REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 39 OF 2015

WINNIE MUMBE KISIA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

The Applicant was charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on 8th April 2015 at Kassoni sub-location, Mbooni East sub county within Makueni County, she murdered June Chebuoge alias Ndinda Kisia alias Kavake. The Applicant pleaded not guilty to the offence. After taking the plea, the Applicant filed a Notice of Motion dated 30th July 2015 seeking to be granted bail pending the hearing and determination of this criminal case.

The Applicant urged her grounds for the application in the said Notice of Motion which are that there are no compelling reasons not to release her on bond/bail, and that she has undertaken to abide by all conditions that may be imposed by this court, and in particular shall attend court whenever so required. The Applicant in her supporting affidavit sworn on 30th July 2015 deponed that since her arrest she had cooperated with the investigations and has not done anything to hinder the investigations. Further, that she pleaded not guilty to the charges and has not done anything to warrant her being denied bond/bail.

The State opposed the Applicant's application in a replying affidavit sworn by Cpl. Lincoln Wafula on 23rd September 2015. The deponent is the Investigating Officer in this criminal case, and he stated that most of the crucial witnesses are family friends and people who used to live with the Applicant prior to commission of the offence, namely Yusuf Machio Idris, Dennis Mutuku and Valedine Chepkorir Kasalu, and being people well known to the Applicant, there is likelihood that she may interfere with them if released on bond. Further, that in the event of conviction being entered in this matter, the accused person will face the death penalty and this on its own is an incentive for her to abscond.

The State contended that though the offence of murder is now bailable, the grant of bail is not absolute but a matter of discretion on the part of the Court, and that considering the nature and seriousness of the offence and the severity of the sentence provided for in law, this Court should find that there are compelling reasons as to why the Applicant should not be released on bail.

The counsel for the Applicant, Mr. Makundi, made submissions in court at the hearing of the application on 29th September 2015 as did Mr. Machogu, the counsel for the State. The counsel for the Applicant

reiterated the grounds for the application and submitted that there is no compelling reason to deny the Applicant bond. He further submitted that it is now settled law as laid down in **Republic –vs- Danson Ngunya & Another, [2010] e KLR**, that the most important consideration in the decision whether or not to grant bond is whether or not the accused person will attend trial. Further, that the likelihood of the Applicant interfering with witnesses had not been demonstrated by the State, and that there was no record that the Applicant would do so or abscond.

The State submitted that the right to bail under Article 49 of the Constitution is qualified by compelling reasons, and that interference with witnesses is one of the compelling reasons as held in **Republic –vs- Danson Ngunya & Another, [2010] e KLR**. The counsel for the State urged that the application for bail be dismissed and can be renewed after the prosecution witnesses have testified.

I have considered the pleadings and submissions by the Applicant and State. Article 49 (1) (h) of the Constitution permits the release of any arrested person including persons charged with a capital offence on bail/bond pending trial, unless there are compelling reasons not to do so. In the case of **Nganga vs Republic (1985) KLR 451,** the learned judge (Chesoni J. -as he then was) stated that in exercising its discretion to grant bail to an accused person under the Constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors as follows:-

> **"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 principal, 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 it shown by the prosecution that there are substantial grounds for believing that:**
>
> **a. The accused will fail to turn up at his trial or to surrender to custody; or**
>
> **b. The accused may commit further offences; or**
>
> **c. He will obstruct the courts of justice**
>
> **…The primary purpose for bail is to secure the accused person's attendance at court to answer the charge at the specified time. "**

The issue in this application then is whether there are compelling reasons why the Applicant 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 **Republic – vs- Danson Ngunya & Another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

The State in this regard has named three (3) witnesses in its replying affidavit who it states are family friends or neighbors of the Applicant, and alleges that they may be interfered with by the Applicant. The State was directed to produce the statements of the said witnesses for perusal by this Court, and after perusal of the same and balancing and considering all the facts and circumstances of this application, I find that it is in the interests of justice that the said witnesses do first testify to allay the State's fears. The Applicant shall thereafter be at liberty to renew her application for bail. The said 3 (three) witnesses namely Yusuf Machio Idris, Dennis Mutuku and Valedine Chepkorir Kasalu shall be called as the first set of prosecution witnesses at the next hearing date.

The Applicant's Notice of Motion dated 30th July 2015 is accordingly denied for the foregoing reasons, however the Applicant is at liberty to make an oral application after the said witnesses have given their testimony. It is so ordered.

DATED AT MACHAKOS THIS 22ND DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE