



**Republic v Wanjiku & another (Criminal Case E002 of 2024)
[2024] KEHC 4663 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL CASE E002 OF 2024
FN MUCHEMI, J
MAY 2, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER NGUGI WANJIKU 1ST ACCUSED

BENSON NJOROGE NGUGI 2ND ACCUSED

RULING

Brief Facts

1. The accused persons face three counts of the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offences are that on the 6th day of December 2023 at Matathi village, Maguguni Sub Location, Kilimambogo Location, Thika East Sub County within Kiambu County jointly with others not before the court murdered Penina Wairimu Ngugi, Pauline Njeri Ngugi and Joyce Wairimu Mwangi. On February 26, 2024, the accused persons pleaded not guilty to the charges.
2. The prosecution filed an Affidavit of Compelling Reasons labelled as an Affidavit in Opposition to Bond dated February 28, 2024 sworn one by PC Martin Kiama who is the investigating officer in this case. He deposes that there is a strong likelihood that the accused persons will interfere with the witnesses since they are family members personally known to him. Thus, the deponent argues that if the accused persons are released on bond, they may compromise the said witnesses who may not be in a position to testify freely on the matters culminating to the instant case which is a result of family property.
3. Further, the investigating officer states that the accused persons are likely to interfere with the arrest of the two suspects who are still at large and may therefore hinder their arrest.



4. The investigating officer contends that the 1st accused person is a flight risk as he does not have a fixed place of abode. The deponent further states that upon arresting the 1st accused person and requesting him to take them to his residence, the 1st accused person took them to a building under construction at Ruiru and thereafter to an unfinished building at Juja where he said he spent the night with the suspects at large after the incident. Thus, the investigating officer argues that if the 1st accused person is released on bond, he would not be traceable as he does not own a phone and the sim card recovered from him was registered with the identity card of one of the suspects who is still at large.
5. Further, the investigating officer avers that tension and hostility is still high at Maguguni Location, where the incident occurred and that the family members of the deceased persons are still bitter with the accused persons. In the event that they are released on on bond, locals and family members of the deceased persons may retaliate.
6. In response to the Affidavit of compelling reasons, the 2nd accused person in his Replying Affidavit dated March 4, 2024 states that he is 57 years old, married with two children and a farmer at Kimbo in Juja Sub County. He further states that the prosecution has merely made allegations without any proof as to how he will interfere with any witnesses or that his life is at risk in the event he is released on bond. The 2nd accused relies on Article 49(1)(h) of the Constitution and the case of Republic v Dwight Sagaray & Others High Court Criminal Case No. 61 of 2012 and states that bail is a constitutional right guaranteed under the Constitution of Kenya. Moreover, the 2nd accused person contends that there are constitutional and legislative mechanisms in place to protect witnesses who are under real threat and he urges the court to take into consideration such mechanisms in the event the safety of the witnesses is at stake.
7. The 2nd accused person avers that he shall attend court as directed by this honourable court. He vows that he will not abscond court. He further states that he suffers from high blood pressure and thus urges the court to release him on reasonable bail terms to enable him get proper medical attention.
8. Parties put in written submissions however the prosecution and the 1st accused person failed to file any submissions.

The 2nd Accused's Submissions.

9. The 2nd accused person relies on Article 49(1)(h) of the Constitution and the cases of Republic v Danson Mgunya v Another [2010] eKLR and Republic v Daniel Musyoka Muasya [2010] eKLR and submits that the right to bail pending trial is guaranteed under the Constitution and can only be limited by existence of compelling reasons which ought to be demonstrated by the prosecution.
10. The 2nd accused also relies on the cases of R v Patius Gichobi (no citation given) and R v Dwight Sagaray & 4 Others [2013] eKLR and submits that interference of witnesses is a compelling reason to deny bail however, the prosecution is bound to lay out the specific instances or likelihood of such interferences with succinct detail or evidence in support thereof so as to persuade the accused bond on that ground. In that regard, the 2nd accused person argues that the prosecution has not demonstrated by way of evidence how he is likely to interfere with the witnesses in the event he is released on bail/bond. Moreover, the 2nd accused person submits that if there is any basis for the prosecution's apprehension, the same can be taken care of by the terms of bond the court may set as was set out in the case of Republic v John Ochango [2021] eKLR.
11. The 2nd accused person contends that the court is only duty bound to take into account in its determination whether or not an accused person is likely to abscond attending trial, which in the instant case, the 2nd accused person argues that there is nothing to suggest that if bail is admitted, he



will abscond his trial. The 2nd accused person thus argues that the prosecution has not established to the required standards existence of compelling reasons to justify denial of his constitutional right to bail/bond.

