



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NO. 18 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

GRACE WANJIRU GATHUMBI.....ACCUSED/APPLICANT

RULING

The applicant was charged with the offence of murder contrary to **section 203 as** read with **section 204** of the **Penal Code**; it was alleged that between the 3rd and 4th September, 2008 at Solio Estate in Naromoru location Kieni East District within Nyeri County, the applicant murdered Rosemary Wangechi Ndaiga.

The applicant took plea on 16th September, 2013 and an application for the bond was argued before my brother Justice Wakiaga on 25th June, 2014; on that date Wakiaga J directed the probation officer from Kieni East to prepare a pre-bail report for the court to determine bail terms and conditions, if at all the application was going to be granted. That report was filed in court on 19th September, 2014 and on 22nd September, 2014, the learned judge directed that the case be mentioned on 5th December, 2014 for determination of the application.

Justice Wakiaga left the station before the 5th December, 2014 and so the application was subsequently mentioned before me on at least occasions for purposes of taking a hearing date for the main trial before counsel for the applicant informed the court on 31st July, 2015 that he wanted to submit on the pre-bail report that had been filed in court. Those submissions were finally made on 21st October, 2015.

Counsel for the applicant briefly urged that the pre-bail report was supportive of the applicant's application and showed that the applicant was not a flight risk.

Mr Nyamache for the state opposed the application and submitted that the applicant had previously been charged with the offences related to kidnapping and in fact she had been imprisoned for five years. More so the applicant's house had been demolished and her family had disowned her and thus she had no fixed abode.

As for the probation officer's report, counsel for the state submitted that of all the applicant's sisters, only one had been interviewed. Counsel also submitted that the community in which the applicant is supposed to be released to has not healed and thus the applicant's own safety was not guaranteed.

According to the affidavit sworn by the Sgt Zablon Wambani who investigated the case, the applicant murdered Rosemary Wangechi Ndaiga (the deceased), by strangling and cutting her into pieces. She then buried the remains in one of the rooms in her house. The accused fled the scene and was only arrested by

members of the public.

Apart from the murder of the deceased, the applicant was also charged with the offence of kidnapping contrary to **section 258** of the Penal Code before the Nanyuki Senior Principal Magistrates' Court; she was convicted of this offence for which she was sentenced and indeed served a term of five years imprisonment. The applicant was arrested immediately she was released from prison to answer to the charge of murder.

The investigations officer deposed that when she was first arrested, she was about to be lynched by members of the public who even demolished her house. According to the investigations officer, the applicant was not only a flight risk but her own life was in danger. He opposed her release on bail.

Before making his report, the probation officer interviewed the applicant's sister, her assistant chief and the applicant herself. Her sister ruled out the possibility of being able to stand surety for the applicant unless the court granted her personal bond. The assistant chief was of the view that the community has not healed and the applicant will not be safe if she is released into it. The suspect herself, according to the probation officer, was disinterested with the bond because of what the officer described as "abject situation at home or other personal reasons".

The right to bail is a constitutional right and is only subject to what has been described in **article 49(1)(h)** of the Constitution as 'compelling reasons'. It provides:-

49. (1) An arrested person has the right-

(a)...

(b)...

(c)...

(d)...

(e)...

(f)...

(g)...

(h) 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 question therefore is whether there are compelling reasons for the applicant not to be released on bail. I think there are the most important of which is that much as the application has been made on her behalf, the applicant herself would prefer to remain in custody where she believes the conditions are better and perhaps safer than what she is likely to face in the unknown world out there.

Secondly, the deposition that the applicant has no fixed abode has not been contested; her house, according to the investigations office, was demolished by members of the public who were baying for the applicant's blood after the murder incident. The investigations officer, the probation officer and the applicant's area assistant chief are all consistent that the applicant's own life may be in danger if she is released to community.

Chesoni, J. held in **Nganga versus Republic (1985) KLR 451**, that the most important factor to bear in mind in considering whether to release or not to release any accused person on bond is whether they will attend the trial. In considering this factor the judge noted the court must weigh:-

- a. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty: where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.
- b. The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused person is strong, it may be justifiable to remand him in custody.
- c. The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.

The case in which these factors were outlined was decided way before the current constitution came into being but even so the learned judge acknowledged then as it is now acknowledged that bail pending trial is a constitutional right except that it is not always granted as a matter of course where there are sufficient or compellable reason not to grant it; these factors can therefore be considered in that light.

There is no doubt the offence with which the appellant is charged is a serious one but that alone cannot be a reason to deny her bail. As for the strength of the prosecution case, nothing much can be said about it at this stage except to say that the circumstances under which the deceased died as deposed to in the affidavit of the investigations officers have not been controverted in this application. The applicant, according to the investigations officer has a previous criminal record, which does not speak well of her character and antecedents; but again this in itself is not a sufficient reason to deny the accused person bail.

All I can say is that a combination of these factors makes it more probable than not that the applicant may not appear at the trial if she is released on bail. In my view, she is may not only abscond but the danger of her escaping from the jurisdiction of this court is real more so considering that she was arrested while running away from the crime scene.

In any event, going by the report of the probation officer the applicant herself does not seem to be enthusiastic about being released on bail.

For the foregoing reasons, I reject the application for bail pending trial.

Dated, signed and delivered in open court this 15th January, 2016

Ngaah Jairus

JUDGE