



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCR NO. E006 OF 2021**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SUSAN GAKII IRERI.....ACCUSED**

**R U L I N G**

1. The Applicant herein has been charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code (Cap 63 of the Laws of Kenya).

2. Before this court is the application dated 26/02/2021 and filed on 01/03/2021. It is brought under the provisions of **Articles 49(1)(h)** and **50(2)** of the **Constitution of Kenya 2020** and **Order 51** of the **Civil Procedure Rules** and seeks for orders that the Applicant be released on reasonable bail/bond pending her trial.

3. The application is premised on the following grounds:

*1. The applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya.*

*2. The applicant has been in hospital and partially in custody since she was arrested because of the subject offence.*

*3. The applicant is a Kenyan citizen, a resident of MERU COUNTY, and has no intentions whatsoever of leaving the jurisdiction of this Honourable court as he is the sole breadwinner of her family.*

*4. The applicant has been diagnosed with a stab on the lower abdomen and is in need of further medical treatment.*

*5. The applicant's doctor has recommended medical check up and or revisit.*

*6. The applicant has a Constitutional right to be released on bail/bond.*

*7. The applicant has the right to be presumed innocent until the proven guilty.*

*8. The applicant shall abide by all the terms and conditions that the court may set.*

*9. The applicant has a fixed abode within the jurisdiction of this court and he is not a flight risk*

*10. The applicant shall attend court whenever she is required to do so.*

*11. The applicant is fully aware of the likely consequences should he abscond.*

*12. The investigations in this matter have been dully completed.*

It is supported by the affidavit of Susan Gakii Ireri sworn on 26/02/2021 where she has reiterated the above grounds.

The State opposed the application and filed a replying affidavit sworn by No.572 P.C Isaiah Wanyama on 2/3/2021. He deposes that he is the investigating officer in this case and is opposed the release of the accused on bail/bond at this stage as she is likely to interfere with two witnesses who are the key prosecution witnesses. He further contends that during the investigations he came to realize that the accused attempted to commit suicide by stabling herself on the chest with a knife but she was rescued and rushed to hospital where she remained for

some days while undergoing treatment. He therefore avers that the security of the accused cannot be guaranteed if she is released on bail. The P3 form for the accused is annexed. He has urged the court to order that she remains in custody and an order be made for her to be escorted to hospital for further treatment when the need arises. This court ordered that a pre-bail report be filed by probation officer and Margaret Mugambi Probation Officer filed a report on 2/3/2021.

This report recommends that bail be considered at a later date to allow the key witnesses in the matter to give evidence.

The State relied on two compelling reasons namely:-

**1) Interference with key prosecution witnesses by the accused.**

**2) That accused had attempted to commit suicide.**

M/s Maari, Prosecution Counsels urges the court to find that the social inquiry report filed by the probation officer has confirmed the averments by the investigating officer and since the witnesses are only a phone call away bail should be considered later after the witnesses have testified. She further urges the court to find that the accused may carry out the suicide which she had attempted and failed. That there is need to secure her life so that she can be prosecuted. The State further urges the court to find that the social inquiry report has confirmed that she is a flight risk.

4. When the matter came up for hearing, counsel for the Accused submitted that the report by the probation officer should not form a basis for denying the accused bail/bond. He submitted that the allegations contained therein are mere speculation as no evidence had been put forth to buttress the same. He averred that the accused plans to relocate to Nairobi to live with her aunty and will therefore not be living in the same plot with the witnesses.

The State relied on two compelling reasons namely:-

#### Analysis

5. **Article 50(2) (a)** of the **Constitution** provides that:

**“Every Accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved”.**

6. Pursuant to the presumption of innocence until proven guilty, an accused person has a right to be released on bail pending trial. This right is anchored on **Article 49(i)(h)** of the **Constitution** which provides that:-

**“An arrested person has the 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.”**

7. The Judiciary’s **Bail and Bond Policy Guidelines, March 2015 (the “Policy”)** sets out the circumstances which a Judge may consider when determining whether or not to grant bail. **Clause 4.26 of the Policy provides 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.**

8. It is trite that the grant or denial of bond is at the discretion of the court. The court, in exercising such discretion, is guided by law as contained in **Article 49(i)(h) of the Constitution** as well as the Judiciary Bail and Bond Policy **Guidelines (2015)**. In the persuasive case of **Republic v Francis Kimathi [2017] Eklr**, the court emphasized that right to reasonable bail/bond terms can only be denied if there are

compelling reasons. The court in that case held that: -

**“... 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 ...”.**

The right to bail is therefore not absolute as it may be denied where compelling reasons not to grant bail exists.

**9.** The evidential burden is on the state to satisfy to the court that there exists compelling reasons to deny the accused the right to bail. In this case, a pre-bail report was filed in respect to the accused herein. While a pre-bail report is not binding on the court, it assists it in informing the court on the social economic circumstances of the Accused while setting bail bond terms.

**10.** The Bail Information Report which has been filed in this court indicates that the accused lives in the same plot with some of her friends who are key witnesses in this case. On the one hand, the family of the victim feels that the safety of those key witnesses will be compromised if the accused is released on bond. On the other hand, the Applicant submitted that she plans to relocate to Nairobi to live with her aunty. In addition, the report states that accused's father is willing to secure bond for her using his title deed.

**11.** It is therefore the duty of this court to balance the right of the accused to be released on bond pending trial against the rights of victims to access justice. The right of the victims to access justice will certainly be gravely affected if the prosecution witnesses are interfered with. In my view, the likelihood of interference of witnesses is not farfetched. The pre-bail report indicates that there are two key witnesses in the matter who are close friends with the accused and who live in the same plot as the accused. In addition, considering the nature and gravity of the offence in question, I opine that the temptation to jump bail will be heightened if the accused moves to Nairobi as she intends to. In the circumstances, I opine that the prosecution has provided compelling reasons to justify the denial of bail at this stage.

I find that the right to bail pending trial is not an absolute right and may be denied if the court is satisfied that there are compelling reasons not to grant bail. In this case the prosecution has established compelling reasons. I therefore decline the application for bail/bond. It may be renewed after the key witnesses have testified.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF OCTOBER 2021.**

**L.W. GITARI**

**JUDGE**