The Law

Whether the reasons for opposing bail are merited in terms of Article 49(1)(h) of *the Constitution*.

12. 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.

13. It follows that the right to bail is not absolute and where there are compelling reasons, that right may be restricted. Nevertheless, since the *Constitution* expressly confers the said right, it is upon the prosecution to show that there exists compelling reasons to deny an accused person bail.

14. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail thus:-

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

15. In *Republic v Fredrick Ole Leliman & 4 Others* [2016]eKLR the court held that:-

“The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of *Ng'ang'a v Republic* 1985 KLR 451 where Chesoni J, as he then was thus:-

“The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the *Criminal Procedure Code* (Cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-



- a) The accused will fail to turn up at his trial or to surrender to custody;
- b) The accused may commit further offences; or
- c) He or she will obstruct the course of justice

The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- a. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
- b. The strength of the prosecution case;
- c. The character and antecedents of the accused;
- d) The likelihood of the accused interfering with prosecution witnesses”.

16. The issue that arises is whether the reasons adduced by the prosecution are compelling reasons such that the court should not grant bail pending trial.
17. The prosecution has argued that the accused persons are likely to interfere with the prosecution witnesses and they shall hinder the arrest of the two suspects who are still at large. Further, the prosecution has stated that the accused persons’ safety is at risk as tensions are still high at Maguguni Location where the incident took place. Furthermore, the prosecution contends that the 1st accused person is a flight risk as he does not have a fixed place of abode.
18. I have perused the Bail Information Reports filed on March 13, 2024 and for the 1st accused person, the local administration from where he hails were hesitant to comment on the matter as the accused is not known to them. The family of the victims opposed the application on bail in respect of the 1st accused as they were apprehensive that he would flee because he already made a confession. The sister of the 1st accused urges the court to grant favourable bail/bond terms to the 1st accused and states that she is willing to step in as his surety. Upon the 2nd accused person being interviewed by the probation officer, he was found to have strong community ties and one of his friends, a senior government officer is willing to stand as surety for him should he be released on bail. The family members of the 2nd accused person are urging the court to grant the 2nd accused person affordable bail terms due to his ill health.
19. In regard to interference with the key witness, the prosecution did not demonstrate by way of affidavits or other evidence that such a thing was likely to happen. Further, the allegation that the accused persons safety is at risk is not supported by any evidence, which is yet another matter of speculation. In the case of *R v Joktan Mayende & 3 Others* (2012) eKLR, the court in considering the scope of Article 49(1) (h) stated as follows:-

The phrase “compelling reasons” denote that the reasons are forceful and convincing as to make the court feel strongly that the accused should not be released on bond. Bail should therefore not be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the *Constitution*.
20. However, I have noted that the 1st accused has not demonstrated that he has a fixed place of abode and further the victims’ families are apprehensive that he is a flight risk as he already confessed to the incidents. However, the court will deal with this issue in granting bail conditions, should this application be successful.



21. The prosecution in my view, has failed to present any cogent evidence to support the allegations in the affidavit of compelling reasons. Having carefully considered the grounds relied on, it is my considered view that the reasons given do not pass the test set out under Article 49(1)(h) of the Constitution.

Conclusion

22. Consequently, the prosecution has not proved on a balance of probabilities that there are compelling reasons to justify denial of bail. I therefore find that the accused persons ought to be granted bail pending trial in the following terms:-
- a. The two accused shall be released on bond of KShs,2,000,000/= each. The 1st accused will avail two (2) sureties while the 2nd accused shall avail one (1) surety.
 - b. That the two accused shall not associate or interfere with any of the prosecution witnesses until the witnesses have given evidence and be discharged by the court.
 - c. That the accused shall not leave the jurisdiction of this court without its permission during the pendency of the case.
23. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 2ND DAY OF MAY 2024 AT THIKA.

F. MUCHEMI

JUDGE

