



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 22 OF 2018

REPUBLIC.....RESPONDENT

VERSUS

STEPHEN OTIENO.....ACCUSED

RULING

1. The accused **STEPHEN OTIENO** faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that between the 18th and 26th day of August 2017 and at unknown time at Riruta Satellite in Dagoretti sub-county within Nairobi country murdered **TAMARA DEBORAH alias NJOKI**.

2. He pleaded not guilty to the said charges and in line with **Article 49(1)(h)** of the Constitution of Kenya 2010 upon the prosecution indicating that they were opposed to the accused begin released on bond, the court directed the prosecution to file affidavit and serve the same upon the defence to reply thereto which order has been complied with.

3. In opposing the release of the accused on bond, the prosecution filed an affidavit in support and a supplementary affidavit sworn by **PC EDWARD ONYANGO** the Investigating Officer in this case from which the following silent matters were raised:-

(a) The accused was last seen with the deceased on 18th August 2017 and did not return back with her until 2nd September 2017 when the clothes of the deceased, and identity card, phone belonging to the accused, tablets, used tissues and unused tissue were discovered at a scene at Thogoto/Ngong forest.

(b) On 17th September 2017 skull and bones were found at the same place which were confirmed to be the deceased as per DNA report and the samples taken from the used tissue paper matched the accused DNA.

(c) The accused had previously after altercation with his wife R.O. ran away with their twins and threatened to kill them so there is a legitimate anxiety on the part of his wife that should he be released on bond he may harm them.

(d) The accused knows and is related to some prosecution witnesses and some are his neighbours, if released on bond the accused will inflict real fear on them.

(e) That the wife of the accused and the mother of the deceased has reported receiving threatening calls from the accused person who currently is in remand custody and a report to that effect made to Kabete Police Station.

4. In reply to the stated compelling reasons the accused raised the following issues:-

(a) The seriousness of the alleged crime are not sufficient by itself to justify denial of bail since he is presumed innocent until the contrary is proved.

(b) The allegation of threat to witnesses has not been investigated and report thereon produced in court.

(c) He intends to stay elsewhere away from Satellite Riruta if released on bail.

(d) He has a fixed abode in Kasaye Village Kisumu County where he will reside during the trial.

5. Incompliance with the Bail and Bond Policy Guidelines the court called for pre-bail report in which the following were noted:-

(a) The accused from 2013 July upto late 2016 was engaged as a security guard with Lavington Security Firm. Thereafter he has been working at construction sites in tile fixing.

(b) According to his family at the time of his arrest he was facing financial challenges. They would therefore not be in a position to guarantee the accused attendance to court given the circumstances of the case thought he might be a flight risk.

(c) On the Victim Impact Statement the accused's wife and the mother of the deceased indicated that prior to the incidence they were experiencing some marital problems and the accused might be a danger to her given that he blames her for his predicament. The lives of their minor children might also be in danger, the death of the deceased has also strained the relationship between her and the biological father of the deceased who is accusing her of having not protected her. She has not been able to bury the deceased.

6. Bail is now a constitutional right of every arrested/accused person under **Article 49(1)(h)** which has expanded the rights which were in existence under **Sections 123 – 133** of the **Criminal Procedure Code**. The Constitution has now made bail available irrespective of the nature of the offence charged with the only limitation being that where there exists compelling reasons advanced by the prosecution. It is further clear under **Article 49(1)(h) (2)** that a person shall not be remanded in custody for an offence punishable by a fine only or by imprisonment for not more than six (6) months.

7. In Kenya the Legislature in its wisdom has not enacted bail legislation to determine how the issues of bail and bond should be dealt with and to cure for this gap the Judiciary has formulated as a guide, Bail and Bond Policy Guidelines so as to bring uniformity on the grant of bail with the primary factor being whether the accused person will appear for trial if granted bail as stated in **Section 124** of the **Criminal Procedure Code**.

8. There being no definition of what constitutes compelling reasons under the Constitution, the policy guidelines at Section 4.9 sets out what the court have stated constitutes compelling reasons as follows:-

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) 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. To this list I add the impact which grant of bail might have upon the conduct of the case and the need to balance between the liberty of the accused and the interest of the society in denying bail.

10. From the material placed before me the following issues are not disputed:- that the accused was a step father of the deceased and between him and the mother of the deceased they have twin minor children who are all listed as prosecution witnesses. There is material placed before the court to the effect that there have been threats directed towards the mother of the deceased and upon the commission of the offence the accused went under for some time. The accused has had very weak ties with his relatives since he came to the city.

11. Whereas the accused has submitted that if released on bond he shall make alternative arrangements for accommodation, from the material placed before the court it is clear that most of the intended prosecution witnesses are related to the accused person and it will be very difficult for the court to enforce or supervise the enforcement of the order keeping the accused away from the said relatives noting that the accused is alleged to had made contact with some of the intended witnesses while in remand custody.

12. Based on the material on record from the affidavits, the pre-bail report, document tendered by the prosecution and the submissions herein, I have come to the conclusion that there exists compelling reasons to enable me deny the accused the enjoyment of his constitutional right to be released on bail which I hereby do.

13. The accused shall remain in remand custody but is at liberty to renew his bail application once all witnesses related to him or were his neighbours have testified and it is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 1st day of November, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Ms. Wegulu for the State

Mr. Wakaba for the accused

Accused present

Court assistant Karwitha