



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 54 OF 2018

LESIIT, J.

REPUBLIC.....PROSECUTION

VERSUS

AMOS WANJALA MUTELWA.....ACCUSED

RULING

1. The accused **Amos Wanjala Mutelwa** faces the charge of Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are as follows;

On the 30th of September, 2018 at about 10:00 HOURS at Kangemi estate in Sodom section within Nairobi County jointly unlawfully murdered Judith Negesa Nafula.

2. The accused was arraigned in court on 6th of November 2018. He denied the charge.

3. The learned defence counsel Ms. Ajiambo has made an oral application for the accused to be admitted to bail pending his trial. Counsel urged that the accused should be granted bail as he was the sole bread winner for his three children. Counsel urged that the accused had a stable job to go back to if released on bond. Counsel stated that the accused was ready to abide by the conditions the court may set for his release. She urged that the accused intended to get a place of abode at Kawangware.

4. Mr. Amos Otieno, the learned Prosecution Counsel did not oppose bail for the accused. Counsel submitted that he had consulted with the Investigating Officer of this case and that he had confirmed to him that there were no compelling reasons to oppose the accused release on bail. He further stated that the investigations were complete and that the potential prosecution witnesses available were not known to the accused and that therefore they would not be intimidated by his release.

5. Under **Article 49 (1) (h)** of the **Constitution** every person arrested or charged for any offence have a right to be released on bail unless there are compelling reasons to deny bail. The Constitution does not define what compelling reasons mean. However several definitions have been given by judges in our jurisprudence.

6. The definition of the phrase compelling reasons adopted by the court in **Republic vs. Joktan Mayende & 3 others [2012] eKLR** was that:

“...the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.

7. Paragraph 4.9 of the Bail and Bond Policy Guidelines deals with compelling reasons. The said Paragraph provides:

"In terms of substance, the primary factor considered by the Courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the Courts face since the promulgation of the Constitution of 2010 is determining the existence of Compelling reasons for denying an accused person bail, particularly in serious offences. ... The determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial..."

8. The Bail and Bond Policy Guidelines urge Courts to evaluate the presence of Compelling reasons based on twelve criterion which include

the following:

- i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty**
- ii. The strength of the prosecution case**
- iii. The failure of the accused person to observe bail or bond terms**
- iv. Likelihood of interfering with witnesses**
- v. The need to protect the victim or victims of the crime**
- vi. The relationship between the accused person and potential witnesses**
- vii. The accused person is a flight risk**
- viii. Public order, peace or security; and**
- ix. Protection of the accused person**

9. The principles set out under the Bail and Bond Policy Guidelines are the same ones that were set out in the celebrated case of Ng'ang'a Vs Republic 1985 KLR 451 where Chesoni J, as he then was, held thus:

“The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should grant bail to the accused person unless it is shown by the prosecution that there are substantial grounds for believing that:

- i. The accused will fail to turn up at his trial or to surrender to custody;**
- ii. The accused may commit further offences; or**
- iii. He or she will obstruct the course of justice.**
- iv. The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;**
- v. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- vi. The strength of the prosecution case;**
- vii. The character and antecedents of the accused;**
- viii. The likelihood of the accused interfering with prosecution witnesses.”**

10. The paramount consideration in granting or denying bail is whether the accused person will turn up for his trial.

11. I called for a Pre-bail report from the Probation in order to have an opportunity to know the accused background, the attitude of his family to his release on bail and also the attitude of the community where he comes from. I also desired to know how the death of the deceased impacted the family of the deceased.

12. From the Pre-Bail Report, I was able to know that the accused had no children with the deceased and further that the 3 children left behind by the deceased are under the care of the deceased's mother. The accused person was dishonest to the court when he told the defence counsel to submit that he and the deceased had 3 children and further that the children were with his aged mother.

13. The family of the accused and his community back home had no objection to the accused be considered favourably for bail.

14. As for the family of the deceased they expressed fear for their lives not only if accused was to be granted bail, but from his family as well. Further they expressed the feelings that they were yet to heal after the loss of the deceased and were concerned that it had only been a month since her death as at the time of their interview.

15. I have noted the findings on the Probation Pre-Bail Report. The Probation Officer stated that a possibility of the accused being a flight risk could not be established and according to the Chief of the area where the accused comes from the life of the accused was not at risk within his community.

16. I have considered the Pre-Bail Report. Considering the Report and Submissions by the Defence Counsel, I find material contradictions. I have already mentioned about the dishonesty of the accused regarding the 3 children left by the deceased. The other inconsistency is regarding the place where the accused intends to reside if released on bail.

17. I find that the accused person is not consistent about his place of fixed abode. In her submissions, the Defence Counsel stated that the accused would reside in Kawangware whereas to the Probation Officer the accused stated that he would reside in Webuye. That contradiction is material and shows that the accused person has not made up his mind in that regard

18. It is also important for the accused person to indicate how he intends to fend for himself. Ms. Ajiambo in her submissions stated that the accused person had a stable job to go back to. However from the Probation Report the accused was a casual labourer and did masonry. There is no clear indication from the submissions and Probation Report exactly what kind of work he intends to be involved in in order to sustain himself.

19. The victim impact statement contained in the Probation Report shows that the relatives of the deceased are yet to heal from the loss of the deceased. They also expressed concern that it was still too soon to consider releasing the accused on bail. The offence was committed 2 months ago. Considering the sentiments expressed by the victims who are the family of the deceased, and especially the fact that the wounds of losing a loved one are still very fresh, I agree with the victims of this offence that given their sentiments it is too soon to release the accused.

20. Accordingly, I disallow the application for bail for now. The accused is at liberty to make another bail application after some time.

DATED, SIGNED AND DELIVERED THIS 6TH DAY DECEMBER 2018.

LESIT, J

JUDGE