



**Republic v Mukungu & another (Criminal Case E009 of 2023)  
[2023] KEHC 22727 (KLR) (Crim) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E009 OF 2023  
DR KAVEDZA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**LINNET MUKUNGU ..... 1<sup>ST</sup> ACCUSED**

**JOSEPH MWANGI ALIAS MUKORINO ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons are jointly 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 January 27, 2023 at Moscow Estate, Gathodeki Village in Dagoretti Sub-County, within Nairobi County, with others not before court jointly murdered Kevin Mutisya.
2. The accused persons took plea on 16/3/2023 and denied the charges following which they promptly applied to be admitted to reasonable bail terms pending trial.

**The submissions of the accused persons**

3. Mr Isoe, counsel for the 1<sup>st</sup> accused person submitted that the right to bail is absolute unless there are compelling reasons. He relied on article 49(1)(h) and 50 of the Constitution as read with section 123 of the Criminal Procedure Code to support his argument. He further submitted that the Investigating Officer in his affidavit has not produced any evidence to support his apprehension that the accused person may interfere with the prosecution witnesses. He relied on the case of Republic v John Kabindi Karisa & 2 others (2010) eKLR to support his submission. It was further submitted that murder is an offence like any other for purposes of bail.



4. With regards to the strength of the prosecution case, Counsel submitted that the accused is presumed innocent until proven otherwise. As such, he prayed that the accused be released on reasonable bail terms as the stringent standards set by the Constitution have not been met as to justify the limitation of the fundamental freedom of liberty of the accused.

### **The case for the respondent**

5. The State has however opposed the release of the accused persons on bond claiming that there are compelling reasons to do so. According to the affidavit in opposition of bond by No. 65908 CPL Wilson Mutua, the Investigating Officer (IO), the offence took place in a neighbourhood setting where both the deceased and the accused persons were residing. He averred that some of the prosecution witnesses are well known to the accused persons as some of them are their neighbours. He is apprehensive that if the accused persons are released on bond, they are likely to threaten, intimidate, coerce, interfere or in any other way influence the said witnesses. Lastly, he urged the court not to release the accused persons on bond considering the agony of the victim's family.
6. To enable the court to determine the issue of bond, the court called for a pre bail report in respect of each accused person. As regards to the 1<sup>st</sup> accused person's report dated 20/6/2023, it was indicated that her family may not have the financial support for her bail/bond. As regards to the corresponding pre bail report dated 17/6/2023 in respect of the 2<sup>nd</sup> accused, it is indicated that he has never done anything to put the investigations at jeopardy despite his wife living in the same neighbourhood even after the incident. However, the victim's family opposed the application for the accused persons to be released on bond/bail. In particular, the victim's father is apprehensive that they may flee the jurisdiction of the court if released on bond and consequently deny them justice.

### **Issues for determination**

7. I have considered the parties' submissions, affidavits and the constitutional provisions cited. From the foregoing, the main issue for consideration is whether the reasons advanced by the respondent are compelling enough to deny the accused persons their respective right to bail.

### **Analysis and determination**

8. 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.
9. 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.....

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.”

10. 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.
11. The main question that this court grapples with is whether the accused persons are likely to interfere with the prosecution witnesses if released on bail/bond? The arguments raised by the respondent on interference with witnesses raises the issue of protection of the integrity of the trial and criminal justice process.
12. Indeed, interference with witnesses undermines the criminal justice system and dents the integrity of the criminal process; in turn interference with the administration of justice, and prejudice to the trial. Thus, it is the duty of the court to preserve the integrity of the trial. In this regard, I concur with the sentiments of Lesiit J in *R v Fredrick Ole Leliman & 4 others*, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR where she held that:
- “Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.”
13. It is incumbent upon the court to strike a perfect balance which ensures that the trial is not impeded by acts of interference with witnesses, but at the same time, upholding the rights of the accused to fair trial.
14. The circumstances of this case are that the incident happened in a neighbourhood setting, within a residential plot. It is alleged that the accused persons, jointly with others not charged before this court, accosted the deceased who eventually succumbed to his injuries. It is further averred by the Investigating Officer that the incident happened in the presence of some of the neighbours who are yet to testify against the accused persons. In as much as the veracity of the said averments is yet to be tested during trial, I find that in the circumstances, the said neighbours may be scared stiffly by the presence of the accused persons among them. It therefore follows that the likelihood of interference of witnesses, directly or indirectly, is not far-fetched.



15. In conclusion, the court finds that a compelling reason has been established; likely interference of witnesses especially the neighbours who are alleged to have witnessed the incident. Certainly, there is a compelling reason to keep the accused persons in custody at least until the said witnesses have testified. Accordingly, the accused persons are denied bail.
16. If, however, within four (4) months, no witness has testified, the accused persons are at liberty to apply for review of the bail terms. The same application shall be considered on its merit and the circumstances of the case at the time.

It so ordered.

**RULING DATED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> SEPTEMBER 2023.**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr Mulama for the State.

Mr Isoe for the 1<sup>st</sup> Accused.

Accused present on the platform.

