



REPUBLIC OF KENYA

High Court at Garissa

Criminal Case 28 of 2012

SHELLY KAVILA NZOMO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant seeks bail pending trial. She is facing murder charges before this court. The charge reads that on 28th August 2012 at Nyaani Location in Mwingi East District of Kitui County she murdered Kondo Kisunzui. The application is anchored on Article 49 (1) (h) of the Constitution of Kenya and all other enabling provisions of the law.
2. Learned counsel for the applicant submitted that bail for murder suspects is now available under the constitution unless there are compelling reasons; that the defence does not dispute the circumstances leading to the death of the deceased and have no problem with the prosecution witnesses and that the defence does not deny the two key witnesses were at the scene of the crime. The application was opposed by the learned state counsel who submitted that the supporting affidavit introduces evidence the defence proposes to use and should be expunged from the record; that the learned counsel for the applicant is deposing matters that are not within his personal knowledge; that there is likelihood that the applicant will interfere with two key prosecution witnesses who are related to her as daughter and step daughter.
3. The Constitution of Kenya 2010 guarantees accused persons the right to bail pending trial. However this right is not absolute. It is discretionary and can be denied where there exists compelling reasons (**see Article 49 (1) (h) of the Constitution of Kenya 2010**). Various considerations have been used by our courts in granting or refusing to grant bail pending trial. These considerations include the following:
 - i. Whether an accused person will turn up for the hearing of her/his case until the matter is concluded.
 - ii. The nature of the charges facing the accused.
 - iii. The strength of the evidence supporting the charge.
 - iv. The gravity of punishment in the event of conviction.
 - v. Any previous criminal records of the accused.
 - vi. Presumption of innocence of the accused until she/he is proved guilty.

vii. Safety of the accused person upon release.

viii. The likelihood that the accused will interfere with the witnesses.

4. Among these considerations, our courts have in majority of cases considered the availability of the accused for trial if released on bail to be paramount (see **Watoro v Republic (1991) KLR 220 at 283**). The burden of proving there are compelling reasons to warrant denial of bail rests on the prosecution.

5. After careful reading of the application and the supporting affidavit, I agree with learned counsel for the prosecution that it contains material that are better left for the main trial. I will limit myself to any material that supports this application. What learned counsel for the applicant ought to have done is to present material that goes to support the application for bail without introducing evidence at this stage.

6. I have read the replying affidavit and submissions in opposition to the application. It appears that the prosecution is apprehensive that the applicant and her husband will interfere or influence the witnesses who are said to be daughter, step-daughter and co-wife to the applicant. If it is true that the applicant's husband is supporting her, and I see no denial to this from the prosecution, then I see no reason why the husband cannot influence those witnesses even when the applicant is in custody. From my reading of the replying affidavit I discern fear by the prosecution that the applicant and her husband will interfere with witnesses especially the two young girls. Are these fears founded? They may be but again it comes out from the submissions of the applicant that the defence is not disputing that the two girls were present during the events that led to the death of the deceased and the defence seems to have no problem with that.

7. To my mind these fears are unfounded. The prosecution is in possession of statements from all the witnesses they would wish to call and they are at liberty to lead evidence as per the statements. The law also allows them to cross examine their own witnesses where those witnesses testify contrary to the statements in prosecution custody. There is no evidence that investigations are not complete to warrant opposing the application and before any court allows bail application there are conditions set and if there is evidence that any of those conditions have been breached then the bail/bond can be cancelled.

8. After due consideration of the application, grounds in support and against, the applicable law, submissions of both counsel it is my view that the prosecution has not tabled compelling reasons to make this court deny the applicant bail pending the hearing of this case. I therefore allow the application for bail and order the applicant released on the following terms:

i. She will sign a bond of two million Kenya Shillings (Kshs 2,000,000) with two sureties of similar amount each.

ii. In the alternative she will deposit in court a cash bail of one million Kenya shillings (Kshs 1,000,000).

iii. This court further cautions the applicant that this bail/bond will stand cancelled if there is evidence that she is interfering or influencing the prosecution witnesses.

I make orders accordingly.

Stella N. Mutuku, Judge

Signed, dated and delivered this 8th day of November 2012.