



**Republic v Ndungu (Criminal Case E013 of 2023)
[2024] KEHC 14130 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE E013 OF 2023
AK NDUNG’U, J
NOVEMBER 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID WAGITA NDUNGU ACCUSED

RULING

1. The Accused Person herein, David Wagita Ndungu is charged with murder contrary to Sections 203 and 204 of the Penal Code. It is alleged in the information dated 18/12/2023 that between 18th and 19th August, 2018 within Laikipia County he murdered Ruth Gathoni Kimondo.
2. On 04/03/24 he pleaded not guilty to the charge. The Republic has now opposed bail by an affidavit dated 21/02/2024 sworn by the Investigating Officer NO.62024 CPL. Reuben Mwaniki. The reasons advanced for opposing bail are;
 - i. That the investigation by DCI Homicide Division at DCI Headquarters revealed sufficient evidence to support the charge of murder that the Accused is facing.
 - ii. That although *the Constitution* makes provision in Article 49(I)(h) for an Accused Person to be released on bond or bail on reasonable conditions, the right is not absolute but a matter of discretion on the part of the Court.
 - iii. That the incident occurred at Nanyuki County within Nanyuki Municipality Block No.11/304 on the 18th day of August, 2018 when the victim herein Ruth Gathoni Kimondo was reported missing at Nyeri Police Station on 21st August, and investigations immediately commenced.



- iv. That during investigations it was discovered that immediately after the commission of the offence the Accused started calling family members of the Deceased demanding to be sent some money while using the Deceased's mobile phone.
 - v. That since the investigations have been ongoing for five years, the Accused Person is very well known to the Prosecution Witnesses most of whom are the Deceased's family members and there is a high likelihood of him interfering with the witnesses when released on bond or bail.
 - vi. That from the recovered body parts, there is evidence to suggest that the Deceased was cut into pieces before she was buried and the investigating team are yet to recover all her body parts.
 - vii. That it is believed that the Accused knows where the rest of the Deceased's body is and there is a reasonable apprehension that if he is released on bond or bail he will interfere with investigations by ensuring that the remaining body parts are never recovered.
 - viii. That investigations show that given the precision with which this offence was committed, there is a likelihood that there are other accomplices involved and if the Accused is released on bail or bond, he is most likely to join his accomplices and continue committing more offences involving violence to the public.
 - ix. That after commission of the offence the Accused moved from his known place of abode, where the Deceased's body was found, and into a house given to him by First Pentecostal Revival Church.
 - x. That the Accused does not have any known permanent place of abode and if he is released on bail or bond there is a very high likelihood that he would abscond as he does not have any known economic or familial ties.
 - xi. That at the time of arrest the Accused tried to escape and as such the Investigating Officer is apprehensive that if the Accused Person is released on bond tracing him in the event of absconding court will be difficult if not impossible.
 - xii. That the Accused Person herein having been charged with the offence of murder and if found guilty the punishment meted out could be that of the death penalty and therefore there are more probabilities and incentives for the Accused Person to abscond if released on bail or bond pending the determination of the hearing.
 - xiii. That the Prosecution has overwhelming and irrefutable evidence that points to the Accused's guilt, thus there is a high probability that the Prosecution will secure a conviction. The Prosecution is apprehensive that if the Accused Person is released on bail or bond he may flee the jurisdiction of the court in fear of being sentenced.
3. The application is opposed and in a replying affidavit the Accused maintains that the averments in the affidavit opposing bail are mere allegations that are unsubstantiated and devoid of any evidence.
 4. He reiterates the constitutional guarantee to bail under Article 49(h) and he pleads the presumption of innocence.
 5. A pre-bail report has been filed to aid the court appreciate the circumstances of the accused in determining his suitability to bail.
 6. The application was canvassed by way of written submissions. The State maintained that the Accused is likely to interfere with witnesses and investigations; the Accused is flight risk; that the nature of the charge and the seriousness of the punishment is an incentive enough for him to abscond. Reliance is



placed on the case of Republic v Ahmed Mohammed Omar & 6 Others (2010) eKLR where the court held that, whereas the Applicant is still presumed innocent; if he were to be convicted for murder, there is a possibility that the trial court could sentence him to death. Therefore, the severity of the sentence remains a significant factor for consideration in an application for bail pending trial.

7. In response, the Accused counsel argued that *the Constitution* grants the Accused persons right to be released on bond or bail unless there are compelling reasons not to be released.

8. 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.

9. From the text of *the constitution*, it does not define nor specify what qualifies under the term “compelling reasons”. The ordinary meaning according to Thesaurus English Dictionary of the word “compelling” is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would militate against the grant of bail to an accused person informed by the provision of Section 123A of the Criminal Procedure Code and the Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015.

10. Section 123A of the Criminal Procedure Code gives the parameters for the grant of the right to bail as follows:

(1). Subject to Article 49(1)(h) of the and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

- (a) the nature or seriousness of the offence;
- (b) the character, antecedents, associations and community ties of the accused person;
- (c) the defendant’s record in respect of the fulfilment of obligations under previous grants of bail; and;
- (d) the strength of the evidence of his having committed the offence;

(2). A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

- (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
- (b) should be kept in custody for his own protection.

11. The Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 at P. 25 sets out judicial policy on bail as follows:

a. 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:

a. That the accused person is likely to fail to attend court proceedings; or



- b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
- c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
- d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e. That the accused person is likely to interfere with witnesses or evidence; or
- f. That the accused person is likely to endanger national security; or
- g. That it is in the public interest to detain the accused person in custody.

12. It is trite that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since *the Constitution* expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial and whether or not the a free and fair trial can be achieved notwithstanding the release of the accused on bond. I associate myself with the view expressed by Muriithi, J in *Kelly Kases Bunjika vs. Republic* [2017] eKLR that:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

- 13. In determining whether or not a free and fair trial is possible the Court ought to take into account the circumstances of the accused as well as that of the potential witnesses. However, since the release on bond or bail is a constitutional right, it is upon the prosecution to satisfy the Court why a free and fair trial is not possible if the accused is so released.
- 14. Any terms of bail to be imposed by court must again be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. Thus, the grant of bail and the setting of terms is at the discretion of the court.
- 15. I have considered the facts placed before me in support of and in opposition to bail. I have had due regard to the pre-bail report which is a useful independent tool in assessing suitability to bail.
- 16. I note however that the pre-bail report is not complete as the officer who conducted the interviews was unable to trace the victim’s family.
- 17. On the material before court and more specifically the fact that the accused moved from his usual place of abode after the incident, the fact that only parts of the body of the deceased were recovered and



it is likely that the accused could interfere with investigations/further recovery, the fact that there is evidence on oath that accused attempted to escape at arrest and the fact that the accused has no fixed abode all militate against the grant of bail to the accused.

18. All these factors coupled with the gravity of the offence and the likely sentence on conviction render the accused a flight risk and a likely bad influence in the administration of justice by interfering with witnesses.
19. With the result that the opposition to bail is upheld. The Accused shall be remanded during the pendency of the trial. In the interests of justice, the trial shall be heard on a priority basis.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH NOVEMBER 2024

A.K. NDUNG’U

JUDGE

