



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
HIGH COURT CRIMINAL CASE NO. 3 OF 2019

REPUBLICPROSECUTOR

VERSUS

JAO1ST ACCUSED

DAO.....2ND ACCUSED

RULING

1. The accused persons **JAO** and **DAO**, a mother and daughter respectively are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that on the 24th day of December 2018 at about 11.00 p.m. at night in Kibera Katwekera slums in Nairobi within Nairobi county jointly murdered **VOO**.
2. It must be noted at the onset that the deceased herein is a son to the 1st accused and a brother to the 2nd accused and therefore members of the same family and the date of the offence was on the eve of Christmas a pagan festival which were celebrated around the Winter Solstice the return of the sun and honoured Saturn the god of sowing which has now been taken over by the Christians and which the Supreme Court of America in **LYNCH v DONNELLY 465 U.S. 668 (1984)** held had a legitimate secular purpose and therefore did not violate the Establishment Clause of the First Amendment. It follows that the deceased by his death was therefore denied the enjoyment of this pagan holiday and mistaken as Christian.
3. The accused persons took their plea on 22/1/2019 in which a plea of not guilty was entered in their favour and the court was informed by Mr. Naulikha for the prosecution that they did not have any compelling reasons to oppose the accused being released on bond. The court therefore ordered for Pre-bail report to be submitted for consideration which has now been done.
4. On behalf of the 1st accused, it was submitted that she is a single mother of three (3) children including the deceased and has lived in Kibera since 1996. The Assistant Chief of Gatwekera Sub-location confirms that she is known to him and is a good person save for when she is under the influence of alcohol. It was stated under conclusion that she is not a flight risk and unlikely to interfere with witnesses. She was found suitable to be released on bond.
5. On behalf of the 2nd accused it stated that she was at the time of the incidence in Form two at Old Kibera Secondary School and was due to join Form three. Unfortunately she is seven (7) months pregnant which led to the friction between her siblings and their mother as they had invested in her education to a point of selling their only cow in the village to pay her school fee. She prays to be released on bond so as to deliver her baby in an environment she is familiar with and to continue with her education thereafter. Her release on bond is therefore recommended.
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 persons being released on bond and the Pre-bail report thereon supports their 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 570** 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 provided for in Bail and Bond Policy Guidelines at General Principles 3.1 (d) **Right to Reasonable Bail and Bond terms** 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.”

9. On behalf of the prosecution it was submitted that a bond of Kenya shillings five hundred thousand (Kshs.500,000/=) would be adequate and reasonable while on behalf of the accused person it was submitted that they are not employed and have no known source of income and therefore asking them to post bond of Kshs.500,000/= would amount to denying them bail. It was submitted that the Area Assistant Chief had indicated that he will ensure their attendance to court.

DETERMINATION

10. It is clear from the material placed before me that the accused persons are of modest means and any bail terms issued must take into account their 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”

11. In the case of **REPUBLIC v JOSEPH KURIA IRUNGU ALIAS JOWIE & ANOTHER NAIROBI CRIMINAL CASE NO. 51/2018** reported in [2018] eKLR this court had this to say on how accused persons ought to be treated while dealing with bond application where they are jointly charged:-

“38. In the eye of the law whereas the accused persons are jointly charged each accused person is independent of each other and can choose to testify against each other and must therefore be treated as such since the evidence which is likely to be tendered against them will not be uniform but based on the level of their involvement in the commission of the offence.”

12. It is therefore appropriate to deal with each accused bond terms and conditions independently as herein under:-

a) 1ST ACCUSED

13. From the Pre-bail report she is a single mother of an advanced age of 51 years with no known source of income save that at the time of her arrest was a casual labourer laundering clothes in the estate around Kibera.

14. Her neighbours at Gatwekera slums and the Area Assistant Chief confirms that they will ensure that she attends court.

15. Her health status is indicated as immune suppressed as a result of HIV and any income earned from her casual work is spent on buying drugs and food.

16. I would therefore having taken into account her economic circumstances weighed against the proposition by Krishan Iyer JSI above set bond terms as follows:-

a) To be released on bond of Kenya shillings fifty thousand (Kshs.50,000/-) with two sureties of similar amount.

b) Upon her release she will report to the Area Assistant Chief immediately and thereafter every last Thursday of the month until final determination of this case and the Assistant Chief to confirm her presence in the area during the trial.

(b) 2ND ACCUSED

17. She is a young girl aged 19 years who now finds herself with double tragedy. In addition to facing a murder charge in respect to the death of her brother she is seven (7) months pregnant at the time of this ruling, with the putative father not disclosed. She has to now drop out of school and having been charged together jointly with her mother the only person who can now offer her support is her aunt JA who had given refuge to the 2nd accused, her mother and two brothers and adopted them into her family.

18. Having taken into account the social status of the 2nd accused, I would therefore set bond terms in respect of her as follows:-

a) The 2nd accused shall be released on free personal bond with her aunt JA as her surety to ensure her attendance to court as and when required.

b) She will be released and placed under the custody of the said aunt and shall attend Mention before the Deputy Registrar of this court once after every sixty (60) days during the period of the trial unless otherwise ordered by the court.

c) To enable her cope with the challenges of expecting a baby and while facing trial for the alleged murder of her brother upon her release from custody, she will report to the probation social worker in charge of Alego sub-county in Siaya county for counseling and guidance while in the custody of her aunt and to ensure she enrolls back into school.

19. Both accused persons shall not interfere with any of the intended prosecution witnesses during the period they are out on bond.

Dated, Signed and Delivered at Nairobi this 15th day of February, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Njuguna D.N. for the 1st and 2nd accused

Accused 1: present

Accused 2: present

Court Assistant: Karwitha