



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 1 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BARBARA NJAMBI alias MAGGIE .....ACCUSED**

**RULING**

1. By notice of motion dated 16<sup>th</sup> May, 2019 indicated as being brought under Article 49(1) (h) of the Constitution learned counsel Langa Langa Chrisero Advocate for the applicant sought to move the court to grant the applicant bail pending the hearing of this matter. The applicant requests that the Honorable Court grant him bail pending the hearing and determination of the case because vide her supporting affidavit she is a 34 year old single parent blessed with two children and she hails from Thika in Kiambu County. She averred that she had a constitutional right to bail unless the state showed compelling reasons to deny the same and that she was willing and able to abide by the terms to be set by the court.

2. The State has not opposed the application.

3. A probation report dated 24.7.2019 was availed in court and the same indicated the applicant as a 31 year old hailing from Thika Sub-county whose father is a casual labourer. The report indicated that the applicant's parents separated and her father is alone and does not have any assets and resides in a single room in Kiganjo. The applicant is reported to have dropped out of school and got married to one Waweru and engaged in commercial sex work until her arrest. It is reported that the victims oppose her grant of bond and that the appellant had no relative willing to secure bond terms for her save for one Hezekiah Amos Orengo who is willing to secure bond for her with his title **Ngobit Supuko Block 1/3710**. Her father reportedly lost contact with her and hardly knows where she stays and the community at High Class Brothel indicated her as brutal when under the influence of alcohol and that her commercial sex workers described her as cunning and is of a don't care attitude. It was reported that the nature of commercial sex work exposes the workers to long distance travel and the probation officer left it to court to decide.

4. The counsel for the applicant orally submitted in support of the application that the family members of the deceased are not threatened by bond being granted. Counsel for the state in opposition to the application submitted that the applicant had no fixed abode and in the event bond is granted then stringent terms ought to be granted.

5. The issue for determination is whether the court can grant the orders sought.

6. According to the charge sheet, the applicant was charged with one count of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The applicants' case is that she is entitled to bail pending trial and Article 49(1)(h) of the Constitution safeguards this right to bond or bail pending trial and she has two children who are not catered for.

7. It is important to point out that grant of bail and bond is an exercise of discretion by a trial court. The Bail and Bond Policy guidelines of the Judiciary at page 25 to 26 has proposed that the court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision, including the following instances:

- a. Where there is doubt on the information on the accused person relating to the grant of bail; or***
- b. Where the prosecution objects to bail, with plausible reasons; or***
- c. Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms; or***
- d. Where the victim of the crime contests the grant of bail or applies for review of bail conditions; or,***
- e. On the court's own motion where it deems necessary.***

8. In this regard, the said report was availed to the court.

9. I have considered the circumstances in which the offence was committed and the effect on the family and the community. I have also considered the Probation Officer's Report as well as the oral mitigation made before me as well as the position adopted by **Mr. Machogu**, the learned prosecution counsel.

10. In **Kenny's outlines of Criminal Law, 19<sup>th</sup> Edition at Page 586 Note 708** the learned author advised courts in exercising the discretion to admit a remand prisoner to bail to consider what likelihood there is of his failing to appear for trial.

11. The entitlement to bail is subject to compelling reasons as per Article 49(1) (h) of the Constitution. Nevertheless the law is silent on what amounts to compelling reasons. In **Hassan Mahat Omar & Another Vs Republic, Nairobi High Court Criminal Revision No. 31 of 2013**, Lady Justice L. Achode rendered herself thus:-

*"What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case."*

12. In the Ugandan Trial on Indictments Act, exceptional circumstances are defined by section 15 (3) and additional factors are considered by section 15 (4) which are reproduced for ease of reference:

"(3) In this section, "exceptional circumstances" means any of the following-

(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;

(b) a certificate of no objection signed by the Director of Public Prosecutions; or

(c) the infancy or advanced age of the accused.

(4) In considering whether or not the accused is likely to abscond, the court may take into account the following factors-

*(a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda;*

*(b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;*

*(c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and*

*(d) whether there are other charges pending against the accused."*

13. In the instant case I have considered the following factors:-

*(a) The need to give the applicant the full benefit of her constitutional rights and freedoms.*

*(b) The apprehension that the applicant keeps company of persons who have a "don't care" attitude.*

*(c) The apprehension that there is a risk of the Applicant absconding because of the nature of the job she is involved in.*

*(d) The seriousness of the charges against the Applicant.*

*(e) The indication that the Applicant is brutal when under influence of alcohol.*

*(f) The status of the case that the offence was as per the charge sheet allegedly committed on 24<sup>th</sup> December, 2018, that is not more than a year old.*

*(g) The Constitutional requirement that the Applicant must be presumed to be innocent until she is proved guilty or until she pleads guilty.*

*(h) The caution that bail should not be refused as a form of punishment to the Applicant.*

*(i) The absence of sureties or persons within the jurisdiction of this Court who are ready to undertake that the Applicant shall comply with the conditions of her bail.*

*(j) The fact that the Applicant has no known spouse and has two children that need to be catered for despite the fact that she*

*leads an unsettled existence with no fixed place of abode within the jurisdiction of this court and no established connection with her parents.*

*(k) Absence of any information from the Respondent that there are other charges pending against the Applicant.*

14. In **Raghibir Singh Lamba v R [1958] 1 EA 337** (High Court of Tanganyika) Spry Ag J at page 338 it was held that the burden is on the prosecution pending trial why the accused should not be released on bail. The onus shifts to the accused to show why he or she should be released on bail.

15. Taking into account all the circumstances of this case, I see there are compelling reasons to deny the accused person bond pending trial. It has transpired that the accused has no family ties and that her nature of work is such that she cannot be in one place at several times and hence no fixed place of abode. In the circumstances I am inclined to decline the application.

16. In the result the application dated 16.5.2019 lacks merit and is dismissed. The applicant is free to move the court to review the matter once there is evidence of compelling circumstances regarding the accused.

It is so ordered

**Dated and delivered at Machakos this 16<sup>th</sup> day of October, 2019.**

**D. K. Kemei**

**Judge**