



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTION

Versus

LUCY NYOKABI MWAURA.....ACCUSED

RULING

LUCY NYOKABI MWAURA, herein the accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The brief particulars are that on the 18th day of June 2017 at Matasia Trading Center, Kajiado North Sub-County the accused murdered one CAROLINE WANJIKU hereinafter referred as the deceased.

The accused was represented at the trial by Ms. Rashid while the state was represented by Mr. Akula, the senior prosecution counsel.

The accused through her counsel Ms Rashid filed an application seeking orders of this court to have her released on bail pending trial.

According to Mr. Ndungu who argued the application urged this court to take notice that under Article 50 (2) (a) of the Constitution the accused is presumed innocent until proven guilty. It was learned counsel contention that the applicant has a right to be released on bond on reasonable terms pending trial unless there are compelling reasons (see Article 49 (h) of the Constitution). Mr. Ndungu further submitted that the state turning on its affidavit sworn filed in court dated 11/7/2017 has not shown existence of compelling reasons to deny the accused bail pending trial.

Mr. Akula, the senior prosecution counsel vigorously opposed the application relying on the affidavit by the investigating officer PC Dorice Ikhavi. According to Mr. Akula, learned counsel for the respondent submitted that the accused is charged with a serious offence who ultimate penalty is death in the event she is found guilty. It was further Mr. Akula contention that the accused has no fixed abode or gainful employment within the jurisdiction of this court. If therefore this court allows the accused on bail there is a likelihood and real apprehension that she might not turn up for trial. Mr. Akula further invited the court to bear in mind before exercising discretion in favour of the accused the right of minor child D.K. aged 7 years left behind by the deceased. In the submissions by Mr. Akula, this court should balance the rights of the victim as provided for under Article 50 (a) and section 10 of the Victim Protection Act. Mr Akula urged this court to take judicial notice that the victim minor has been rendered an orphan by virtual of the death of her mother. In the best interest and welfare of the minor the court should sct cautiously by restraining itself from releasing the accused on bond at this stage of the trial. It was the contention by Mr. Akula, that the charges against the accused are serious; she has been supplied with statements identifying the would be witnesses lineup to testify at the trial. According to Mr. Akula the background information available to the state is that of the likelihood to interfere with the witnesses who are known to the

accused. Mr. Akula contends that the evidence so far availed to the state is so strong and that alone will be a motivation for the accused to take flight. In the course of this application a prebail approve was requested for by this court to capture both the accused profile and sentiments by the community.

The contents of the prebail report has been perused and various aspects as it relates to this application noted. The court observes that the accused though having her roots in Nyahururu County she has been on and about in various towns in search of work and earn a living. The above information by the probation officer did not go a step further to indicate the last time accused set foot at her parents' home in Nyahururu to become a fixed abode for purposes of this case. The mother of deceased in her sworn statement gave a victim impact statement and vehemently opposed the accused release on bond at this stage.

One of the key factor alluded to by the family of the deceased is the relationship between one Joseph Njoroge, the husband to their daughter. In the same vein the accused and husband to the deceased have a relationship which render the safety of the minor D.K. aged 7 years in jeopardy. In the statement by the family through the mother the best interest of justice will be served by withholding the release order on bail in favour of the accused at this stage.

The Law:

In Kenya the accused right to bail is governed by Article 49 (h) of the Constitution which states that, ***“an accused person has a right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.”***

The standards governing the execution of bail as provided for under Article 49 (h) of the Constitution are set out under section 123, 123A, 124, 125 and 126 of the Criminal Procedure Code. The legal provisions deal with the terms of the accused bail. Some of the conditions to be considered include the nature and gravity of the offence, the weight of the evidence already on record which can motivate the accused to abscond, the financial ability of the accused to raise sufficient surety and enter cognizance to ensure his appearance at the trial, the character of the accused and any previous antecedents, the security of the accused, the accused relationship with the community and whether he will fulfill the conditions to be released pending trial.

The provisions under the criminal procedure code have been reinforced by the Bond and Bail Policy Guidelines. The policy provides for the principles and factors to guide the court in exercising discretion before granting bail to an accused person. The most important test to be applied in bail application is to ensure that the accused will turn up in court as required till the final orders of the trial court. All the other conditions are meant to reasonably satisfy the court that he will attend court as scheduled and will not engage in anything to harm the community, the witnesses or commit further offences. The fact that the accused is said to have firm family and community roots is not by itself an automatic element to require this court to release her on bail. This court is bound to consider a number of factors including some of the ones cited elsewhere in this ruling.

Case Commentaries:

The question remains whether under this application the state has demonstrated existence of compelling reasons not to grant the accused bail under Article 49 (h) of the Constitution. The superior courts have considered this issue in various authorities in the case of ***Republic v Kokonya Muhssin [2013] eKLR*** the court delved into the issue as to what will constitute compelling reasons and held thus:

“All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aid that the witness will not give evidence or will give particular evidence or in a particular manner. Interference with witnesses offers a wide range it can be immediately on commission of the offence during investigations at inception of the criminal charge in court or during the trial, and can be committed by any person including the accused, witnesses or other persons. The

descriptions of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or preventing the course of justice and if it is so found it is a justifiable reason to limit the right to liberty of the accused.”

The corresponding case on this legal proposition is that of ***Republic v Dwight Sagaray & Others Cr. Case No. 61 of 2012*** at Milimani the court stated as follows in this passage:

“For the prosecution to succeed in persuading the court on this criteria (of interference) it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and the witnesses; close familial relationship between the accused and witnesses among others.....at least some facts must be placed before court otherwise it is the court to speculate.”

