



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.29 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

VIGILANCE SHIGHI.....ACCUSED

RULING

The accused, Vigilance Shighi is facing the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 9th May 2020 at Amani Court in Umoja II Estate within Nairobi County, the accused murdered Edward Budoyi Okello. When the accused was arraigned before this court, she pleaded not guilty to the charge. She has applied to be released on bail pending trial. In her application, she has asserted that she is entitled to be released on bail pending trial as guaranteed by **Article 49(1)(h)** of the **Constitution**. There existed no compelling reasons to deny her bail pending trial. She was not a flight risk and was willing to abide by any terms that the court may impose to secure her attendance before court during trial. She had a fixed abode and had close relatives residing in Nairobi who were willing to be her surety. She stated that she was not likely to interfere with the prosecution witnesses as she would not come into contact with them. She urged the court to take into account the fact that prior to her being charged with the present offence, she was a person of good behaviour and had no criminal record. The grounds she put forward in support of her submission were supported by her counsel Mr. Ong'anya during the hearing of the application.

The application is opposed. Ms. Gikonyo for the State opposed the application. She relied on a replying affidavit sworn by the investigating officer in which she asserted that there existed compelling reasons to deny the accused bail pending trial. She submitted that the deceased was killed in such a horrific manner that it will only be just and fair for the accused to be denied bail pending trial. She was apprehensive that the accused, being a person of no employment, was likely to abscond from the jurisdiction of the court if she was released on bail pending trial. Being a resident of a border county (Kenya-Tanzania), she was likely to flee to a neighbouring country to avoid trial and being called to account for what she is being charged of. It was further submitted that the accused was likely to interfere with witnesses if released on bail pending trial. The fact that the prosecution believed that it has a strong case against the accused was one of the reasons that it formed the view that the accused would abscond if released on bail pending trial because of the fear of the punishment that will ensue upon conviction.

This court has carefully considered the rival submission made by the parties to this application. That the accused has the constitutional right to be released on bail pending trial is without doubt. **Article 49(1)(h)** of the **Constitution** provides so. The caveat is however that the court may deny an accused bail if the prosecution establishes existence of compelling reasons. The **Constitution** does not define what constitutes compelling reasons. However, **Section 123A** of the **Criminal Procedure Code** sets out some of the circumstances that the court may consider when deciding whether or not there exists compelling reasons to deny the accused bail pending trial. The **National Council for Administration of Justice** has published the **Bail and Bond Policy** which sets out some of the considerations that the court ought to take into account when determining whether or not to grant bail to an accused. There is also considerable case law on the issue. For instance, Odunga J in Grace Kananu Namulo -vs- Republic [2019] eKLR held thus:

“In S. vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17 [2017] ZWBHC 262 (31 August 2017), the Court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interest of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will:

- Endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
- Not stand his or her trial or appear to receive sentence; or

- Attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- Undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system...the ties of accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the Court should be taken into account...

In considering any question...the Court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular and prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the Court should be taken into account...

In assessing the risk of abscondment, the established approach is for the Court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be (Emphasis mine)."

What is clear from the above is that the courts are under constitutional imperative to lean towards granting the accused persons bail pending trial unless it is established to the satisfaction of the court that the trial would be frustrated by the accused prior conduct or failure to attend court during trial.

In the present application, it was clear to the court that the prosecution failed to provide clear and uncontroverted evidence that there exists compelling reasons for this court to deny the accused bail pending trial. The circumstance in which the crime is said to have occurred, in the absence of other evidence, cannot form a basis for this court to deny the accused the constitutionally guaranteed right to be released on bail pending trial (See **Article 49(1)(h)** of the **Constitution**). There was no evidence placed before this court that the accused will be a flight risk if released on bail pending trial. The prosecution's fears shall be addressed by this court given appropriate conditions that shall secure the accused's attendance in court during trial. The accused cannot be discriminated from being granted bond by virtue of the fact that her home country happens to be bordering a neighbouring country. In the absence of any other evidence, this court sees no reason why the accused should not be released on bail pending trial.

She shall be released on bail pending trial on the following conditions:

- I. She shall post bond of Kshs.1 million with two sureties of the same amount.
- II. In the alternative, she shall deposit cash bail of Kshs.500,000/-.
- III. The accused shall provide two contact persons, who shall be her close relatives, who shall ensure her attendance before court during trial.
- IV. The accused shall not contact any prosecution witnesses during the pendency of the trial at the pains of having the bail pending trial granted to her cancelled.
- V. She shall attend court on the dates scheduled without fail.

It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2020

L. KIMARU

JUDGE