



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 59 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

LAURYNHILL NYATICHI KIMAIGA.....ACCUSED

RULING

1. Once again this court is faced with the case of a young girl aged eighteen (18) years who sat for her KCSE exams in 2017 attaining “Matiangi” B- and is therefore qualified to join Public University. At the time of the alleged commission of the offence herein she had like most of Kenyans born in Rural Area moved to the city in search of a job to enable her raise school fees for her college education and to assist her mother meet basic needs for her siblings which was a very noble idea.

2. The deceased on the other hand was a twenty five (25) year old University graduate with a Degree in Statistics but working as a sales representative with Telkom and at the time of his death was cohabiting with the accused apparently against the wishes of his family as per the Pre-bail report. On the other hand the parents of the accused had no knowledge that the same was cohabiting with the deceased until after her arrest pointing out how the girl child is still disadvantaged.

3. The accused is now faced with a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that on the 3rd day of November 2018 at Tena Mpya Estate of Embakasi sub-county within Nairobi county murdered **JAPHETH OTIENO OKARO**. She pleaded not guilty and by a Notice of Motion dated 14/12/2018 applied to be released on reasonable bond or cash bail terms pending the hearing and determination of this case. In support of the said application, the accused stated that she was a student at **KERINA MIXED HIGH SCHOOL** in Nyamira County where she obtained B- in the year 2017 and was preparing to proceed to University or any other college she was to be admitted to and was yet to collect her Certificate from school due to school fees arrears.

4. She deponed further that she was arrested on 3rd November 2018 and since that time has been detained at Lang’ata Women’s Prison and has a severe medical condition suffering from acute asthma and ulcers which require specialized treatment. She stated that she was depending upon her father and mother for upkeep and after her release on bail she would stay with them.

5. The court ordered for a Pre-bail report and on 11/12/2018 Mr. Okeyo for the prosecution informed the court that they did not have any objection to the accused being released on bond subject to Pre-bail report which has been presented before me and in which it was stated that the relatives of the accused had shown willingness to meet any bond terms set and to ensure that she attends court without fail while staying with them. On the other hand the relatives of the deceased who was the most educated in their family and who are witnesses in this matter objected to the accused being released on bond for fear of their lives as the accused knows them physically and where they reside.

6. Bond is now a constitutional right of every accused person which can only be denied under **Article 49 (1) (h)** where there are compelling reasons to be advanced by the prosecution on a balance of probability. In this case the prosecution is not opposed to the accused person being released on bond and the Pre-bail report thereon supports her release.

7. The only issue for court’s determination is what constitutes reasonable bond/bail terms. In setting the bail terms or conditions the court should not subject the accused to any condition which is not pragmatic and is unfair, noting that the Constitution requires that the conditions be reasonable. In the Supreme Court of India case of **SUMIT MEHTA v STATE OF N.C.T. OF DELHI [2013] 15 SCC 470** the court held:-

“The words ‘any condition’ used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail.”

8. The Constitution of Kenya 2010 does not define what constitutes reasonable bail terms and since we do not as at this time have bail legislation the only definition is that found in Bail and Bond Policy Guidelines at General Principles 3.1 (d) **Right to Reasonable Bail and Bond terms** which provides as follows:-

“Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.”

DETERMINATION

9. It is clear from the material placed before me that the accused person is of modest means and any bail terms issued must take into account her status. In **STATE OF RAJASTHAN, JAIPUR v BALCHAND 1977 SCC (4) 308** Justice Krishna Iyer had this to say:-

“While the system of pecuniary bail has a tradition behind it, the time has come for rethinking on the subject. It may well be that in most cases not monetary suretyship but undertaking by relations of the petitioner or organisation to which he belongs may be better and more socially relevant.”

10. The accused before me is a young lady who has found herself at the wrong side of the law as a result of her wanting economic status. Having performed very well in her KCSE examination as stated herein obtaining “Matiangi” B- but is unable to collect her school Certificate due to outstanding fee arrears despite the government’s directive to schools not to detain the certificate, she came to the city in search of “greener pastures” and how she ended up in the arms of the deceased and whether it was advisable will only come out when her history is written at the conclusion of this trial.

11. For now whereas there is life lost, in the eyes of the law she is presumed innocent and her right to liberty ought not to be curtailed unless there are compelling reasons to do so. With the material placed before me I am persuaded that the best approach to her bond terms is to borrow a leaf from Justice Krishna Iyer of the Indian Supreme Court in **Bulchand case** (supra) and order that the accused be released on bond on the following terms:-

a) Personal free bond upon an undertaking by her mother MARCEKKA KERUBO MOMANYI ID no. [particulars withheld] and father OSCAR KIMAIGA ONGWAE ID No. [particulars withheld] to secure her attendance to court as and when required.

b) To report to the Area Assistant Chief of BOKIAMBORI sub-location immediately upon her release and thereafter every last Thursday of each subsequent month until further orders by the court.

c) To further report to the Education Officer in charge of Nyamira Division for purposes of assisting the same secure her KCSE certificate for purposes of pursuing her University placement within the next fourteen (14) days of her release and to report the outcome thereof to the Deputy Registrar of this court within the next thirty (30) days from the date of her release.

d) Not to make any contact with any of the intended prosecution witnesses who are relatives of the deceased in any form whatsoever before they testify against her and it is so ordered.

Dated, Signed and Delivered at Nairobi this 19th day of February, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Ms. Chepkorir for Mrs. Kinyori for the accused

Accused present

Court Assistant: Karwitha