



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 77 OF 2011**

**LESII, J.**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**JENIFFER WANJIRU NG'ANG'A.....ACCUSED**

**RULING**

1. The accused persons, **JENIFFER WANJIRU NG'ANG'A aka MAMA FLORA aka MAMA MWANGI aka MAMA KABIRI** is charged with 8 counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The offences are alleged to have been committed on the 11<sup>th</sup> September 2011 at Gitambaya village in Ruiru District.
2. The accused has made 4 applications for bail so far. The first application was by Notice of Motion dated 17<sup>th</sup> November 2011. The application was heard by Ombija, J who made a ruling declining the application on 22<sup>nd</sup> February 2012.
3. The accused filed another Notice of Motion application dated 30<sup>th</sup> May 2012 seeking bail pending trial. That application was heard by Ombija, J and dismissed on 5<sup>th</sup> July 2012. In the fourth application the accused seeks to be released on bail pending the hearing and determination of her case. The application is by Notice of Motion dated 2<sup>nd</sup> July 2014. The application is premised on grounds on the face of the application namely;
  - a. That the applicant is elderly, currently sickly and attending regular admissions in hospital while in custody, at the Kenyatta National Hospital (File No.1489848 Ward No.5D).
  - b. That the applicant has been in custody for well over one (1) year three (3) months, and her family of six (6) children continue to languish in destitution.
  - c. That one of the applicant's children viz: Stanley Nganga is epileptic and begs for motherly care and attention.
  - d. That the applicant undertakes not only to abide by any conditions laid out by this Honourable court in granting her bail **BUT** further emphasizes that she has no intention of interfering with prosecution witness and/or this trial or at all.
  - e. That the applicant had made similar applications before this court and which applications were declined inter alia on the grounds that tempers were still high at the time and hence a danger to the applicant's safety.
  - f. That such tempers have since been subdued by effluxion of time and this Honourable court ought to be pleased to grant this application.

- g. That the applicant is a permanent resident of this court's jurisdiction and has a permanent abode and other interests within this court's jurisdiction and has no intention or at all to abscond and/or jump bail.
  - h. That whereas the prosecution will not suffer any prejudice should this application be granted the applicants earnestly seeks of this court conscience to uphold the very sacred and fundamental freedoms of this Republic in her favour and be pleased to grant her application as prayed.
4. The affidavit in support is sworn by the accused on which she reiterates the grounds upon which the application is based.
  5. Mr. Esuchi urged the application on behalf of the accused person. In his submissions, counsel invoked Articles 21(1), 49(1)(h) and 50(2) of the Constitution.
  6. Mr. Esuchi urged that the accused has been in custody for almost 3 years; that she has six children one of which is epileptic needing her care. Counsel urged that accused had no intention of absconding or interfering with witnesses.
  7. Regarding previous applications, Mr. Esuchi urged that the instant application was the second one by the accused and that the reason the earlier application was declined was due to danger of the accused being attacked by villagers. Counsel urged that the danger no longer exists due to lapse of time. Mr. Esuchi urged that the accused intended to live with her daughter in Kariobangi South.
  8. The application was opposed. Ms. Mwaniki, learned Prosecution Counsel urged that the State was relying on the replying affidavits filed in response to the two earlier applications for bail by the accused. The replying affidavits, counsel urged are dated 19<sup>th</sup> June 2012 and 6<sup>th</sup> February 2013.
  9. Ms. Mwaniki submitted that the circumstances of the case had not changed since the previous applications. Counsel contended that witnesses had been warned not to testify and that if accused is released, the prosecution case will suffer irreparable damage unless the accused guaranteed she would refrain from interfering with witnesses.
  10. Ms. Mwaniki urged that 8 people died in this matter and that the civilian witnesses had not testified. Counsel urged that in the circumstances the application for bail should be declined.
  11. I have carefully considered the application for bail pending trial by the accused in this case. As noted earlier, this is the third such application.
  12. In the first application of 17<sup>th</sup> November 2011 the basis of the application was that the divination of the trial was unknown, that the accused was an old woman, married with children and who was not a flight risk and who had no intention of interfering with witnesses.

