



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. E007 OF 2021**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GRACE MUMBI MUTHAMA.....ACCUSED**

**RULING**

**Brief Facts**

1. This is a ruling on whether the prosecution have established a prima facie case against the accused. The accused is charged with murder contrary to **section 203 as read with 204 of the Penal Code**. The particulars of the offence are that on the night of 12<sup>th</sup> and 13<sup>th</sup> day of June, 2020 at Labura Village in Mweiga Division in Kieni West Sub-County, within Nyeri County, jointly with another wilfully murdered George Kahuhu Wahome.

2. The prosecution filed an Affidavit dated 20<sup>th</sup> September 2021, sworn by CPL Anthony Murigi the investigating officer in this case. He deposes that the accused is a flight risk as she murdered her husband the deceased and went into hiding at Rumuruti area in Nyahururu where she was arrested on 23<sup>rd</sup> July 2021. Evidence of witnesses is to the effect that the accused was seen buying petrol in a yellow jerrican on the night before the deceased went missing and she moved the deceased's vehicle, registration number KCC 994S which was found in the possession of one Wilfred Nyabiosi Nyamanya.

3. The accused filed her affidavit on 15<sup>th</sup> October 2021 and stated that she is a mother of three children who are school going and she is the sole bread winner of the children who are now at risk of being taken to a children's home. She further contends that she is not a flight risk as she has a permanent residence where her family stays and she has never been arrested before or had a criminal record. She prays to be released on reasonable bail terms and is ready to abide by any terms set by this honourable court.

**Issues for determination**

4. On perusal of the affidavits by both parties the main issue for determination is whether the prosecution have established compelling reasons not to release the accused.

**The Law**

**Whether the Prosecution has demonstrated compelling reasons not to release the accused on bail**

5. **Article 49(1)(h)** of the Constitution provides that:-

**An accused 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.**

6. It follows that the right to bail is not absolute and where there are compelling reasons, that right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exists compelling reasons to deny an accused person bail.

7. The considerations in determining whether or not to grant bail are set out in **Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25** which sets out judicial policy on bail thus:-

**“the following procedures should apply to the bail hearing:**

- a) The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:-**
- b) That the accused person is likely to fail to attend court proceedings; or**
- c) That the accused person is likely to commit, or abet the commission of, serious offence; or**
- d) That the exception to the right to bail stipulated under Section 123A of the criminal Procedure Code is applicable in the circumstances; or**
- e) That the accused person is likely to endanger the safety of victims, individuals or the public; or**
- f) That the accused person is likely to interfere with witnesses or evidence; or**
- g) That the accused person is likely to endanger national security; or**
- h) That it is in the public interest to detain the accused person in custody.”**

8. In **Republic vs Fredrick Ole Leliman & 4 Others [2016]eKLR** the court held that:-

**“The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of Ng’ang’a vs Republic 1985 KLR 451 where Chesoni J, as he then was thus:-**

**“The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (Cap 75), should grant bail to an accused person unless it is 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;**
- b) The accused may commit further offences; or**
- c) He or she will obstruct the course of justice**

**The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;**

- a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- b) The strength of the prosecution case;**
- c) The character and antecedents of the accused;**
- d) The likelihood of the accused interfering with prosecution witnesses.”**

9. The court will proceed to examine the reasons given with a view of establishing whether they are compelling enough for this court not to grant bail to the accused.

10. One reason presented by the prosecution is that the accused fled when she committed the offence and was later arrested at Rumuruti. It is the prosecution’s case that the accused comes from Ngarua, Nyahuru and she had fled to Rumuruti area following the commission of the offence at Mweiga in Nyeri County. The prosecution state that the charge of murder is a serious offence that if convicted, the accused would serve a sentence of death or a long period of imprisonment. As such the temptation to abscond would be even greater due to the seriousness of the offence.

11. The prosecution ought to have put in affidavits of the arresting officer explaining how and in what circumstances the said arrest was effected in order to bring out clearly the alleged escape and hiding. The affidavit of the investigating officer is not by itself sufficient to establish that the accused is a flight risk. The prosecution have a duty to satisfy the court that the accused if released on bail is likely to abscond by placing sufficient material for consideration by the court.

12. The law presumes the accused person innocent until proven guilty. From the contents of his affidavit, the investigating officer seems to have convicted the accused person of the offence before the trial begins. Compelling reasons must be very powerful and persuasive to demonstrate that the accused is a flight risk and that he may not turn up for trial if released on bail. The prosecution has failed to give weighty and sound material for this court to consider.

13. The paramount consideration in granting bail is to ensure that the accused will attend court. Depending on the seriousness and nature of the offence, the court has a discretion of setting the terms for release where it considers bail appropriate.

14. It is my finding that the prosecution have not demonstrated compelling reasons not to release the accused under Article 49.

15. Consequently, the accused shall be released on bail to execute bond of Kshs.1,000,000/= with one surety of alike amount and will not leave the jurisdiction of the court without its permission.

16. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 11<sup>th</sup> day of November 2021**