



**Republic v Ochieng (Criminal Case E032 of 2023)  
[2023] KEHC 21436 (KLR) (Crim) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21436 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E032 OF 2023  
DR KAVEDZA, J  
JULY 31, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DANIEL OCHIENG ..... ACCUSED**

**RULING**

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal](#) Cap 63 Laws of Kenya. The Particulars of offence are that on the night of 24 and 25, 2023 within Nairobi County the accused jointly with others not before this court murdered James Gitau Ng'ang'a.
2. The Accused took plea on June 14, 2023 and denied the charges. His Counsel, Mr Koskey, promptly applied that he be admitted to reasonable bail terms pending trial.
3. The State has opposed his release on bond claiming that there are compelling reasons. According to the affidavit in opposition of bond by No 70499 Cpl Geoffrey Kipkirui, the Investigating Officer (IO), the offence took place on April 24, 2023 and the accused was arrested on April 29, 2023. Further, that on May 1, 2023, while the accused was in police custody and investigations were ongoing, the accused's accomplices set fire to the primary scene of crime, motor vehicle KCT 651U. According to him, the accused communicated with his accomplices while he was in custody before they set ablaze the said motor vehicle in a bid to eliminate any evidence which may connect them to the alleged offence. He averred that if the accused is granted bail/bond he will regroup with his accomplices and undermine the prosecution case. He averred further that the accused does not qualify to be admitted to bail as the prosecution has strong and irrefutable forensic evidence that points to his guilt. He is apprehensive that if the accused is released on bond, he will interfere with two of the prosecution witnesses who are



his workplace colleagues. Lastly, he averred that the nature of the charges facing the accused are serious attracting the death penalty and thus could be an incentive enough for the accused to jump bail.

4. Mr Isoe, counsel for the accused person submitted *inter alia* that; the right to bail was absolute unless there were compelling reasons; the averments in the affidavit by the Investigating Officer were not supported by any evidence; and that the continued detention of the accused may compromise the quality of the accused's defence as he needs ample time and a conducive environment to prepare a robust defence.
5. A pre bail report filed in court on July 10, 2023 recorded that the accused person at the time of arrest was working as a customer service attendant at House of Leather shop in Westlands. He had been working at the said shop for over one year. The area assistant chief indicated that he could not vouch for the character of the accused as he had spent most of his adult life at his maternal grandparent's place in Busia and in Nairobi. He further stated that the character of most of the accused's family members is wanting and as such, the accused could not be expected to be on positive behaviour while on bail. The deceased's family members felt that the psychological pain of losing a loved one was still fresh in their minds and that releasing the accused on bail will heighten their sense of insecurity and safety.

### Issues for determination

6. I have considered the parties' submissions, affidavits and the constitutional provisions cited. From the foregoing, the main issue for consideration is whether the prosecution has established compelling reasons not to release the accused on bond/bail. The prosecution has raised two main grounds, namely; interference with witnesses and strength of the prosecution case.

### Analysis and determination

7. Although Bail and bond is a constitutional right of an accused person under Article 49(1)(h) of the [Constitution](#), there are circumstances under which an accused person may be denied bail if the prosecutor is able to demonstrate compelling reasons to warrant the denial.
8. In the case of [Republic V Danson Mgunya & Another](#) [2010] Eklr, which is a *locus classicus* on matters of bail/ bond, the issue was exhaustively addressed. The findings of the learned Judge are replicated in the Bail and Bond Policy Guidelines. The learned Judge stated:

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -

- (i) The gravity of the punishment in the event of conviction
- (ii) The previous criminal record of the accused, if any
- (iii) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him
- (iv) Detention for the protection of the accused
- (v) The necessity to procure medical or social report pending final disposal of the case.



The said court stated that the criteria was not exhaustive.

“The main function of bail is to ensure the presence of the accused at the trial. Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.”

9. The Judiciary [Bail and Bond policy guidelines](#) under paragraph 4.9 has also provided the factors that ought to be considered by courts in bail and bond applications, inter alia:
  - i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
  - ii. The likelihood of interfering with witnesses.
  - iii. The accused person is a flight risk.
  - iv. Whether the accused person is gainfully employed.
10. Firstly, the Investigating Officer (IO) at paragraph 7 averred that he is apprehensive that if the accused is granted bond/bail he will regroup with his accomplices who are still at large with the aim of absconding or further undermining the prosecution case since he is aware of the prosecution evidence against him. The IO further averred that on May 1, 2023, while the accused person was in custody, he communicated with his accomplices who are still at large and who in turn set ablaze the primary scene of crime to eliminate any incriminating evidence against them. This court however notes that there was no specific proof that the accused communicated with the said accomplices or that he is likely to regroup with them if released on bail to interfere with the prosecution evidence. The IO did not disclose the telephone numbers that the applicant allegedly used to communicate with his accomplices. In the absence of such evidence, his averment that the applicant is likely to regroup with his accomplices with a view of undermining the prosecution case is speculative. I therefore reject his averment for that very reason.
11. Secondly, as to the nature of the offence and the seriousness of the punishment likely to be meted if the accused person is ultimately found guilty, I note that at paragraph 8 of the affidavit in opposition to bond, the Investigating Officer (IO) avers that the accused person does not qualify to be admitted to bail as the prosecution has strong and irrefutable forensic evidence that points to the accused person's guilt. To my mind, such evidence can only be that which has been duly proved, tested and formally admitted before the Court, either by way of affidavits or viva voce evidence. That being the position, I am therefore not convinced that the strength or weakness of the prosecution is so apparent at this stage of the proceedings as to be a helpful factor in determining the instant bail application.
12. Thirdly, is the accused person likely to interfere with witnesses? On this ground, the court in *R. V. Jaktan Mayende & 3 others*, stated that:

“ - In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to [the Constitution](#) of Kenya 2010.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding



or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

13. Furthermore, it is the duty of the court to give effect to the rights of victims expressed in Section 10 of the *Victim Protection Act* No 17 of 2014, as follows: -
- 10 (1) a victim has a right to: -
- (a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
  - (b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and
  - (c) Have their property protected.
14. In this regard, I note from the pre-bail report the community and the victim’s family are opposed to the accused person’s release on bond. In particular, the victim’s family indicated that the deceased’s death has taken a heavy toll on the family and they are still trying to unearth the motive of the murder. The deceased’s family is apprehensive that if the accused is released on bond, it will heighten genuine fear and anxiety, consequently arresting the healing process. The family further indicated to the probation officer that the burning of the deceased’s car immediately after the accused was arrested was not a mere coincidence. They also feel insecure as the accused and his accomplices probably know their residence.
15. In the end, the probation officer recommended that the bond be withheld for a while as the deceased’s family members still suffer psychological pain. He further stated that releasing the accused on bail/ bond will only heighten the sense of insecurity and safety within the deceased’s family. These are witnesses who will be expected to testify against him at the trial. In the circumstances, I find that the release of the accused on bail/bond at this juncture can inflict genuine fear and anxiety to the deceased’s family leading to intimidation of potential witnesses.
16. From the foregoing, this Court finds that there is a compelling reason to deny the accused admission to bail. The application is therefore temporarily disallowed until the tension cools down and primary witnesses have testified.

It is so ordered.

**RULING DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2023.**

**D. KAVEDZA**

**JUDGE**

In the presence of:

