



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 69 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NANCY WANJIKU NGUGI.....ACCUSED**

**RULING**

Nancy Wanjiku Ngugi is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. She denied the offence and was remanded in custody since 8/7/2010. By the Notice of Motion filed in court on 18/2/2011, she seeks to be released on bail pending the determination of the trial. The applicant was arrested on 26/6/2010, is a mother of five children who now live with her elderly mother at Nakuru Pipeline. At time of arrest, she was five months pregnant and gave birth to a child who is now 2½ months old. She is willing to abide by any terms that may be imposed by the court. The application was supported by the affidavit of the accused’s mother, Josephine Gachui Kimani who is willing to stand surety for her daughter and ensure that the accused attend court as will be required.

Mr. Nyakundi appearing for the State, opposed the application on grounds that the deceased was the applicant’s husband; the family of the husband is still bitter and the accused will be safe remaining in remand. He also submitted that since the offence carries a life sentence, she may abscond.

The application is made pursuant to **Art 49(1)(h)** of the Constitution which provides as follows:-

***“49(1) An arrested person has the right –***

....

***(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.***

.....

***(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”***

From a reading of the above provision the court has discretion to grant bail in all cases where the accused is charged with offences punishable by fine alone, or imprisonment for a period not exceeding six months. However, in all other cases, the accused will be released on bail/bond on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. The right to bail is therefore not an absolute right. It is limited by what the Constitution refers to as compelling reasons. The said reasons are not defined but in **DANSON V MGUNYA (MSA)** Cr. 26/08 J. Ibrahim considered the Nigerian case of **ALHAJI MUJAHID DUKUBO ASARI V FEDERAL REPUBLIC OF NIGERIA** Supreme Court of Nigeria SC 208/06 which set out some of the criteria on whether or not to grant

bail. The criteria include:-

- (i) *The nature of the charges;*
- (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 applicant;*
- (v) *The probability that the criminal may not present or surrender himself for trial;*
- (vi) *The likelihood of further charges being brought against accused;*
- (vii) *The likelihood of accused interfering with witnesses or may suppress any evidence that may incriminate him;*
- (viii) *The probability of finding the applicant guilty as charged;*
- (ix) *The detention for the protection of the accused;*
- (x) *The necessity to preserve medical or social report pending final disposal of the case.*

The above criteria were set out in a case on an appeal and some may not be applicable to applications for bail at the trial stage. For example the issue of:-

- (ii) *The strength of the evidence which supports the charge;*
- (iv) *The previous criminal record of the applicant;*
- (x) *The necessity to preserve medical or social report pending final disposal of the case.*

In this case, the prosecution has already closed its case and it is awaiting submissions on whether or not the accused has a case to answer. The accused is presumed innocent until proved guilty (**Art. 50 (2)(a)**). This court having heard the evidence adduced by the prosecution, it cannot ignore it in considering whether or not to grant bail. It is noted that it would have been best if the application for bail was made before any evidence had been taken.

The applicant is charged with a capital offence of murder which carries a death sentence in the event of a conviction. The applicant cannot interfere with witnesses because the prosecution has closed its case. As to whether the applicant is a flight risk, the respondent has not alleged that she can take flight. She is a mother of 5, including a 2½ months old baby whom she got while in remand. The other children are left in the custody of their grandmother. Since the applicant is the only surviving parent to look after the children, having taken all these factors into account it is in the best interest of the children that she be released on bond to take care of them as she awaits the determination of this case. It is unlikely that she will be a flight risk. As to whether her life may be at risk, the accused's mother intends to stay with her away from the scene of crime. I find that there are no compelling reasons to decline the application to release the applicant on bond and I hereby exercise my discretion and order the release of the applicant on bail. The applicant be released on bond of Khs.500,000/- with two sureties of same amount. The applicant do report to court for mention of her case every 2 weeks till further orders of this court.

**DATED and DELIVERED on this 8<sup>th</sup> day of April 2011.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Accused/Applicant present – in person.

Mr. Omutelema for the State.

Kenned – Court Clerk.