



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HCCR CASE NUMBER 15 OF 2015

REPUBLIC.....PROSECUTOR

- V E R S U S -

D K M.....1ST ACCUSED (SUBJECT)

M N M.....2ND ACCUSED

R U L I N G (REVIEW OF BOND)

The subject herein D K M is jointly charged with his mother M N M with the offence of Murder Contrary to section 203 as read with S. 204 of the Penal Code.

They took plea on 21/9/15 and bond was set at Ksh. 250,000/= each with one surety of a similar amount. The subject's mother was released when a surety was found. However the subject has been in custody since then

On 21/7/2010 – an application for review of bond terms was made before Hon. Justice Mativo. The bond terms were reviewed as follows:-

Cashbail of Ksh. 60,000/=, and the subject to attend court at all times, the father of the subject to execute a personal bond to ensure attendance of the subject – and to provide his identity, physical address, name of location, chief, assistant chief and contact and telephone numbers. The family was not able to comply with the orders because they were unable to raise the Ksh.60,000/=. This was the gist of a further application for review of bond made on 14/3/2017 by S.K. Njuguna for the subject.

For purposes of the review, I ordered for a bail review report from the Department of Probation and After Care Services. This was filed on 27/3/17 by L.K. Wanjohi probation officer. He confirmed in his report that the subject was born on 5/9/1999, and had been in custody since 2015 when the case was brought to court. That he was missing out on education and wished to go back to school. That her parents were ready to ensure that he attended court.

I sought a supplementary report with details of the schools if any that he would attend to, the possibility of bail supervision and whether the school was willing to support the bail supervision.

This further report was filed on 5/5/2017.

The prosecution had no objection to the application for review, but drew the court's attention to the fact

that the subject faced a serious charge and that there was need for a surety.

I have carefully considered the application for review. I have also considered the sentiments of the prosecution. I have taken into consideration the seriousness of the charge facing the subject. I have considered that for last 2 years or so the family has been unable to raise the bond terms set by the court, and that after the review, the Ksh. 60,000/= cash bail set has been beyond the reach of the family.

It is a fact that at the time the subject was charged he was 15 years old, a child, and still now a child under the provisions of our Constitution and the Children's Act Cap 141 Laws of Kenya which define any person below the age of 18 as a child. That is a legal status that comes with certain obligations for court dealing with the child.

The Constitution at Article 53(2) provides that a child's best interests are of paramount importance in every matter concerning the child. This is articulated further in section.4 of the Children's Act which provides both for the best interests of the child and the interests of the child in general.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

There is a clear emphasis for the need to secure the welfare and rights of the child by treating the interests of the child as the first and paramount consideration and ensuring that the best interests of the child shall be a primary consideration.

It should never escape our minds that children fall under the vulnerable category of members of the family. Article 21 of the Constitution sets this straight in the following terms;

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, **children**, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

Hence even where a child is an offender, the first lens through which we should see the child is that of the Constitution. Of a member of the society who is vulnerable and needs care and protection and where necessary "guidance and correction as is necessary for the welfare of the **child and in the public interest**". (Section 4(3) (c) of the Children Act. The courts and society are the duty bearers to give the child every opportunity to turn out as a responsible law abiding citizen.

It is in within that reality that the children Act places children like the offender in the category of a child in need of care and protection as provided for under s. 119 of the Children's Act. The 20 categories set under this section reflect situations where the family, the society, is unable to carry out its role of raising the child for one reason or the other, exposing the child to all manner of situations some of which the child's level of maturity may not be able to deal with without adult guidance.

The subject herein, as a child in conflict with the law also falls under that category despite the fact that that he is facing a serious charge. Facing a murder charge and remaining in custody while his age mates go to school places him squarely in the category of the child “who is exposed to any circumstances likely to interfere with his physical, mental and social development” (section 119 (2) (q)) and the court still has a duty to secure his welfare.

Section 187 of the Children Act is under part XIII which deals with child offenders. It makes it mandatory for **every court** to take into consideration **the welfare of child** who is brought before the court. It states

(1) **Every court** in dealing with **a child who is brought before it** shall have regard to the best interests of the child and shall, in a proper case, take steps for removing him from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training.

There is a way this can be done: the two file system for child offenders, just like in cases where the victim is a child, where the Children Officer is informed in the first instance and directions are given for a Protection and Care (P&C) file is opened. It is within this file that issues of the welfare of the child offender can be dealt by the Department of Children Services simultaneously as the criminal case is being heard. It is in there that a social inquiry report can be called for and the children officer address the child’s welfare issues at the earliest stage in the proceedings. The child is put in a place where he faces up to the offence he/ she committed while at the same time remedial processes are put in place.

Article 53(1) (f) prohibits the detention of children; that a child has the right not to be detained, **except as a measure of last resort**, and when detained, to be held—(i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take account of the child’s sex and age.

The subject here in has been in custody for the last two years. It is with the foregoing in mind that I must consider his application for bail review and the fact that he has the right to be released on bond or bail, on reasonable conditions.

Poverty and lack of means was never intended to be a reason to remain in custody pending bail. It has been demonstrated that the family can only raise Ksh. 20,000/= cash bail. The subject is willing to go back to school. The parents have secured a school for him, the school is aware of the subject’s situation – and the department of probation and after care services is ready to carry out bail supervision.

Having considered application, the bail review reports, the period the subject has been in custody, I allow the application and make the following orders.

The bond terms for the subject D K M is reviewed in the following terms:

1. He may be released on a Cash bail of Ksh. 20,000/= be deposited in court
2. In addition, his father S M to comply with the orders issued by Mativo J, on 21/7/16 and to execute a personal bond of Ksh. 60,000/= supported only by 1 full photo of himself, photocopy of his national Identity Card, a letter from his assistant chief confirming his residence in that sub-location and to provide his contacts. For this purpose, the matter be placed before the DR as soon as these items are available.
3. Upon compliance with (1) and (2)

the subject be released to his parents who will ensure that he is enrolled in school as indicated in the bail report.

4. There shall be a monthly bail supervision pending the hearing and determination of the case by the department of probation office and after care services in liaison

with the parents and the school to and a report either oral or written made to the court. For this purpose, there will be a mention before the DR every 30 days from the date of release. The subject's presence is dispensed with for these mentions for as long as he is in school.

5. Failure to abide by any of the bail supervision order a warrant of arrest to issue for the subject and summons to the surety.

6. These orders be served on the Sub County Probation and After Care Officer, Nyeri Central.

Dated, Signed and Delivered at Nyeri this 9th May 2017

Teresia Matheka

Judge

Court Assistant: Harriet