In the case of ***Republic v Dorine Aoko Nakuru HC Cr. Case No. 36 of 2010 UR Emukule J*** as then was stated thus:

“To my mind again, those compelling reasons are the very same ones spelt out in section 72 (5) of the repealed constitution and elaborated in section 123 as read together with 123A of the Criminal Procedure Code emphasis mine namely that the accused person, as the applicant in this case is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (taking away another person’s life, disloyalty to the state of one’s nationality or griveious assault and injury another person or his property) are offences which are by their replensiveness are condoned by society in general. It would thus hurt not only merely society sense of fairness and justice, and more so, the kin or kith of the victim to see a perpetrator of murder, reason or violent robbery committed or attempted walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted would thus be a compelling reason for not granting an accused person bond or bail.”

A mere promise by the applicant to this court that if released on bail she will attend court is not sufficient. There is no affidavit by the applicant to rebut the disposition by the investigating officer. The investigation officer has sworn in the affidavit on matter which will jeopardize the administration of justice. The accused herself has not demonstrated that she has any gainful employment that provide her basic needs with a saving for her to travel from Nyahururu – Kajiado when required. It is obviously clear from the probation officer that besides the title deed there is no evidence to show the family has deposable income available to the accused to meet the necessary court attendances. She has no relative or family within the county. She has no community ties within the county.

These are factors which cannot be ignored. The flight risk of an accused is the business of the proposed surety. It is precisely the situation which he has intimated to court that by surrendering his title deed he guarantees applicant presence in court when needed at all times. What the surety has failed to show on reasonable grounds is how he will secure the accused commitment to appear in court notwithstanding the posting of the bail bond to be imposed by the court. This court is privy to the prebail report which indicate that prior to the arrest of the accused she had been residing in Eldoret, Kariobangi, Kayole and lately Matasia in Ngong.

What will compel the accused not to leave her parents while other parts of the country or even in the neighbouring region in search of gainful employment? An important consideration which the court must bear in mind while exercising discretion is whether the accused would very likely take flight rather than go through the court process. The other crucial issue is whether the availability of a surety alone can guarantee practicability of the attendance of the accused at the trial.

In the present case it is not in dispute that the alleged offence as projected by the state is one of the

serious felonies in our penal code. The senior prosecution counsel contended that the investigating officer has put together strong case as supported by the witness statements supplied to the accused. From the affidavit by the investigating officer some of the star witnesses are close friends to the accused. The accused will also be alive to the fact of possibility of the stiff mandatory sentence in the event she is found guilty and convicted of the charge. Seriousness of the offence is certainly a critical factor to be weighed when balancing the right to liberty under Article 49 (h) of the Constitution.

Can it be said that there is a reasonable possibility that the accused will entertain an idea of absconding from Nyahururu to any other town outside the jurisdiction of this court. In my view the answer is in the affidavit by the investigating officer save for the mention of family ties; in the probation report. There is nothing credible and cogent that will keep the accused in Nyahururu and when due regard is given to the circumstances of this case. The accused is facing a serious offence for the first time in her life whose punishment if convicted is that of mandatory death sentence.

Is it possible in Kenya to cross over to other counties and live there without much difficulty. The answer is a yes. There has been no attempt on the part of the accused and her proposed surety to dispel that fear as put forth by the state that accused is not on any permanent employment to persuade this court that she has real attachment to dissuade her from taking flight. The family ties being fronted in the probation report are in connection with the parents. As for the accused who is now an adult cannot be said to be under control and direction of her parents. This fact is evident from the same prebail report that the accused has been staying on her own in search of employment and financial freedom. There is no nexus/relevancy between family ties and the accused conduct prior to the allegation of her being involved in unlawful act at Upper-Matasia in Kajiado County.

Witness intimidation is a behaviour which strikes at the heart of the justice system itself at especially predictable among cases like the one the accused person is facing before this court. In most cases the source of intimidation will be the defendant or her allies including friends and family to actively discourage them from co-operating with the prosecution by testifying. This fact has been clearly alluded to by the investigating officer in her affidavit filed in court on 11/7/2017. When such a disposition has been made under oath without any rebuttal from the defendant this court has reason to believe the existence of such facts. Is there a likelihood as suggested by the investigating officer for the accused to try and reach out her friends who have been enlisted as prosecution witnesses? To me on a balance of probabilities the answer is in the affirmative. What will be the motive? In the context of the context of the case an aversion to water down the strength of the prosecution case as documented in the advance information supplied to the accused.

In my considered view balancing the right to bail in favour of the accused with the rights of the victim and fair administration of criminal justice on the hand I hold as follows:

That the accused has no fixed abode or close family ties within the county. The charge of murder contrary to section 203 of the Penal Code levelled against her is a serious offence whose likely outcome in the event of conviction is a mandatory sentence of death; that there is a real risk that the applicant will try to reach out to the key witnesses who have been identified as close friends and acquaintances by the investigating officer. The availability of the surety has only assured this court that in the event the accused does not comply with the bond conditions he will be willing to forfeit the suit land to the state. However to me the cardinal objective in criminal justice is not primarily to sell surety property or pay to court the amount deposited in the cognizance. The primary concern will be to ensure appearance of the accused at the trial so that there is due process of the law and justice can be seen to be done to both the victim and the accused.

These circumstances to me are compelling reasons under Article 49 (h) notwithstanding the constitutional provisions under Article 27, 28(1), 29(a) and 50 (2) (a) on fundamental rights, and right to be presumed innocent until the contrary is proven to decline grant of bail in favour of the accused.

Dated, delivered and signed in open court at Kajiado on 19/7/2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Ms. Rashid for the accused present

Mr. Akula for the DPP present

Accused present

Mr. Court Assistant