



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISC. CRIMINAL APPLICATION NO. 67 OF 2017

K K K APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. By a Notice of Motion dated 18th July 2017, the applicant who faces a charge of incest before the Eldama Ravine Principal Magistrate's Court in Criminal case No. 115 Of 2017 repeats an application for bail pending trial before the Magistrate's Court and urges his right to bail and challenges the denial of bail by the trial court as an affront to his right to be presumption of innocence.

2. The DPP opposes the application for bail. By an affidavit sworn by the Chief Children Officer, Koibatek Sub-County sworn on 16th August 2017 it is deponed that the complainant had narrated to the Chief Children Officer how the accused had been defiling her resulting in her pregnancy and that the accused had attempted to prevail upon her to withdraw the complaint and abort her pregnancy, prompting the Children Officer to seek an order for her care and protection in Eldama Ravine Children's Case No. 6 of 2017 upon whose order the complainant was placed with Beehive Rescue Home, Nakuru.

Determination

3. I respectfully agree with the case-law authority cited by the counsel for the Applicant ***Albanus Nyayo Kimeu v. Republic***, Machakos HC Cr. Case No. 10 of 2015, (2015) eKLR, (per Nyamweya, J.) that an accused person is, consistently with the presumption of innocence, entitled to be released on bail pending trial, unless there are compelling reasons not to do so, and that the Prosecution must show such compelling reasons.

4. The Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 identify the likelihood of the accused interfering with witnesses or evidence as a compelling reason for denial of bail as follows:

"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.”

5. From the Court record, the trial court has set the hearing of the case on the 7th September 2017. The trial court had initially granted the accused bail upon bond terms of Ksh.100,000/- with one surety of similar amount. The bail was suspended by the trial court on 13th March 2017 when the Court on application by the prosecution for suspension of bail ruled as follows:

“As the victim is a minor in need of protection and care and there being indications of likelihood of interference, the accused shall remain in custody till the minor comes to testify upon which the accused’s bond terms shall be reinstated.”

6. In considering the question of bail in this matter, the court must balance the right of the accused pursuant to presumption of innocence to be released on bail pending his trial against the public interest in prevention of crime and access to justice by the victims of crime by successful prosecution of offences, which would no doubt be adversely affected by interference with witnesses and evidence relied on by the Prosecution to prove its case. The key is in adopting a path that ensures prosecution of the offences in a manner that is least restrictive of enjoyment of the accused’s right to bail. Where an expedited hearing is possible, the same should be ordered; where the witness protection measures guarantees no interference of the complainant or other witnesses by the accused, he may be released on bail as with where the evidence may be secured; and where the witnesses are prone to interference by the accused or other persons for his benefit, the testimony of such witnesses should be taken before the accused is released on bail.

7. The Court considers that the likelihood of interference of complainant by her accused Uncle is real in view of the loyalty of a child to a person *in loco parentis* status, notwithstanding the fact that the complainant resides at a Rescue Centre as no evidence indicates that the accused cannot reach her there. Nor could the fact that the complainant has now given birth pre-empt the possibility of interference with testimony and evidence by the Prosecution witnesses.

8. The Court notes that early trial of the case is possible as hearing is set only 14 days from today, for the **7th September 2017**, and the complainant’s evidence may be taken at the first hearing of the trial or on any adjourned date shortly thereafter. The trial Court may reconsider the accused’s bail thereafter having regard to the circumstances of the case in accordance with the guidelines set out above. Indeed, by its own orders of 27th February 2017 and 13th March 2017, the trial court only suspended the bail and bond terms previously granted and which will be reinstated upon the complainant testifying in Court.

ORDERS

9. Accordingly, for the reasons set out above, the applicant’s application for bail pending trial by Notice of Motion dated 18th July 2017 is declined. The Court directs that the hearing of this case be had on priority basis as scheduled on the 7th September 2017 or shortly thereafter as the testimony of the complainant may be taken to permit the reinstatement of the bail previously granted to the accused by the

trial court.

10. There shall be no order as to costs.

DATED AND DELIVERED THIS 25TH DAY OF AUGUST 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ngamate for the Applicant.

Ms. Macharia Ass. Deputy Director of Public Prosecution for the Respondent.