



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 28 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SUSAN KNIGHT KUBAIACCUSED

RULING

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which was that on the 29th day of March, 2016 at about 9.30 p.m. at Green Wood Estate in Kasarani Sub-county within Nairobi County murdered **HELLEN WANJA GICHUKI**.
2. She took her plea on 11/4/2016 when a plea of not guilty was duly entered in her favour and her trial fixed for 13/14/15/09/2016. After several adjournments on 17th May 2018 she filed a Notice of Motion dated 9th April 2018 in which she sought to be granted bail on the ground that she had been held in custody since her arrest on 30th March 2016 and that her trial may be protracted.
3. The application was supported by her own affidavit in which she deponed that she was a business woman in Embakasi and a mother of two children whose future would unduly be periled. It was deponed that she had co-operated with the Investigating Officers since her arrest and will not interfere with witnesses upon being released on bond.
4. While the said application was pending, on 22/1/2019 her trial commenced before me and so far the court has heard the testimony of six (6) prosecution witnesses. On 27/3/2019 the court called for Pre-bail report which was presented before me, in which it was stated that at the time of her arrest she was in the business of selling food along Kangundo Road and a mother of three children. She was in a relationship with the husband of the deceased.
5. On the Victim Impact Statement it was indicated that the deceased was a mother of two children and was in the process of establishing a salon business in Juja. The accused was a mistress of her husband. At the time of the report her first born was at home due to school fees arrears and the family was therefore opposed to the accused being released on bond.
6. Based upon the information gathered it was the view of the probation Officer that it would not be safe to grant the accused bond at the moment.

SUBMISSIONS

7. At the hearing of the application Mr. Naulikha submitted that based upon the Pre-bail report, the accused should not be admitted to bond. On behalf of the accused, Mr. Wakaba submitted the issue of the accused being a flight risk as stated in the Pre-bail report was a matter of evidence and none had been tendered before the court. It was stated that there was no risk or threat to witnesses. It was contended that the accused had strong community ties and was well known to the local administrator who could easily trace her. It was stated that her children who were living with relatives should be granted opportunity to live with the mother while the trial was ongoing.

DETERMINATION

8. Under **Article 49 (1) (h)** bond is now a constitutional right of every accused person which can only be limited where there exists compelling reasons to be advanced by the State. What constitutes compelling reasons has been captured by the **Bail/Bond Policy Guidelines** issued by the Judiciary to include:-

- a) *The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.*

- b) *The strength of the prosecution case.*
- c) *The character and antecedents of the accused person.*
- d) *The failure of the accused person to observe bail or bond terms.*
- e) *The likelihood of interfering with witnesses.*
- f) *The need to protect the victim or victims of the crime.*
- g) *The relationship between the accused person and the potential witnesses.*
- h) *The best interest of child offenders.*
- i) *Whether the accused person is a flight risk.*
- j) *Whether the accused person is gainfully employed.*
- k) *Public order, peace and security.*
- l) *Protection of the accused persons.*

9. In this matter, the prosecution did not advance any compelling reasons save that they relied upon the Pre-bail report in which it was stated that the family of the victim were opposed to the accused being released on bond since they believed that the same was likely to abscond due to the magnitude of the case.

10. It must be stated for record purposes that whereas the nature of the offence is one of the grounds the court is supposed to consider while granting bond, that alone is no ground to deny the accused person bond as the new Constitution unlike the retired one, does not limit the grant of bail due to the nature and magnitude of the offence.

11. One of the general principles the court ought to consider as per the Bond/Bail Policy Guidelines is to endeavour to preserve the liberty of the accused person who is presumed to be innocent and who should be allowed to keep the fabric of his/her life intact by maintaining employment, family and community ties. The court while considering the right of victim must also look at the period the cause has taken or likely to take before determination.

12. I have taken note of the fact that since 2016 the State has only examined six (6) witnesses and therefore the matter is likely to take long before its conclusion. Balancing the rights of the victim and the family of the accused, I have come to the conclusion that the State has failed to advance compelling reasons to enable the court deny the accused her constitutional right to bail.

13. The reasons advanced through the Pre-bail report can be adequately mitigated through bond and bail terms provided that the said terms are legitimate and within the scope of the Constitution while balancing the sympathy for the accused who has been in remand for a long term on account of pendency of the cause against the impact of the alleged crime against the victim and society.

14. In arriving at the conclusion herein, I am guided by the principles set out in the Supreme Court of Canada in the case of **REPUBLIC v ANTIC 2017 SCC 27 [2017] 1 SCR 509** where it was stated thus:-

“The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons. This right has two aspects:- a person charged with an offence has the right not to be denied bail without just cause and the right to reasonable bail. Under the first aspect, a provision may not deny bail without “just cause” — there is just cause to deny bail only if the denial occurs in a narrow set of circumstances, and the denial is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to that system. The second aspect, the right to reasonable bail, relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the accused for the release period. It protects accused persons from conditions and forms of release that are unreasonable.”

15. With that in mind I therefore grant the accused bond on the following terms having taken into account the nature of the offence:-

- a) *Bond of Kenya shilling one million (Kshs.1,000,000/=) with two sureties of similar amount.*
- b) *In the alternative cash bail of Kenya shillings five hundred thousand (Kshs.500,000/=) with two sureties of similar amount.*
- c) *Upon her release the accused shall report to her Area Chief who shall monitor her presence thereat during the period of the trial and shall be reporting to the said Chief on the last Thursday of each subsequent month until the final determination of this case.*
- d) *The said Area Chief shall file a report with the Deputy Registrar of this court.*

e) The accused shall not make any contact with any of the intended prosecution witnesses in any form whatsoever.

f) The accused shall not leave the jurisdiction of this court without written consent of the Deputy Registrar of this court.

It is so ordered.

Dated, delivered and signed at Nairobi this 9th day of July, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Ms. Muiruri for Wakaba for the accused

Accused present

Court Assistant: Karwitha