

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 10 OF 2019

REPUBLIC.....PROSECUTOR

VERSU

NAOMI NECHESA SANYA.....1ST ACCUSED

FAITH KANANU.....2ND ACCUSED

RULING

Both Naomi Nechesa Sanya, 1st accused, and Faith Kananu, 2nd accused, are charged with the murder of Felix Ng'ang'a. The offence is alleged to have been committed at an unknown location in Londiani within Kericho County on 14th day of January 2019. Both accused persons have denied committing this offence. Each accused has applied to this court to be admitted to bail pending the hearing and determination of this case. The application by the 1st accused is dated 8th April 2019 and filed on 16th April 2019. In the affidavit in support of the application, the 1st accused deposes that she has a right to bond/bail; that she is presumed innocent unless there is proof to the contrary.

In the written submissions highlighted in court by Mr. Michuki on behalf of the 1st accused, it is submitted that bail is a constitutional right under Article 49 (1) (h) that can only be denied if there are compelling reasons; that Section 123A of the Criminal Procedure Code does not set out limitations to the right to bail but instead sets out considerations to be taken into account by courts when admitting an accused person to bail; that the consideration of the strength of the evidence set out in Section 123A of the Criminal Procedure Code curtails the accused person's presumption of innocence. Mr. Michuki cited the case of **Republic v. Danson Mgunya & Another [2010] eKLR** in which the court stated that strength of evidence should not be a consideration in bail applications because it is inconsistent with the principle of presumption of innocence. It was submitted that Section 123A of the Criminal Procedure Code should guide the court in so far as it is not inconsistent with the Constitution and the Bail and Bond Policy Guidelines.

It was further submitted that the 1st accused has a young child who needs her care; that she has no previous convictions and undertakes to abide by the terms and conditions of bail that this court will set out; that she will reside in Kakamega where she will pose no threat to the witnesses and that the offence she is charged with has no implications on national security.

The 2nd accused's application is dated 25th March 2019. In it she states that she is a mother of two children aged 18 years in University and in Standard 2; that she is not a flight risk and will not intimidate or threaten witnesses. In the supporting affidavit the 2nd accused deposes that at the time of her arrest she operated a saloon business based at Kawangware 46 where she resided.

Both applications are opposed by the prosecution. It was submitted that there is evidence against the accused persons which is overwhelming. It was submitted that the manner in which the offence was committed is cruel and inhuman and that the 1st accused fled after the commission of the offence and was arrested about one month after through Safaricom tracking. The prosecution submitted that it is apprehensive that the 1st accused may abscond if granted bail.

I have considered both applications and the submissions by the prosecution in opposition. Bail is a right guaranteed by the Constitution. It is a limited right because it can be denied where compelling reasons are given. I have considered the submissions by all the parties. I need not repeat that murder is a serious offence. Despite the seriousness of the offence the law allows accused persons the right to be released on bail/bond unless there are compelling reasons not to do so. The only reasons advanced by the prosecution are that the 1st accused may abscond because she was arrested one month after the offence was committed and that the evidence is overwhelming. I have taken this into account. In determining a bail application, the court must balance the rights of the accused and those of the victim. Justice will not be served if the accused were to jump bail. It is only when the accused person faces the law by attending court to the conclusion of the case either by acquittal or conviction can justice be said to have been served. This is the reason courts consider the paramount consideration in bail applications to be that an accused person is able to attend court until the case is fully heard and determined.

To secure the attendance of the accused person the court determining bail application must set out reasonable terms and conditions of bail.

It is my view that the strength of the prosecution case cannot be determined before the evidence is tabled before the court. Having taken into account all the submissions, it is my view that the attendance in court of the accused persons can be secured by setting out stringent terms and conditions of bail. It is for this reason that I make a finding and so hold that the prosecution has not satisfied this court that there are compelling reasons to deny the accused persons bond. I will and do allow both applications for bail/bond and admit each of the accused persons to bail on the following terms:

(a) Each accused shall execute a bond of two millions (2,000,000) Kenya shillings with one surety of similar amount or two sureties of one million (1,000,000) each.

(b) In the alternative each accused is at liberty to pay cash bail of Kenya shillings Five Hundred Thousand (500,000).

(c) The accused persons are cautioned to attend court without fail until this case is heard and determined.

Orders shall issue accordingly.

Delivered, dated and signed this 7th May 2019.

S. N. Mutuku

Judge