



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 84 OF 2019

REPUBLIC.....DPP

VERSUS

MARGARET KEMUNTO NYAMOKAMI.....ACCUSED

BRAVIAH NYAMWAYA ITEBA ALIAS MOKAYA.....ACCUSED

RULING

On 12.2.2020, the 2 accused's made an oral application for bail on reasonable terms. Mr. Otieno for accused 1 submitted that there are no compelling reasons. He denied that the 1st accused is a flight risk. It was further submitted that the accused has a fixed place of abode with 2 children and a husband. And for accused 2, Mr. Ondieki added that Article 49(1) (h) guarantees an accused person the right to bail. It was denied that there is a likelihood of the accused absconding. He is a person of a known fixed abode with a family and children working with a reputable transport company. It was further denied that accused 2 was arrested while hiding not that his life would be in danger should he be released on bond.

In objecting to released of the 2 accused's on bond, Ms. Kimani for the state submitted that under Article 49(1)(h) the right to bail is not absolute and that same may be denied where there are compelling reasons. It was submitted that both accused are facing the serious charge of murder, which could attract death sentence in case of conviction, which could be an incentive for absconding. This, in view of the fact that there are other suspects still at large.

Secondly, it was submitted that accused's have no known fixed abodes, with accused 1 failing to take the investigators to her house, while accused 2 was arrested at a lodging with police having looked for him for 5 days. The 2 therefore, it was maintained, are flight risks.

It was also submitted that since the accused are known to the witnesses, they are likely to interfere with the witnesses. Also, that there are still tensions in the area and the lives of accused shall be in danger should they be released on bond.

I have considered the submitted as above by the prosecution side and the defences. As agreed by both sides, Article 49 49(1)(h) guarantees an accused person the right to bail pending his trial. However, the same Article limits the said right to the extent that where there are compelling reasons then the right may be denied. The prosecution has given a number of factors as constituting compelling reasons as to make this court deny the accused the right to bail.

First, it was submitted that accused's face a serious offence of murder which carries a possible death sentence in case of conviction and so there is a real incentive for the accused to abscond. There is no doubt that the accused are facing a serious offence of a capital nature. However, this alone cannot stand as a compelling reason since the Article 49(1) (h) of the constitution gives all accused's the right to bail irrespective of the nature of the charges. This ground therefore, on its own, in the manner in which it was raised, cannot stand as a compelling reasons.

Secondly, it was submitted that accused's have no known fixed abodes. There is no doubt in my mind that this may be a compelling reason. It is my opinion however, that for this ground to stand, the prosecution must show that an attempt or attempts have been made to locate the place of abode in vain in our case, there is no evidence to show that the investigating officers even made attempts at locating the abodes of the 2 accused. It is in this event quite premature to conclude that the accused both have no fixed places of abodes.

The third ground raised by the prosecution is that the accused are well known to the witnesses and are therefore likely to interfere with the witnesses if released on bail. To me, this ground sounded rather like a fear that the prosecution side harbours. No evidence was tendered of any actual or perceived interference or an intention to do the same. This court, has severally held that mere allegations of a likelihood of interference without proof, remains mere allegations. The court held so in Republic Vs. Ali Hussein Ali HCCR 53/2019 (NAJ). And this court is also persuaded by the same finding in Republic Vs. Sarah Wairimu Kamotho, HCCR 60/2019. In absence of any such proof of actual or intention to interfere with the witnesses, I do not find this to be a compelling reason in this case.

Lastly, on the issue of security of the accused's if released on bail owing to existing tensions at the relevant scene, again this court was not shown any evidence of the same. I am therefore not convinced that the released of the accused's on bond would inevitably lead to any escalation of any insecurity, both to the accuseds and in the general areas around the scene of the alleged crime. To this extent therefore, this ground also fails.

This court notes that the purpose of release of an accused on bail is basically to ensure that accused is able to do his case while out of custody. I am guided on this ground by the decision of the court in Republic Vs. Godfrey Madegwa & 6 others (2016)eKLR that in deciding whether an accused person is to be released on bail, the court ought to consider the circumstances. I have considered the circumstances in our instant case as submitted on by both the defence and prosecution sides. I am not convinced that the prosecution has proved the existence of any compelling reason that could enable this court deny the 2 accused the enjoyment of the right to bail. I accordingly therefore dismiss the objections of the prosecution.

I order that each of the 2 accused may be released on a bond each of Ksh.2 million with 1 surety of a similar amount. The accused are ordered never to contact and or interfere with any of the prosecution witnesses, directly or indirectly in person or through their proxies. They are also ordered to attend court at all times as may be ordered by the court till the determination of this case. Orders accordingly.

Ogembo D. O.

Judge

20.2.2020

Court:

Ruling read out in open court in the presence of the 2 accused, Mr. Otieno for accused 1 and holding brief for Ondieki for accused 2 and Ms. Kimani for the state.

Ogembo D. O.

Judge

20.2.2020