



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 15 OF 2016

REPUBLIC.....PROSECUTOR

=VERSUS=

AMINA SHIRAZ YAKUB.....ACCUSED

R U L I N G

The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code chapter 63 laws of Kenya. The particulars are that, the accused on the 26th of July 2015, at Amani Villas in Watamu township, Kilifi County, jointly with another not before court murdered Jimmy Paluram Jagatram.

After the taking of the plea, counsel for the accused applied for the release of the accused on bond but the state opposed the application. Mr. Gicharu and Miss Hannan, counsels for the accused informed the court that the accused is a widow and she lost her husband in July 2015. She is a mother of three children aged 3, 5 and 11 years respectively. All the children are attending school. The last born goes to Kabete Kindergarten in Nairobi. All the children depend on her. Further, the accused is a Chief Executive officer and a director of a Pets farm. She undertakes the daily operations of the company. She lives in Nairobi at New Nyari Estate. This is her first time to be charged with an offence and she is a law abiding citizen. Prior to her being charged, there was an inquest and she frequently attended court even if her attendance was not required. She has complied with all the summons issued by the police and she will abide by any bail terms imposed by the court.

Counsels further submit that the right to bail is a constitutional right under Article 49 (1) (h) of the Constitution. It is upon the state to prove that there are compelling reasons so that the accused cannot be released. The objection to the release of the accused is based on two issues.

On the issue that the accused is a flight risk and that she will interfere with witnesses, it is submitted that the accused has been travelling in and out of the country several times and has never absconded or refused to come back. The offence occurred on 26th of July 2015 and she has been all along available and complied with all police summons. At one time she applied for US citizenship but that has not been granted. The accused is a Kenyan citizen and lives in Kenya. She has not interfered with any witness. There is no report to a police station to the effect that the accused interfered with a witness. The letter dated 11th October 2016 from the DCIO alleging interference with witnesses is an afterthought.

The accused also at times resides in the UAE but has no passport for that country. Counsel contends that she is innocent until proved guilty and her freedom should not be curtailed.

Mr. Monda, prosecution counsel, opposed the application. Counsel submit that the right to bail under article 49 of the Constitution is not absolute. Article 49 is not coached in mandatory terms. Counsel relied on the affidavit of PC Ismael Oruko filed on 12th October 2016. Mr. Monda maintains that the accused is a flight risk as she has frequently travelled out of the country. There is an extract of her travelling history which proves that the accused travels out of the country frequently. There is also proof that she applied for US citizenship. She is facing the most serious offence under the Kenyan law that is murder. The consequences upon conviction is a death sentence. That in itself is a compelling reason to deny the accused bail. Given an opportunity the accused would fly out of the country.

Mr. Monda, further contends that there is a letter dated 11th October 2016, confirming that the accused threatened witnesses. At the time of the threats there was an inquest but the circumstances have changed whereby the accused is now facing a murder charge. These were not empty threats and is also not an afterthought. Counsel urged the court not to release the accused on bond. Should the court exercise its discretion then the accused should be released on stringent bond terms which should include reporting orders and deposit of her passport in court. The accused stated in her own statement under inquiry that she applied for US citizenship.

Mr. Maro, counsel watching brief for the victim's family urged the court not to release the accused on bond. Counsel informed the court that the charge sheet indicates that there is another suspect who is still at large. That suspect used to attend the inquest sessions. The police have been unable to arrest him because he cant be found. Chances are that he might be outside the jurisdiction of the court. That person is called Jacob Shmitz. The accused is a resident of the UAE as her own statement under inquiry and her children have residential rights in that country. These are compelling reasons not to grant the accused bail.

From the submissions and the record, it is established that the deceased was the accused's husband. The court is being called to weigh between the accused's right to be released on bond under Article 49 of the Constitution and the state's position that there are compelling reasons not to release the accused on bond. It is clear from the record that prior to the accused being charged with the offence, there was an inquest. No witness testified during the inquest. It is true the circumstances have changed and the accused is now facing a charge of murder. The mandatory sentence for that offence is provided under Section 204 of the Penal Code. Section 204 provides for a death sentence for the offence of murder.

Article 49 (1)(h) of the Constitution provides for the rights of arrested persons. It states as follows: *to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.*

It is an accused person's right to be released on bond. However, should the prosecution establish that there are compelling reasons not to release an accused person on bond, that right can be curtailed. The right to be released on bond does not fall among the rights and freedoms that may not be limited under Article 25 of the Constitution.

Article 24 of the Constitution provides for limitation of rights and freedoms under the Bill of Rights. It is provided that rights shall not be limited except by law and to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.

The record shows that the accused has been frequently travelling out of the country. The state has

annexed the accused's travelling history between November, 2014 and 30th October, 2015. It is not unusual for someone to travel in and out of the country. Further, the offence occurred on 26th July, 2016. The accused was exercising her freedom of movement and the right to leave Kenya under Article 39 (i) and (ii) of the Constitution. She could not anticipate that she would be charged with the offence and she was free to leave and enter the country as she wished. Exercising that freedom cannot amount to one being a flight risk. It is true that the accused could be having a place in the UAE where she could reside but still that does not conclusively make her a flight risk.

