



**Republic v Nyakundi (Criminal Case 34 of 2019)
[2023] KEHC 423 (KLR) (Crim) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 34 OF 2019
DO OGEMBO, J
JANUARY 30, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ERICK ONYONO NYAKUNDI ACCUSED

RULING

1. The applicant Erick Onyono Nyakundi filed for bail way back in 2019 and 2020. For some reasons the applications have remained unheard till the issue was raised by the defence on 31.11.2022. The parties then agreed to canvass the issue of bail by way of written submissions which were duly filed. The Respondent has opposed the release of the accused on bail on several grounds.:-
2. First, that the accused is likely to interfere with witnesses if released on bail. That since the applicant now knows the identity of the witnesses and the strength of the case of the prosecution, he may contact the witnesses in an attempt at self preservation, (*Republic v Fredrick Ole Leliman & 4 others* [2016] eKLR).
3. Second that the accused is a flight risk. That immediately after the incident on 23.5.2019, the accused fled to his rural home in Kisii and discarding his mobile phone line, remaining at large for 9 days. That he also has no known place of abode, a ground used in *Republic v Joseph Kuria Irungu & another* [2018] eKLR.
4. The prosecution also submitted that the accused faces a serious charge and that the prosecution has a strong case, which the applicant is fully aware of.
5. In response, the defence have submitted that 4 prosecution witnesses have so far testified and given weak evidence and that the accused is presumed innocent till proved otherwise. That the accused has



fully cooperated with the investigating team. It was also denied that the accused is a flight risk. The defence relied on the cases of *Republic v Dwing Sagaray & 4 others*, Criminal Case No 61 of 2012 and *Republic v Richard David Alden*, Criminal Case No 48 of 2016. That the court can set appropriate terms of bail.

6. It was also denied that the accused will interfere with witnesses. That the prosecution need to show same facts pointing towards likelihood of such interference (*Panju v Republic* [1973] EA 284). Counsel also relied on *Republic v Jakton Mayende & others* [2013] eKLR, wherein Gikonyo, J held;

“Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where the person is a witness, it suffices to prove that the accused did acts tending or intended to interfere with a witness.”

That no such evidence has been shown to court.

7. I have considered this application and the submissions made to it by both sides. Articles 49(1)(h) of the *Constitution* avails the right to bail to all accused persons irrespective of the charges that they face. The right to bail however, maybe denied should the prosecution prove the existence of a compelling reason. In simple terms, these are reasons that are good enough as to justify a denial of the right to bail.
8. The bail-bond policy guidelines, and indeed the courts in their decisions have spelt out what could amount to compelling reasons. Amongst the factors for consideration include:-The nature of the charge and the seriousness of the punishment in case of conviction.Character and antecedents of the accused.Strength of the prosecution’s caseLikelihood of interference with prosecution witnesses.Whether the accused is a flight risk.Need to protect witnesses.Public order, peace and security.Protection of the accused himself.
9. The first objection of the prosecution herein is that the applicant is likely to interfere with prosecution witnesses. The reason given is that he now knows who the witnesses are. With respect, it has been held severally that for this ground to stand as a compelling reason, the prosecution must show some proof of either actual or perceived interference (see *Panju v Republic* [1973]EA 284, *Republic v Joktan Mayende & others* [2012]eKLR, *Republic v Danford Kabage Mwangi* [2016]eKLR. So that mere allegation cannot suffice as a compelling reason. And that is what the prosecution has done in the instant case wherein no proof of interference or perceived proof of interference has been placed before the court.
10. Similarly, on the second ground that the applicant is a flight risk, no evidence of the same has been shown to court. Certainly it is not sufficient evidence to state that the applicant had moved to his rural home. The arrest itself was done within a relatively short time i.e 9 days, leaving a doubt as to whether the applicant had indeed absconded and gone underground.
11. As regard the third and fourth grounds i.e that the applicant faces a serious charge and that the prosecution has a strong case against the applicant, there is no doubt that the charge herein is serious and that it attracts a severe sentence in case of conviction. Article 49(1)(h), of the *Constitution*, however, avails the right to bail to all accused persons irrespective of the charges that they face. This ground therefore, cannot on its own be a compelling reasons.
12. The accused is otherwise presumed innocent till the contrary is proved. In a case such as this one where the prosecution’s case is yet to be fully heard, it is not possible for this court to gauge the strength or otherwise of the prosecution’s case. I therefore find this ground also cannot be a standalone ground as a compelling reason.
13. The sum total is that this court is not convinced that the prosecution has proved the existence of any compelling reasons, good enough to justify a denial of the right to bail to the applicant. I accordingly



therefore dismiss the objections of the prosecution and order that the applicant/accused may be released on bail on the following terms:-

- i. A bond of Kshs 2 million with 1 surety of a similar amount.
- ii. An alternative, of Kshs 200,000/= a cash bail.
- iii. Upon released on bail, the accused is ordered never to contact and or interfere with any of the prosecution witnesses, directly or indirectly till this case is determined.
- iv. Upon release on bond, the accused is ordered to attend court at all times as would be ordered by the court till this case is determined.

Orders accordingly.

HON. D. O. OGEMBO

JUDGE

30TH JANUARY 2023.

Court:

RULING READ OUT IN OPEN COURT IN THE PRESENCE OF THE ACCUSED, MS. CHEPSEBA FOR ACCUSED AND MS. NJOROGI FOR STATE.

D. O. OGEMBO

JUDGE

30TH JANUARY 2023.

