



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO.49 OF 2018

REPUBLIC.....PROSECUTOR

Versus

ROSEMARY AKWIYA1ST ACCUSED

ESTHER ANYANAI2ND ACCUSED

RULING

[1] **Rosemary Akwiya** and **Esther Anyanai** were arraigned before court on 19th July 2018 to answer charges of murder. They pleaded not guilty and a plea thereto was entered. Counsel for the accused then sought for the release of accused on bond or bail.

[2] Bail assessment reports were failed for each accused person. The probation officer stated that the accused have a good reputation and are sociable. However, the victim's family members are still bitter because of the death of their brother and son; they do not understand how a simple drinking spree turned tragic. Tensions are still high and the community members swore to lynch the accused if they set foot in the area. The probation officer opined that this anger was demonstrated in the fact members of the public torched the house of the accused immediately upon learning of the incident. In spite of this the family of accused persons does not see any threat to the lives of the accused or any chances of them absconding. They pleaded with the Honorable court to grant them affordable bond term so that they may be able to bail her out. The recommendation of the probation officer is that the accused are not suitable for release on bond at the moment due to the fact that bitterness has not yet toned down and chances of absconding are very high.

[3] It is now beyond peradventure that **bail is a constitutional right under Article 49(1) (h)** of the Constitution which will only be denied if there are compelling reasons. The said provision states:-

“An accused person has the right –

...

(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.”

Needless to state that bail is provided as enabler of fair trial guaranteed under Article 50 of the Constitution and more specifically gives effect to the right to be presumed innocent until proven guilty. See article 50(2) of the Constitution which provides that:

“(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;..”

[6] As a result, bail should only be denied where there are compelling reasons not to then such a right should be denied. I find wisdom in the opinion by **Chesoni J (as he was then) in the case of NGANGA vs. R [1985] KLR 451** that:-

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions ... generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless there are substantial grounds for believing that;

a) *the accused will fail to turn up at the trial or to surrender to custody or;*

b) *the accused may commit further offences; or*

c) *he will obstruct the course of justice.*

The primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time. I would therefore agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In making this consideration, the court must consider;

(i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;

(ii) The strength of the prosecution case;

(iii) The character and antecedents of the accused;

(iv) The likelihood of the accused interfering with prosecution witnesses.

2. Where more than one person are jointly charged with a criminal offence, the case of each accused person must be examined on its own facts and this applies also to an application for bail in which each accused person's application is to be considered on its own facts, circumstances and merit."

[7] Death of any person is painful on the family and it is even more painful when it is occasioned by another person. In this case, the accused have been accused of murder. In anger, the community burnt down lynched their house. Notably, however, in spite of the charge they face the accused were still considered to be people of good reputation and character. At this particular juncture, they are regarded as innocent until proven guilty. But, the family of the victim has expressed opposition to the accused being released on bail and their expressions are relevant factors. See the wisdom in the decision by Lesiit J, in the case of **R vs. FREDRICK OLE LELIMAN & 4 OTHERS [2016] eKLR** that:-

"The accused persons have a right to liberty, to be presumed innocent until proved guilty, to be granted bail/bond before trial and to be given reasonable bond terms. The same Constitution has provided that the courts should no longer consider only the rights of the accused person alone."

[8] The foregoing notwithstanding, each case should be determined on its own merit. The 2nd accused has seven children and her spouse is deceased. Five of them are under the age of ten years. The 1st accused has four children and she has been separated from her spouse for two years. Three of her children are under the age of ten years. These children do not have people to take care of them; some of them are already placed in the Meru's Children Remand home for safety and care. The accused have been described as people of good character and the family is willing to bail her out.

[9] I admit the circumstances of this case present difficulties. On the one hand, the probation officer is of the view that the community is hostile to the accused and may harm them. While on the other hand, the accused are young mothers with small children some of whom were placed in a children remand home for safety and care. These children also have rights and it would be most cruel to deny them presence of their mothers. Similarly, it would be unfair in the absence of clear evidence that the safety of the accused is in danger. In any case, the accused could find an alternative home or place to reside whilst the case is pending. There are other options which will secure the attendance of the accused persons during trial, say, by imposing appropriate terms and conditions of bail. I am therefore not convinced that there are compelling reasons not to release the accused on bail. Accordingly, the accused persons shall each be released on bond of Kshs. 50,000 each with two sureties of similar amount. In addition, each accused person:

1. Shall report every two weeks to the OCS Tigania Police Station. If Tigania Police Station will not be convenient the accused and the prosecution to provide the court with the particular Police Station to which they shall report.

2. The accused shall swear and file an affidavit before the next appointed date herein disclosing the exact location of residence.

Dated, signed and delivered in open court at Meru this 17th day of September, 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiarie for State

Accused – present

F. GIKONYO

JUDGE