



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL MURDER NO. 8 OF 2020

REPUBLICRESPONDENT

VERSUS

MARY WAMBUI MWAL.....ACCUSED

RULING

1. The application pending before this court is a notice of motion dated 14/1/20 in which the accused seeks an order that she be released on reasonable bail terms and conditions pending the trial. It is based on the grounds that:-

a. The accused has a right to be admitted to bail and there are no compelling reasons not to release him on bail pending trial.

b. That the accused have a right to presumption of innocence before proved guilty as enriched in the Bill of Rights and therefore any further pre-trial detention and/or custody would be punitive and an abrogation of this fundamental right.

2. The background in this matter is that the accused was charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code** vide information filed in this court on 7/1/2020. The particulars are that on 18/2/2018 at Mbiri Township Kirinyaga East Sub-County within Kirinyaga County together with others not before court, unlawfully murdered Nathan Mwai Njogu.

3. The accused denied the charge and file this application for bail pending trial.

4. The State has opposed the application and filed a replying affidavit sworn by Sergeant Boniface Mwangasi. He depones that the offence herein was committed on 18/2/2018 at Quick Service Bar in Mbiri Township Kirinyaga East Sub-County within Kirinyaga County. Investigations were conducted and one James Mbogo Gatia was arrested and arraigned in court in court file Number 3 of 2018. There were two other suspects who were placed at the scene of crime together with the accused already charged in court and the accused in this case who is the deceased's was one of the suspects linked with the offence. However immediately after the commission of the offence, and on learning that the police were after her so that she can be arraigned in court, the accused shifted from her matrimonial home to an unknown place. The accused remained at large since the commission of the offence until the time she was arrested. It is the contention by the prosecution that if the accused is released on bail there are high chances that she may escape as she has been hiding and she has been at large.

5. The appellant filed submissions. The application was brought under **Section 123(3) of the Criminal Procedure Code (Cap 75 Laws of Kenya)** and **Article 49(1)(i) of the Constitution**. She submits that the prosecution has completed their investigations and she will not abscond or interfere with witnesses. That she is ready to abide by any conditions which the court may set. She submits that she has a right to be admitted to bail and there are no compelling reasons not to be released on bail pending trial. She further submits that she has a right to be presumed innocent until proved guilty. The appellant has relied on the case of **R –v- Robbert Zippor Nzullu Criminal Case No. 14/2018**, High Court Machakos where it was stated that the burden to prove whether there are compelling reasons to deny the accused person bail. She contends that there are no compelling reasons for the reasons that:-

- **There is a pre-bail report which was filed in court and gives a different and independent account of the accused person, that she shifted to Kagio marked from her matrimonial home for business and harbored no intention of fleeing from the authorities.**
- **That she has rebutted the assertions by the investigating officer in her further affidavit. She used to call the Investigating Officer and he knew her whereabouts.**
- **She is not likely to interfere with witnesses as some witnesses have testified in Murder Case No. 30/2018 R –v- James Mbogo.**

She has also urged the court to release her so as to decongest the prison especially during this period of Corona virus.

6. I have considered the application. The issue for determination is whether the prosecution has discharged the burden to prove that there are compelling reasons to deny the accused person bail.

Section 123 of the Criminal Procedure Code provides that a person may be admitted to bail once he has been brought to court. **Article 49(1)(h)** provides that:-

“An accused person has the right –

To be released on bond or bail on reasonable conditions pending a charge or a trial unless there are compelling reasons not to be released.”

7. Bail is a constitution right but the right is not absolute as it may be denied where it is proved that there are compelling reasons. The court is supposed to ensure that the accused enjoys the right but if released on bail is opposed, the burden is on the prosecution to prove that there are compelling reasons to deny the accused bail. The compelling reason depends on the circumstances of each case. **Section 123A of the Criminal Procedure Code** gives some of the circumstances which the court will consider to determine whether to release the accused person on bail which includes:-

- **The nature or the seriousness of the offence.**
- **The character, antecedents, associations and community ties of the accused person.**
- **The defendants record in respect of the fulfilment of obligations under the previous grants of bail.**

8. These circumstances are aimed at ensuring that the accused person will turn up for his trial. The primary consideration when granting bail is whether the accused person will turn up for the trial. The court sets the terms and the conditions of bail which must also be determined with the aim of ensuring that the accused turns. The court exercises discretion to grant bail and to set the terms and condition of bail if no compelling reasons are shown to deny the accused bail.

9. The Black Law Dictionary defines the word compel to mean, **“to convince court that there is only one possible resolution of the legal dispute”**.

10. Since the court has to determine whether or not there are compelling reasons to determine the constitutional right of an accused person, it has a duty to determine what amounts to a compelling reason.

11. The court has to balance between protecting the right of accused to liberty and to be presumed innocent as well as the interest of justice. The right to liberty of an individual and the interests of the Society at large must be balanced as a general rule. The court has to consider the right of the accused to liberty before he is found guilty and convicted and the interest of the public depending on the peculiar circumstances of each case. The court will then exercise discretion to grant or refuse bail. What amounts to compelling reason includes whether the accused will attend court, character of accused, likelihood of interfering with witnesses, the nature of the offence, the safety of the accused, interest of justice and whether accused is a flight risk, whether he has a fixed abode and family ties. In the case of **Hassan Mahat –v- Republic, H.C Nairobi Rev 31/2013** quoted in the case of **R –v- Dunford Kabege Mwangi (2016) eKLR** the court stated:-

“what amounts to compelling reasons as envisaged in Article 49(i)(h) of the constitution is a matter of Judicial discretion Kenya does not have statutory guidelines to govern the granting of bail.

However a glimpse at pertinent Laws of other common law countries such as the Bail Act of England and Section 60 (4) of the Criminal Procedure Code of South Africa gives us examples of issues to consider in determining whether or not compelling reasons exist in a case.”

12. In this case the allegation that the accused left her matrimonial home soon after this offence was committed is not a compelling reason to deny the accused bail. The court called for a Probation Officer’s report – (Pre-bail report) and does not paint the accused as a person who would fail to turn up for her trial.

13. The court can set such terms as would ensure that the accused turns up for trial. The bail and bond Policy Guidelines, March 2015 Page 25 sets out **Judicial Policy** on bail as follows:-

The following procedures should apply to bail hearing. The prosecution shall satisfy the court on a balance of probabilities of the existence of compelling reasons that justify 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. 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.

14. The prosecution has not discharged the burden placed upon them to prove that there are compelling reasons. The accused is said to have moved to Kagio within the jurisdiction of this court. She has stated that she was in communication with the Investigating Officer and had no intention to abscond.

15. I find that there is no compelling reason to deny the accused bail.

16. I order that accused be released on a bond of Kshs 500,000/- plus two like sureties to appear.

Dated at Kerugoya this 9th day of June 2020.

L. W. GITARI

JUDGE