In the honourable judge's ruling, Ombija, J observed that not only was the application unopposed as no replying affidavit was filed, there was no prosecution counsel in court during the hearing of the application. The learned judge declined the application on grounds it would be dangerous to the safety of the accused to release her.

13. In the application of 30<sup>th</sup> May 2012 the grounds advanced for the granting of bail were fact the tempers of the community members had since been subdued due to effluxion of time. The rest of the grounds were basically the same.
14. The State filed a relying affidavit dated 18<sup>th</sup> June 2012 by CPL Kieme the investigating officer. The investigating officer deposed that the witnesses in the case all reside from known localities, were common patrons of accused's pub and that there was possibility the witnesses may be inflicted real fear when they came into contact with the accused and that some had been warned not to testify. He deposed that there was hue and cry from members of public who held demonstrations against the accused and that it was in accused's rest interests to remain in custody.

15. In brief the learned judge's ruling dated 5<sup>th</sup> July 2012, Ombija, J declined bail to the accused on grounds the accused and witnesses are still neighbours and that the likelihood of the accused intimidating them was very real; that the temptation to abscond was very real and finally that the weight in the evidence in the replying affidavit of CPL Kiema was more than that of the affidavit sworn in support of the application.
16. The third application was by a Notice of Motion dated 17<sup>th</sup> December 2012. The grounds for that application are almost word for word to those upon which the instant application is based. The State opposed the application by way of a replying affidavit sworn by CPL Kiema, the Investigating Officer, dated 5<sup>th</sup> February 2013. The contents of that affidavit by CPL Kiema is similar to the one he swore dated 18<sup>th</sup> June 2012 in response to the earlier application.
17. In the learned Judge's ruling delivered on 19<sup>th</sup> March 2013, Muchemi, J declined bail mainly for reasons the witnesses have been threatened while accused is in custody and that releasing her would cause the situation to become worse. The learned judge ruled that the accused should not be released until all the witnesses from Gitambaya village testify. Finally the learned judge was convinced that releasing the accused would lead to the likelihood of interference with witnesses and also the likelihood of the accused security being at risk.
18. I have considered the instant application. Since the ruling of Muchemi, J which is the last one made before this one, there has been 11 prosecution witnesses heard. The State has given an indication that there are 11 witnesses to go and that the bulk of them are the civilian witnesses from the village where incident occurred and where the victims, witnesses and accused come from.
19. The defence has not observed the ruling of Muchemi, J. The ruling is clear that accused should not be released until all civilian witnesses have testified. The civilian witnesses have not all testified. That means the circumstances prevailing when the previous three applications were argued have not changed.
20. That also means that the likelihood of the witnesses being intimidated not to testify still persists. Further, having held demonstrations against the accused in the past, it may be putting the life of the accused at risk to release her when part of those who demonstrated, said by CPL Kiema the investigating officer in his affidavit to be relatives of the deceased persons in this case one yet to testify in court.
21. My learned colleagues who have heard similar applications for bail from the accused have all consistently ruled against granting accused bail. The reasons for declining bail have been the same, that likelihood of interference with witnesses is real, that release may lead to intimidation of witnesses who are yet to testify and who have been threatened in accused absence and finally for reason accused life may be in real danger and at risk.
22. Having considered the fourth such application by the accused, and considering all the previous applications and rulings given thereof, I find that the circumstances have not changed since said rulings. The civilian witnesses are yet to testify, the accused life is still at risk and the likelihood of more serious intimidation of remaining witnesses is still very high.
23. For that reason I find that the application is an abuse of the court process having been made when clearly the situation and circumstances of the case are clearly the same. For these reasons I disallow the application for bail pending trial, dismiss it and direct that the accused do remain in custody until her case is heard and finalized.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF DECEMBER, 2014.**

**LESIT, J.**

**JUDGE.**



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