There is a letter dated 11th October, 2016, by the Malindi District Criminal Investigating Officer stating that the accused threatened two witnesses. Unfortunately, this letter was written on the same date the accused was arraigned before the court. It is not clear why from 26th July, 2016 to the time the decision to prosecute the accused no complaint had been made. Ordinarily, it would be proper for the witness who was threatened to swear an affidavit or make a report at a police station about the threats: The court takes seriously threats to witnesses as cases are proved through the evidence adduced by such witnesses. However, allegations that an accused person is threatening witnesses have to be well established as the consequences could be denial or cancellation of the accused's bond.

The charge sheet indicates that one person who was to be charged with the accused is still at large. Mr. Maru informed the court that that person used to attend court during the inquest just like the accused. In essence therefore the fact that the accused has been abiding with police summons should not be conclusive evidence that she will not jump bail. It is possible to make such a conclusion. It is not possible to know one's intention. At times even those charged with minor offences jump bail. We cannot read one's mind. Even the devil does not know one's intention. All what we can do as human beings is to expect the best of everybody and hope that everyone will abide by the law. Making a negative postulation may not be the answer to the situation at hand.

Several factors comes into play when considering an application for bail. Before 2010, capital offences such as murder, robbery with violence and treason were not bailable. At one time drug related offences were also not bailable. The promulgation of the 2010 Constitution has made all offences to be bailable. In the case of **REPUBLIC V LUCY NJERI WAWERU & 3 OTHERS, Nairobi Criminal Case No. 6 of 2013**. Muchemi J itemises these factors as follows: -

- (a) **Whether the accused persons were likely to turn up for trial should they be granted bail;**
- (b) **Whether the accused persons were likely to interfere with witnesses;**
- (c) **The nature of the charges;**
- (d) **The severity of the sentence;**
- (e) **The security of he accused if released on bond;**
- (f) **Whether the accused person has a fixed abode within the jurisdiction of the court.**

In the case of **REPUBLIC V JOKTAN MAYENDE & 4 OTHERS Bungoma High Court Criminal Case No. 55 of 2009**, Justice Gikonyo held 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.”

The Court in exercising its discretion to grant bail ought to consider the primary factor which is whether or not the accused shall turn up for trial, that is to say the likelihood of the accused jumping bail as held in **WATORO V REPUBLIC [1991] eKLR**. The burden of proof in bail applications is on a balance of probabilities as held in **REPUBLIC V DAVID KASOVU SYENGO & ANOTHER (2016) e KLR by Dulu J.**

Article 24(1) of the Constitution makes it clear that rights and freedoms can be limited by law such as the right to bail is limited by the existence of compelling factors. The court in reaching its conclusion ought to consider the compelling factors. What then is considered compelling" The constitution does not define the word nor does it list its characteristics. Hence in interpreting the word 'compelling' within the rules of interpreting the Constitution as per its Article 259, it ought to be defined so as to, inter alia, advance the rules of law and the human rights and fundamental freedoms in the Bill of Right. The construction has to be made broadly, liberally and purposively as per the Court of Appeal in **CENTER FOR RIGHTS EDUCATION AND AWARENESS & ANOTHER V JOHN HARUN MWAU & 6 OTHERS [2012] e KLR**.

In my view when one is facing the possibility of a harsh sentence the temptation to abscond the jurisdiction of the court is heightened. This is not to say that the Applicant in this case has such intentions but the Court must be alive to such a possibility. As regards to flight risk allegations by the State, the Applicant is willing to surrender her passport and be reporting to any office the Court would order. This in my view offers a respite to the concerns of the State and balances the freedom of movement of the Applicant, who is innocent until proven otherwise by a court of law.

There was a concern about interference with witness. The Applicant in her defence stated that there was no evidence to this effect. It was also pointed out that the DCIO only took action in the month of October, 2016 on the alleged threat made in the month of July, 2016. I find it too convenient that the DCIO applied for witness protection many months after the said threat. If at all those threatened were key witnesses whose lives were at stake and hence the prosecution evidence in jeopardy, why was action not immediately taken" In my view, the witness protection program application notwithstanding, this is not a plausible compelling reason due to the circumstances at hand.

The accused is a mother with three young children. That position calls for a deeper consideration of her status. One does not premeditate that criminal charges would confront her in future. Such situations come in as a result of our daily engagements in life. The Constitution has extended the liberty of even those charged with capital offences. Denial of bond should be the exception and not the rule. The accused is a Kenyan and holds a Kenyan passport. I do find that her situation of being a mother of three coupled with the fundamental principle that one is innocent until proven guilty qualifies her to be released on bond. The situation is further compounded by the long delays in prosecuting criminal matters in Kenya which condemns accused persons to long periods of incarceration in remand prison before their trials are concluded.

In the end, I am satisfied that there are no compelling reasons not to release the accused on bond. The accused is hereby granted bail on the following terms: -

(i) The accused to deposit her passport in court and should not leave the court's jurisdiction without permission.

(ii) The accused shall be released on a bond of Kenya Shillings Ten Million (Kshs.10,000,000) with two Kenyan sureties of similar amount. No log book or books should be used as security

document.

(iii) The accused to report to the OCS Gigiri Police Station, Nairobi once every week with effect from 1st November, 2016 until the finalisation of this case.

(iv) This case shall be mentioned once every month and the accused to attend all mentions.

Dated, signed and delivered in Malindi this 26th day of October, 2016.

S. J. CHITEMBWE

JUDGE



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