



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NUMBER 21 OF 2019**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**NAOMI CHEPNG'ENO KIMETO.....ACCUSED**

**RULING (BAIL REVIEW)**

1. The accused person **NAOMI CHEPNG'ENO KIMETO** is charged with **Murder contrary to section 203 as read with section 204 of the Penal code**. The particulars are that on the 21<sup>st</sup> May 2019 at Kapkwen Village Rongai Sub County within Nakuru County in the Republic of Kenya she murdered SHAN CHEPKURUI.
2. She pleaded not guilty on the 8<sup>th</sup> April 2019 and was granted bond of Ksh 300,000/= with a surety of the same amount.
3. The matter was assigned to me on the 19<sup>th</sup> November 2019 when it was for hearing. By then she had not been able to raise the surety and her counsel Ms. Chemng'etich applied for review of bond terms. During the same time the prosecution indicated they did not have any witnesses. The defence indicated they were going to initiate a plea bargain agreement. The matter was fixed for hearing on 23<sup>rd</sup> and 24<sup>th</sup> March 2020.
4. The prosecution did not have any objections to the application.
5. I sought a pre-bail report on the accused to be filed on 19<sup>th</sup> December 2019. It was filed on 30<sup>th</sup> January 2020 after an unreasonable delay on the ground that the matter had not been noted by the Probation Officer.
6. The report as filed, had gaps which the court pointed out and directed that the same be returned to the Probation and After Care service department for an update. It bore no serial number, did not have the office stamp and was scanty of detail giving the impression that it was a desk report. The supplementary report was filed on 10<sup>th</sup> March 2020, reference number BI/HC/20/10. It still did not have the office stamp but the signature of a different Probation Officer, from the one who conducted the original inquiry.
7. Instead of being a supplementary report, it reproduced all the information in the previous report. The only substantive difference was the phone number of the Assistant Chief who still appears in the report by one name, the towns where the mother to accused worked before, the fact that the her mother was burdened with taking care of her children together with those of her unnamed brother and sister. It also indicated that there was an unnamed uncle in Elburgon who was willing to accommodate her pending the hearing and determination of the case due to the stigma in her home area. There was nothing in the report to show that the officer had followed that lead, what the uncle had said and whether it was a good prospect with regard to any proposed release of the accused on bond.
8. The report also introduced the fact that the accused's mother had an allotment letter for the family land but no title deed. The report also introduced a neighbour whom it was proposed was willing to stand surety for her with his Kenya Revenue Authority (KRA) pin which was attached together with his passport size photos.
9. The report also had two letters annexed to it both speaking to the character of the accused person, a letter from the Assistant Chief Kapkwen Sub location on the letter head of the Chief Visoi Location which indicated that the accused is '*a resident of Saina area, a lady who has been humble and of good character*'; the other letter was from the pastor Kapkures Africa Gospel Church confirming that the accused family was a member of the Church. One would have expected similar introductions about the proposed surety whose good standing in the society is the social capital that is expected to cover the requirement for surety. It is not clear whether that omission is inadvertent or deliberate. It is noteworthy that at the conclusion of the report the probation officer states that the accused's mother is ready and willing to stand surety for her, and prays for a personal bond.

10. Be that as it may, the report outlined the persons interviewed, the accused, her mother, her neighbours, her church pastor and the area assistant chief.

11. The probation officer was of the opinion that due to the family ties in the community the accused was not a flight risk. .

12. The report has a paragraph headed "VICTIM'S SENTIMENTS" which identifies the accused's *mother and neighbours* as 'the secondary victims' who expressed shock at the offence and were of the view the accused acted out of desperation. That it would be prudent if she was released so as to assist the mother with the raising of her own children.

13. The **Victim Protection Act 2014** defines a victim as "**victim**" *means any natural person who suffers injury, loss or damage as a consequence of an offence*"; It seeks to provide for the protection, rights and welfare of victims of offences and as far as it is concerned in relation to bail decision making;

14. **Section 329A of the Criminal Procedure Code**, though making reference to the Victim Impact statement that comes at the time of sentencing, gives an elaborate definition of Victim. In my view there is no contradiction in applying the same to the Victim to be interviewed at the time of bail because that is the same person we have to meet at the end of the trial. The provision states:

*"family victim", in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence;*

*"member of the primary victim's immediate family" means—*

*(a) the victim's spouse;*

*(b) the victim's de facto spouse, being a person who has cohabited with the victim for at least 2 years;*

*(c) a parent, guardian or step-parent of the victim;*

*(d) a child or step-child of the victim or some other child for whom the victim is the guardian; or*

*(e) a brother, sister, step-brother or step-sister of the victim;*

*"primary victim", in relation to an offence, means—*

*(a) a person against whom the offence was committed;*

*(b) a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence;*

*"victim" means a primary victim or a family victim"*

15. The **Victim Protection Act** imposes a duty on the courts at **Section 4(2) (b)** to "**ensure that every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken**" and at **Section 10 (b)** it gives victims of crime the right "**to have their safety and that of their family considered in determining the conditions of bail and release of the offender**".

