence of their mother at home. I think that best interest of the children call for the release on bail of the accused. The DPP claims about the accused's attendance to trial will be addressed by bond terms suitable in the circumstances to ensure the primary object of bail that the accused attends his trial. In accordance with Article 20(3) (b) of the Constitution, the court is enjoined to apply the Bill of Rights in a manner that ensures the enjoyment of rights and fundamental freedoms.

13. Accordingly, for the reasons set out above, the Court grants the accused bail upon terms as follows:-

1. The accused will execute a bond in the sum of Ksh.300,000/-
2. The accused shall furnish security by way of three (3) sureties in sum of Ksh.300,000 each.
3. The accused will visit the Deputy Registrar every 30 days pending hearing and determination of her trial.

14. Mention on 11th July 2017.

DATED AND DELIVERED THIS 27TH DAY OF JUNE 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr Kemboi for Accused

Ms. Macharia for the DPP.