



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
CRIMINAL CASE NO. 20 OF 2016

LESIT, J

REPUBLICPROSECUTOR

V E R S U S

IRENE MBITHE KIMUNYU.....1ST ACCUSED

CATHERINE KUTILA MUTHAMA.....2ND ACCUSED

R U L I N G

1. The 1st and 2nd accused persons are charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code Cap 63 Laws of Kenya**.
2. The particulars of the offence are that on the night of 24th / 25th February, 2016 at Kwangure Estate in Embakasi Sub-County within Nairobi County they jointly murdered Brian Kibet Kipngetch.
3. The 1st accused has sought bail pending his trial through his counsel Mr. Kariuki while the 2nd accused has sought bail pending trial through his counsel Mr. Kibathi. Both Counsels urged that bail is a constitutional right and that the court should release the accused persons on reasonable conditions. They undertook to abide by those conditions and any other condition the court would impose on them.
4. Ms. Njuguna Learned Prosecution Counsel representing the State opposed both applications and relied on the affidavit sworn by the Investigating Officer P.C Kanai dated 13th June 2016. The grounds upon which the applications are opposed are that the lives of both accused persons were at risk. The Investigating Officer explained that the accused were arrested by members of the Public who wanted to lynch them at the time. He averred that their release would trigger the fury of the area residents in Kayole where they were arrested and that they may in turn harm or even kill them.
5. Ms Njuguna argued that the accused persons were a flight risk and hence should be denied bail. Counsel urged that the 2nd accused did not indicate any fixed abode in her affidavit.
6. Ms Njuguna urged that the sentence the accused were likely to face if convicted was severe and that it may motivate them not to appear for their trial.
7. I have considered the application by the Counsels for the 1st and 2nd accused persons as well as the objection by the Prosecution Counsel.

8. There is no dispute that bail is a right to all persons charged before court irrespective of the charge facing them. The only rider under **Article 49(1)(h)** which gives rise to thought is that bail should be denied if there exists compelling reasons not to release an accused person on bail.

9. The principles applicable in an application for bail pending trial were considered in the case of **Ng'ang'a vs Republic 1985 KLR 451** where Hon. Chesoni J, as he then was held:

1. "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.**

10. 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;

- 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."**

11. The Bail and Bond Policy Guidelines were formulated specifically to guide the police and judicial officers in the administration of bail and bond. The guidelines set out what the courts should bear in mind when considering an application for bail. They are similar to those set out under **section 123A of the Criminal Procedure Code**. These general considerations are:

- "i) the nature of the offence; strength prosecution case;**
- ii). character accused and antecedents; failure by the accused to observe previous bail or bond;**
- iii). witness interference; protection of the victim;**
- iv). relationship between the accused and the potential witness(es);**
- v). whether the accused is a child offender;**
- vi). whether the accused is a flight risk;**
- vii). if the accused is gainfully employed;**
- viii). public order;**
- ix). peace security; and**
- x). whether there is need for the protection of accused person.**

12. Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include:

- i). the right of the accused to be presumed innocent;**
- ii). accused right to liberty;**
- iii).accused obligation to attend court;**
- iv). right to reasonable bail and bond terms;**
- v). bail determination must balance the rights of the accused persons;**
- vi). and the interest of justice; and,**
- vii).considerations of the rights of the victims.**

13. It is therefore now very clear to courts what it is that should guide in the considerations of bail and bond, unlike the situation as it was at the time the Constitution was promulgated and the court found itself at a loss as to how to enforce the rights particularly those under **Art. 49(1) (h)**.

14. The first accused person is aged 38 years. A Pre-Bail Report was prepared on her by a Probation Officer at Milimani Courts Nairobi. That report shows that the accused was of poor health having undergone two consecutive operations notably a caesarean section and a corrective operation. The Reports shows that the accused suffered from both physical and mental ailments as a result of the operations. She complains of severe headaches and hallucinations. She also complains of hearing voices of a man and a baby talking to her.

15. I have considered the Report and I have cautioned myself that the same does not have any medical documentation to support it. It is however clear from the Report that the accused is suffering from postpartum depression. The Report indicates that the 1st accused requires treatment and her family is willing to assist her in this aspect.