16. It is important for the probation officer to bear these definitions in mind as they are the statutory guidelines as to who should be interviewed during the social inquiry for the pre-bail report so as to give a clear statement from the victims as required by the **Victim Protection Act**. This will ensure the probation officer, as in this case does not gloss over the part requiring the views of the victims.

17. In this case the accused has other children old enough to have their views taken as they are school going. This is in the best interests of the child protected by the **Constitution at Article 53(2)**.

*A child's best interests are of paramount importance in every matter concerning the child.*

Also elaborated by the **Children Act Section 4(4)** which states:

*"In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."*

18. The Probation Officer did not speak to the accused's children nor did she speak to accused's siblings. She did not speak to these primary victims and whether they were aware of what had happened and how they felt about her being released on bond.

19. The Probation Officer having agreed with the mother and neighbour's that the accused had acted out of **desperation**, she did not interrogate the begging question whether he same desperation could lead the accused to commit similar offences against her remaining

children?

20. These children automatically became children in need of care and protection under **Section 119 (1) ( r )** which states;

***“If any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child;”***

The third schedule provides *inter alia* for any offence causing bodily injury. In this case the charge facing the accused is more serious as the child died.

21. The Probation Officer omitted a very crucial part of the report. The views of these primary victims, who may be at risk. The report covered the other crucial areas; as to whether accused is a flight risk, whether her security is at risk should she be released, whether there is a person willing to stand surety for her etc. But it was important to say more about the children, and their aunts and uncles, the siblings to the accused with whom she will have to live should she be released.

22. I have gone to this length because I have a very genuine concern here. I have no doubt that the Probation Officer is the expert in this field. As a court I request for these reports because they are now part and parcel of the Criminal Justice System, not only for purposes of availing the accused person the most appropriate decision in the circumstances of her case, but to ensure that all necessary parties are involved as required by the law. I need the reports. I need the officer to cover the requisite areas satisfactorily so as to be a guide to making the appropriate orders and to act on the report for the requisite purpose. I need the officer to bear in mind that though cases may be similar, No case is the same as another. Neither can we be too cautious when it is within our mandate to establish certain facts it is only proper that we do it properly. I need the officer to be alive to the fact that when a report is presented with glaring gaps it throws doubt as to the seriousness with which the inquiry was conducted and may be prejudicial to the accused person.

23. Having said the foregoing, I have considered the generality of the report. The accused is not a flight risk. She has a fixed abode. Her mother sees her being on bond as a way of making light the burden of caring for her children. I am persuaded that she is entitled to a review having been granted bond a year ago and not having been unable to raise a surety. Nevertheless for the reasons given above it will be conditional.

24. The bond terms are reviewed from Ksh. 300,000/= to Ksh. 100,000/= with a surety.

25. The Probation Officer’s report says her mother has an allotment letter for their parcel of land at home. Let her come with that allotment letter with a letter from the Assistant Chief introducing her as such. It matters not the value of the said piece of land.

26. The Deputy Registrar to approve accused’s mother as the surety.

27. Upon release on bond the additional condition is for the accused to be on ‘bail supervision’ by the Probation Officer herein. In addition, the Probation Officer shall bring the Children Officer on board so as to comply with **Section 4 of the Children Act** to safeguard the welfare and rights of the accused’s children, who, as pointed out by the probation officer, could be at risk.

28. The following orders issue: -

- The accused be released on a bond of **Ksh. 100,000/=** with the surety of her mother’s allotment letter, letter from the chief, identity card, full size photo.
- That the surety shall be approved by the Deputy Registrar of this court.
- The accused shall be on bail supervision by the Probation Officer pending the hearing of the case or until review of this order by this court
- The Probation Officer shall bring on board the Children Officer for purposes of securing the welfare of the children of the accused as provided for by Section 4 of the Children Act. The Children Officer shall open a P&C file and deal accordingly in the appropriate Children’s Court.
- That the accused shall attend all mentions and hearing dates as may be fixed from time to time during the pendency of this case or when required by the court unless such attendance is dispensed with by the court.
- This ruling be served on the Regional Director Probation and After Care Services, and the County Coordinator Children Services Nakuru for necessary action.

**Dated, Delivered and Signed at Nakuru this 9<sup>th</sup> day of April, 2020.**

**Mumbua T Matheka**

**Judge**

In the presence of: Via zoom

Republic Ms Mburu

For Defence Mr. Wambeyi

Court Assistant Edna

Accused person present