



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NO. 3 OF 2015

PURITY WAMBUI KABUGI.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant in this case has been charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**; according to the particulars of the offence, on the night of 1st January, 2015 at Kiahungu Trading Centre in Mukurweini District within Nyeri County, the applicant, jointly with another not before the court murdered Michael Githinji Wanjama.

The applicant entered a plea of not guilty on 9th February, 2015 and on the same day an application to be admitted to bail pending the accused person's trial was argued on her behalf. Mr Abuor for the applicant argued that the applicant is a single mother whose children wholly depend on her for their livelihood; the accused, so urged her counsel, has a fixed abode and has sureties who will ensure that she is always in court whenever required.

Mr Njue for the state opposed the application for bail. Relying on the affidavit filed by the investigations officer in this case, Mr Josephat Mbulu, counsel urged that the accused person was arrested while fleeing and considering these circumstances under which she was arrested, the state fears that the accused person is likely to flee if she is granted bail.

Article 49(1) (h) of the Constitution under which bail pending trial is granted says:-

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.

Prior to the promulgation of the Constitution in which this provision is embedded, Chesoni J (as he then was) had the occasion to consider the grant of bail in such circumstances in the case of **Nganga versus Republic (1985) KLR 451**, where he said that in exercising its discretion to grant an accused person bail under the constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors. The learned judge said:-

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions...generally in principal, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it shown by the prosecution that there are substantial grounds for believing that:

- a. ***The accused will fail to turn up at his trial or to surrender to custody; or***
- b. ***The accused may commit further offences; or***
- c. ***He will obstruct the course of justice***

“The primary purpose for bail is to secure the accused person’s attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

- 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.***
- d. ***Accused’s failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.***
- e. ***Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with the prosecution witness if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.***

It, therefore, follows that the court, in exercise of its discretion under section 123 (1) or (3) of the Criminal Procedure Code, in considering the accused’s constitutional right to bail, it does not do so in

the abstract but also considers the factors I have outlined above.”

According to this decision, subject to certain factors or conditions which the trial court was bound to consider, bail could be granted even before the emergence of **article 49 (1) (h)** of the Constitution; with this new constitutional provision, bail is now granted as a matter of right unless there are compelling reasons not to. In my view, the compelling reasons may include but not limited to those factors which deserve consideration that the learned judge outlined in the cited decision.

Coming back to the case at hand, the state says, as I understood its counsel, that the applicant is a flight risk and therefore she is likely to abscond. Whether an accused person is a flight risk is a valid consideration which the court ought to take into account when granting or rejecting an application for bail pending trial after all, as aptly put by the learned judge in the *Nganga case*:-

“The primary purpose for bail is to secure the accused person’s attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial.”

The affidavit on which the state counsel relied in his submissions states that the applicant was arrested away from the scene of the crime and presumably she must have been fleeing; however, it is not clear from that affidavit whether the crime was committed at the applicant’s home where she would ordinarily be expected to reside and therefore if she was arrested at any other place different from her home she must be deemed to have been fleeing. Neither is it clear whether Kiahungu, where the crime was committed, was the deceased’s person’s home so that the applicant may have possibly gone there, committed the crime and either gone back to her home or moved elsewhere. It is also not quite certain whether the applicant was ordinarily not expected to be at the place where she was arrested.

With all these possibilities and uncertainties it cannot be concluded with any conviction that the accused person was in flight from the scene of crime or to avoid apprehension. In these circumstances, I find that there is no compelling reason why the applicant should not be admitted to bail pending her trial. I would therefore admit her to bail pending the hearing and determination of her case on the following conditions:-

1. The applicant shall execute a bond of Kshs. 1 Million with two sureties of the like sum;
2. The applicant shall appear before the Deputy Registrar, High Court, Nyeri, once every month until her trial has been concluded;
3. The applicant shall not leave the jurisdiction of this honourable court without the court’s prior permission.

Dated, signed and delivered in open court at Nyeri this 13th April, 2015

Ngaah Jairus

JUDGE