16. The Probation Officer's Report also shows that the family of the 1st accused are willing to stand surety for her if she is released on bail. On the other hand the family of the father of the deceased do not oppose the release of both accused on bail.

17. The 2nd accused person is 23 years old and a mother of a child of six years. A Pre-Bail Report prepared by Probation Officer shows that the 2nd accused may have been an innocent victim of circumstances for having accommodated the 1st accused person in her house without knowing that she was mentally unwell. The Report recommends that she be given favorable bond terms as her family was willing to meet them and to ensure that she attends court when needed to.

18. I have considered the Report on the 2nd accused and have cautioned myself that the facts alluded to have been given by the accused herself will need to be tested at the trial. That notwithstanding, it is clear from the Report that the accused release on bond is not opposed by the family of the deceased on both sides.

19. I have considered the replying affidavit by the Investigating Officer, P.C Kanai dated 13th June, 2016. He has deposed that the accused persons should be denied bail. Even though the right to bail is not absolute, denying bail to an accused person is a serious matter as it denies them their liberty. The grounds upon which it can be denied are presence of compelling reasons. The burden of proving these reasons lies with the prosecution and must be based on cogent and sound grounds.

20. The Investigating Officer has deposed that the accused persons are a flight risk on grounds they have

no known places of abode.

21. Mr. Kariuki for the 1st accused urged that the 1st accused was not a resident of the area where the offence occurred but came from Yatta in Machakos County, where she would reside once released where there was no evidence of hostility by the area residents towards her. Counsel urged that the 1st accused was therefore not a flight risk as she had a fixed abode and it was not difficult to trace her home.

22. Counsel for the 2nd accused, Mr. Kibathi urged that the 2nd accused was not a flight but was an ordinary Kenyan who came from a family with strong ties which had come to show her support in court. He urged that the 2nd accused would relocate to Mbiuni in Machakos County where her family resided and that she would attend court when needed.

23. Apart from the 2nd accused, the 1st accused has deposed in her supporting affidavit that if released on bond she has a fixed place of abode in Yatta where she would relocate to. . The counsel for the 2nd accused also named the place where the 2nd accused intends to live once released on bond as Mbiuni in Machakos County. The prosecution does not challenge the accused persons' statements that they do have a place of abode.

24. The Investigating Officer deposed that the prosecution had a strong case and may be a motivation for the accused to jump bail. Both counsels for the accused persons urged that it is only the court that could determine whether there was strong evidence after hearing the case.

25. The Investigating Officer deposed that the lives of both accused may be at risk. That factor is substantiated on the basis that the arrest of both accused was effected by residents of the area where the incident occurred. Further that the matter was widely reported in the media and that it may be dangerous to release the accused persons on bail due to the wide media coverage of the incident. That allegation was not substantiated. The prosecution has not attached the alleged media coverage reports or clips to demonstrate the reality of the alleged threat. I find this claim to lack in basis and reject it.

26. I find that the prosecution has failed to establish that there exists any compelling reasons to warrant this court to deny the accused persons bail. I have formed an opinion that the accused persons are young people. There is no proof that they may jump bail, or that they are a flight risk. It is their right to benefit from the right to bail pending their trial.

27. Furthermore the 1st accused has a medical condition that needs attention including peace of mind. She can benefit immensely if set at liberty on bond terms pending her trial. For that reason I find that due to the medical condition of the 1st accused, and due to any demonstration of compelling reasons not to release the two accused on bond, and based on the fact that there is no demonstration of any hostility against the accused persons as to prevent their release, I will grant both bond on the following terms:

- 1. Each to be released on a cash bail of Kshs. 50,000/-.**
- 2. In the alternative, each accused may be released on a bond of Kshs. 250,000/- with a surety each of the same amount.**
- 3. The accused persons should not set foot in Kwangure Estate or its environs where this incident took place.**
- 4. The accused persons should also not reside in the same area to avoid conflict during the pendency of this case.**
- 5. They should keep peace between themselves and also between themselves and those affected by the death of the deceased including the deceased's father.**
- 6. The accused must disclose the place where they will be residing before they are released.**

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF SEPTEMBER, 2016.

LESIIT, J

JUDGE