



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 17 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

LYDIA WAKUTHII MBOGO.....ACCUSED/APPLICANT

RULING

A. Introduction

1. This is a ruling on the application for bail pending trial. The accused took plea in the Kerugoya High Court Criminal Case No. 12 of 2019 where the parties argued out an oral application for bail. Before the ruling was delivered, the Presiding Judge recused herself necessitating the transfer of the case to this court where the file was registered afresh.
2. The applicant is charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** the particulars are that between the 21st and 22nd August 2018 at South Ngariama, within Kirinyaga County, jointly with others not before court murdered Francis Mbogo Ndambiri Alias Kasarani.
3. The applicant pleaded not guilty to the said charges and by a Notice of Motion dated 8th August 2019 under **Article 49(i) (h) and 50 (2) (a) of the Constitution of Kenya 2010** and under **Rule 3 of the Judicature Act** applied to be admitted to bail pending the hearing and final determination of the case which application was supported by the applicant's affidavit which does not indicate the date it was sworn. She stated that the deceased was her husband who had been murdered under mysterious circumstances.
4. It is noted that an oral bail application before Kerugoya High Court was argued before the Presiding Judge on 10/06/2019. On 12/07/2017, the matter was mentioned before the judge in Chambers and the ruling brought forward to 29/07/2019 for the reason that the court was not to sit on 31/07/2019.
5. On 29/07/2019 the judge recused herself in the case for undisclosed reasons. As such the ruling was never delivered. This file was sent to this court for hearing and determination. A fresh bail application was filed and served on the respondent who did not file any response.
6. On 29/09/2019 when the fresh bail application came for hearing, the defence counsel Mr. Mogusu prosecuted the application. The respondent through Ms. Mati for Mr. Obiri said she was relying on the oral submissions made at Kerugoya in the earlier application.
7. In my considered opinion that this is a fresh bail application to which the respondent ought to have filed a replying affidavit if they opposed the application. However, since the oral submissions of Mr. Obiri the prosecution counsel Kirinyaga County are on record, the court will have regard to them in its analysis of the material presented before it.
8. It was deposed that the applicant was arrested on 25th May 2019 during which period the prosecution witnesses who are her employees had already recorded their statements, around August 2018, and as such she will not interfere with them if released on bail. She stated that she had school going children in class 6 and form 2 with one in United States International University (USIU) who had been traumatized by the events and their education greatly affected. It was stated further that she was sickly having undergone thyroid surgery in 2015 necessitating her to be on drugs throughout since a situation which cannot be managed while in custody.
9. It was the applicant contention that she would abide by all the terms and conditions set by the court including attending court at all material times.
10. The prosecution's opposition to this application was that the applicant was likely to interfere with some of the prosecution witnesses who were her employees.

11. Analysis and Determination

12. I have considered the application and the affidavits in support thereof. Article 49(1)(h) of the Constitution provides that: -

a. “An accused person has the right ...

b. (h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

13. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. It is upon the prosecution to show that there exist compelling reasons to deny an accused person bail as provided for by the law. The mere fact therefore that the offence with which an accused person is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial.

14. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the severity of sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the conditions thereof rests with the court.

15. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. A court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release.

16. In this matter the prosecution has stated that their only reason for opposing bail is that some of the prosecution witnesses are employees of the deceased. I do note that the alleged offence was committed over a year ago, in August 2018 and the statements of the prosecution witnesses must have been taken by the time the accused was charged. For the accused to have been charged in court, the investigations must have been completed and even if there is still pending investigation that in itself is not compelling reason enough to deny the accused his constitutional right to bail.

17. It is trite law that bail will not be denied without adequate compelling reasons and a person should not be denied his freedom until he is found guilty of the crime for which he is charged depending on the circumstances of each case.

18. It is my considered view that the prosecution have failed to provide compelling reasons not to release the accused person on bond. The main purpose for bail is to secure the attendance of the accused person at the trial but no sufficient reason has been advanced to show that the accused is likely to abscond the trial if released on bail.

19. I have considered all the issues raised in this application including the oral submissions of Mr. Obiri. The prosecution’s reason for opposing bail is speculative in that they claim that the applicant is likely to interfere with the witnesses who were employees of the deceased. The offence was allegedly committed about one year ago. The prosecution have not shown any attempt by the accused of such interference.

20. It is my finding that the prosecution have not demonstrated any compelling reason for not releasing the applicant on bail.

21. I hereby allow this application on the following terms: -

a. That the applicant be and is hereby released on bond of Kshs. 500,000/= with one surety of a like amount.

b. That the applicant deposits her passport if any in court and attends monthly mentions before the Deputy Registrar pending disposal of the case.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Mogusu for Accused

Accused present