



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL CASE NO. 12 OF 2020**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**NAOMI WANJIKU MURAGE.....ACCUSED/APPLICANT**

**RULING**

**A. Introduction**

1. The accused herein is facing two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the 1<sup>st</sup> count are that on the night of 9<sup>th</sup>/10<sup>th</sup> April, 2020 at Kirimaini village, Mukure Location in Kirinyaga West Sub-County within Kirinyaga County murdered Charles Murimi Ngige. The particulars of the 2<sup>nd</sup> count are that on the night of 9<sup>th</sup>/10<sup>th</sup> April, 2020 at Kirimaini village, Mukure Location in Kirinyaga West Sub-County within Kirinyaga County murdered Valarie Njeri Murimi.

2. The accused was arraigned before this court and wherein she pleaded not guilty to the two counts and a plea of not guilty entered. Ms. Ndung'u the defense counsel proceeded to make an oral application for bail/ bond (pending trial) and which application was opposed by Ms. Mati for the state and wherein she prayed for leave to file an affidavit of compelling reasons. The defense was granted a corresponding leave to file their reply to the said affidavit.

3. In compliance with the above directions, the state filed the affidavit of compelling reasons sworn by Sgt. Biffent Otieno the Investigating Officer and wherein he proffered two reasons for denial of bail/bond. He deposed that at the time of arrest of the accused herein, she was almost being lynched by irritated members of the public but she was saved by the police and taken to Baricho police station and thus her life will be in danger (if released on bail). Further that the main witness Felix Njine Murimi who is the son of the accused stays at home and as such the accused might interfere with the said witness.

4. The accused opposed the above compelling reasons in her replying affidavit and wherein she deposed that she has a medical condition and thus in need of constant medical care and treatment, that she has supportive relatives ready to house her during the trial and are willing and ready to stand surety for her release and that prosecution has not provided information as to the age of the witness, mental dependence of the witness to the accused and the influence that the accused may have on the witness. She relied on the case of **Republic –vs- Gerald Mutuku Nyalita & another (2015) eKLR**.

5. The parties did not seek directions as to filing of submissions in support of their rival positions. As such, I will proceed to determine the application for bail/bond herein based on the rival affidavits on record.

6. I have considered the application herein. Article 49(1)(h) of the Constitution provides that an arrested person has a right to *be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. This therefore means that the right to bail/ bond pending trial is a constitutional right and which can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person.*

7. In **Republic v Francis Kimathi [2017] eKLR**, it was held: -

*“... There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Except, however, compelling reason should be a reason or reasons which is rousing, strong, interests attention, and brings conviction upon the court that the accused person should be denied bail. Flimsy reasons will not therefore do. Therefore, the standard is high for it draws from the constitutional philosophy that any restriction of rights and freedoms of persons must be sufficiently justified given the robust Bill of rights enshrined in the Constitution ...”.*

8. The Court of Appeal in Michael Juma Oyamo & Another v Republic [2019] eKLR adopted the definition of the phrase “compelling reasons” in the case of R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 where the Learned Judge held as thus;-

**“..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.”**

9. The Court went further to lay down some of the compelling reasons to include the likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; **interfere with witnesses or evidence**; endanger national security or public safety; and **where it is necessary for the protection of the accused.**

10. The Bail and Bond Policy Guidelines under Section 4.9 further lists the factors to be considered in determining what compelling reasons are and includes; -

- a) *The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty*
- b) *The strength of the prosecution case*
- c) *Character and antecedents of the accused person*
- d) *The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond*
- e) *Likelihood of interfering with witnesses*
- f) *The need to protect the victim or victims of the crime from the accused person*
- g) *The relationship between the accused person and potential witnesses*
- h) *Child offenders*
- i) *The accused person is a flight risk*
- j) *Whether accused person is gainfully employed*
- k) *Public order, peace or security.*
- l) *Protection of the accused person.*

11. It is trite law that the prosecution bears the burden of proving to the required standard that in any case an accused person ought not to be admitted to bail pending hearing of a criminal case. The question therefore is whether the prosecution presented compelling reasons to warrant denial of bail/bond to the accused.

12. As I have already stated, the prosecution proffered the reasons that the accused’s life will be endangered as she almost got lynched by the public save for the police who rescued her. Though accused deposed that she has relatives who are ready to take her and stand surety for her, she did not deny the fact that the public wanted to lynch her after the offence was committed.

13. The other compelling reason proffered by the state was that the main witness is the son of the accused and stays at home and that he was almost killed during the incident and thus if the accused is released, she might interfere with the said witness. In Republic v Antony Karanja Njeru [2016] eKLR where the Learned Judge held that (paragraph 9):-

**“.....It has long been recognized that an accused who interferes with witnesses does not qualify to be granted bail. In Panju v R (1973) E.A. 282 the High Court held that where an allegation of interference with witnesses is used as a ground of opposing release on bail, the prosecution must produce evidence. This was the practice under the independence Constitution of 1963. The requirement to produce evidence to support an allegation of interference with witnesses is in principle good law. The reason being that a decision of a court must be based on evidence.”**

14. In the persuasive authority of Republic –vs- Gerald Mutuku Nyalita & Another (supra), E.M.Murithi J held that;-

**“[5] In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of the Constitution of Kenya, the Prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant.**

15. The court has perused the committal bundle and as a matter of fact there exist the said statement of Felix Njine Murimi who is the son of the accused and the deceased. The witness being a son to the accused is a close family member which creates an environment of control and influence on him which can likely interfere with the ability of the witness to give evidence before a court of law in a free and truthful manner thereby affecting either the credibility of the witness or his testimony or his very ability to attend court. The nature of his testimony is also critical in this case.

16. Considering all the above, it is my considered view that the grounds upon which the state proffered as compelling reasons are indeed compelling as to persuade the court into denying the accused person bail pending trial. As such the application for bail/bond is hereby dismissed.

17. It is so ordered.

**Delivered, dated and signed at Embu this 11<sup>th</sup> day of May, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the Republic