



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.10 OF 2014

JOYCE WANZA MUTUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Joyce Wanza Mutua** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that she murdered one Joseph Kiragu Warui on the night of 12th/13th January 2014, at Kahawa Sukari Estate within Nairobi County. She now seeks to be released on bail pending trial.
2. In her application dated 21st January 2014 she states that she has an unqualified constitutional right to be released on bail; that there were no compelling reasons to deny her bail; that she has an unqualified constitutional right to be presumed innocent; and that the allegations of murder however grave cannot be a proper basis to deny her fundamental freedoms and human rights guaranteed by the Bills of Rights. Further she states that she has two dependant children and is not a flight risk.
3. The application is opposed by the State. **No. 58062 Cpl. Paul Chebet** (the investigating officer) has sworn a lengthy Replying Affidavit stating that his investigations revealed that the applicant and her deceased husband had a quarrel which degenerated into a fight in which the deceased was stabbed four times; that at the time of the fight they were the only ones in the house; that the applicant was likely to interfere with prosecution witnesses two of whom are immediate neighbours while the third is a watchman in the residence of the accused; that the applicant was likely to abscond given the likelihood of conviction and the severity of the sentence; that the court should exercise discretion to deny the applicant bail.
4. At the hearing of the application **Mr. Ombetta**, learned defence counsel argued the application on a constitutional platform. He urged the court to uphold the constitutional rights of the accused under Article 20, 21, and 49 (i) (h). He further contested the averments in the Replying Affidavit of **Cpl. Paul Chebet** to the effect that the applicant was likely to abscond trial or interfere with witnesses.
5. On her part **Ms. Maari** the learned prosecution counsel urged the court to exercise discretion to deny the applicant bail. She submitted that the applicant might abscond given the severity of the sentence upon her likely conviction. She further submitted that the applicant was likely to interfere with the prosecution witnesses who were her neighbours and that her release may inflict fear on them.
6. The law and practice on bail for murder suspects is now settled. Numerous decisions have been rendered which support the constitutional interpretation that all offences including murder are nowailable under Article 49 (i) (h) of the Constitution. The only fetter to the right to bail is the existence of compelling reasons. Decisions also abound on what constitutes compelling reason(s) See **Republic –Vs- Milton Kabulit & 6 others 2011EKL**. See also **Republic –Vs- Daniel**

Musyoka Muasya & 2 others, High Court Mombasa Criminal Case No. 42 of 2009. Courts have also held time and again that the primary consideration in a bail application is whether or not the applicant will attend trial. See **Watoro Vs Republic (1991) KLR 220; Republic Vs. Danson Mgunya & another 2010 ECLR;** and **Republic Vs. Ahmed Mohammed Omar & 6 others HC Nairobi Criminal Case No. 114 of 2010.** In **Alhaji Mujahidi Dokubo –Asari and Federal Republic of Nigeria, SC 208/2006** the Supreme Court of Nigeria listed some of the accepted criteria for considering bail as:-

- i. *the nature of the charge;*
- ii. *the strength of the evidence which supports the charge;*
- iii. *the gravity of the punishment in the event of conviction;*
- iv. *the previous criminal record of the accused if any;*
- v. *the probability that the accused may not surrender Himself for trial;*
- vi. *the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;*
- vii. *the likelihood of further charges being brought against the accused;*
- viii. *the probability of guilt;*
- ix. *detention for the protection of the accused;*
- x. *the necessity to procure medical or social report pending final disposal of the case.*

7. This decision has been severally cited by Kenyan Courts.

8. In all cases however the court must be guided by **Article 49(i) h** of the **Constitution** and needless to state must exercise discretion judiciously in granting or denying bail. The present application is contested on the ground that the applicant is likely to abscond trial. I find, however, that the real likelihood of absconding is not demonstrated. It is merely stated, not explained and demonstrated to the satisfaction of the court. See **Patious Gichohi Njagi Vs. Republic Nairobi H.C. Criminal Case No. 45/2012.**

9. On the question of likely contact and interference with witnesses however, I find that the prosecution has discharged its duty in demonstrating the nexus between the applicant and some of the witnesses and the likelihood of interference with such witnesses. This, in my view is a compelling reason not to release the applicant.

10. In considering the present application, other than the respective affidavits and submissions by counsel, I called for and considered a pre-bail probation officer's report in respect of the applicant. The report gives an insight into the home environment of the accused. It shows that the applicant was the 2nd wife of the deceased and that there is still a lot of tension within the larger family arising out of the alleged murder of the deceased. The report further suggests the likelihood of confrontation between the applicant and her co-wife over the property of the deceased. I consider this however, to be outside the purview of the matter before court.

11. Having considered all the circumstances in this case, and exercising my discretion judiciously, I am disinclined to grant the applicant bail at this stage. The application dated 3rd February 2014 is thus dismissed.

Ruling delivered, dated and signed at Nairobi this 13th day of May, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused/Applicant

.....: For accused/applicant

.....: For the State/respondent