



**Republic v Magu & another (Criminal Case E071 of 2023)
[2024] KEHC 9778 (KLR) (Crim) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E071 OF 2023
LN MUTENDE, J
JULY 30, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ANTONY GIKUNDI MAGU 1ST ACCUSED

FAUSTINE JERUTO 2ND ACCUSED

RULING

1. Antony Gikundi Magu, the 1st Accused, and, Faustine Jeruto, the 2nd Accused, are indicted for murder of baby CWG. The particulars against them being that on 2/10/2023 at around 1100hours at Kayole one area in Kayole Sub-county, they murdered Baby CWG.
2. Having denied the information presented against them they seek to be released on bail pending trial.
3. The application is opposed by the State. Through an affidavit deposed by No. 71504 Corporal Timothy Wanyama of DCI Kayole, it is averred that: the accused have been charged with a serious offence; the prosecution has a strong irrefutable evidence against the accused and that the deceased was a child of tender years.
4. That the accused persons failed in their parental duty and the extended family / victims have been greatly impacted by loss and the violent manner in which the offence was committed and would be prejudiced.
5. Further that prosecution witnesses who are neighbours and relatives are likely to be threatened, intimidated or influenced in some way. That the crime scene was the rental house where the accused lived as husband and wife, hence they do not have a fixed abode and or any known employment.



6. That the court should balance the accused rights with the victim's considering what is provided by Article 26 of *the Constitution* on the right to life and also provide an enabling environment for witnesses to testify.
7. The application was disposed through oral submissions. Learned defence counsel, Mr. Kariuki Njiri, urged that the fact that the accused is charged with a serious offence should not be used to deny him bail. That the object of bail is for the individual to attend court. That the prosecution's grounds seeking to have the accused denied bail are mere allegations.
8. Based on the affidavit deposed by the 2nd accused, learned defence counsel for the 2nd Accused, Mr. Mokua urged that the accused should benefit from the presumption of innocence. That although the charges are serious, the witness statements are allegations at this stage of the trial.
9. Relying on the replying affidavit the State through learned Prosecution Counsel urged that the 1st accused is the biological father and the 2nd accused is the deceased step mother. That the many witnesses are known to the accused and are also related to them. It is therefore their prayer that bond should be deferred until the relatives have testified.
10. A social inquiry was conducted by Probation and AfterCare Services department and Pre-bail reports filed in the case. The 1st accused is the biological father of the deceased who was aged 2 ½ years and whose mother died at child birth.
11. The child lived with her paternal aunt until recently when the accused married the 2nd accused and took over custody. The 1st accused drinks alcohol and also admits to taking bhang. However according to the family this is not an issue since the family will ensure that he complies with bail terms.
12. The 1st accused family also doubles up as the deceased / victim family. The accused mother and sister were shocked by the death that occurred, they support the 1st accused application but fear for the accused security if he goes to Kayole hence the family has organized for the 1st accused to stay with his uncle at Gitwamba Estate in Ruai.
13. The community indicated that the accused does not have a criminal record. That he will relocate to Ruai and the Assistant chief undertakes to corroborate with the family to ensure the accused observes court orders. That the accused mother owns a parcel of land in Murang'a which she intends to use as collateral.
14. The 2nd accused had been living with the 1st accused and they have a 7 months old child together. The accused has chest problems, she is not a flight risk and that her family is ready to use a land title to secure her release on bond. That she would be residing with her brother at Muthurwa. She denies attempts to interfere with witnesses. The accused is said to be hardworking and calm person and she has a young child under her care.
15. The secondary victims are opposed to her release on bond as they are bitter because the deceased was aged 2 years and the only child to the mother who died at child birth. And, that her family has not extended an olive branch and sought forgiveness. However, the Community is not opposed to the accused application for bail.
16. I have considered rival arguments. Article 49(1)(h) provides that: An arrested 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.



17. An accused person is presumed innocent until proven guilty, To deny an accused bail, the prosecution have the duty to adduce compelling evidence in contest of the application. Reasons given should be cogent and not mere speculation.
18. Granting bond is a discretionary function of the trial court and depends on the circumstances of the case. Of importance is the question whether the accused will turn up for trial. In Republic -Vs- Danson Mgunya & Another [2010] eKLR Ibrahim J (as he then was) held that the principle that the liberty of an accused should only be limited where there are compelling reasons not to be released and it is the duty of the state to demonstrate the same, and even then each case must be decided on its own circumstances touch and context.
19. The compelling reasons alleged are the interest of the victim, strength of the evidence, the accused chances of interfering with witnesses, the accused lack of fixed abode, and, the severity of the offence and sentence to be imposed in case of conviction.
20. The victim's interest must also be considered as provided under Section 2, 4 and 20 of the [Victim Protection Act](#). In this case the deceased was the child of the 1st accused and a step child of the 2nd accused. The 1st accused family who represent the victim are not opposed to the 1st accused application. But, the family is bitter against the 2nd accused and her family.
21. However, the circumstances under which the offence was committed and considering that the deceased was said to be in the care of both accused, the court has to act fairly to both sides pending determination of the actual evidence against the accused, the cause of death and the real perpetrator.
22. On the question of the strength of evidence, this is not a persuasive ground at this stage of trial but can be brought up after the defence case when the accused is aware of the case against him/her and is likely to abscond.
23. To deny bail on the question of interference or intimidation of witnesses, there must be convincing evidence that the accused will deliberately obstruct/prevent integrity of justice making them alter what they intend to adduce.
24. It must be demonstrated that there is a probability that the witnesses will be reached by the accused resulting into sacrifice of justice, in some way influence and in the long run the justice of the case would be sacrificed.
25. In this case the stated witnesses likely to be influenced are not indicated in the affidavit or the pre-bail report .The relatives who would be called have not been revealed.The conclusion to be drawn is that the grounds put forth by the prosecution have not been proved to the expected standard.
26. Further, the court cannot suspend bail in a vacuum unless guided by parties on the particular witnesses who should be heard on priority basis. The accused right to bail and the right against unmerited pretrial detention is a solemn and protected right.
27. There is the question of safety expressed by the family members. Section 123A of the Criminal Procedure provides for exception to right to bail. It states that:
 1. Subject to Article 49(1)(h) of the Constitution 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 fulfillment 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.
28. The accused have proposed to reside at Ruai and Muthurwa respectively which will be away from the area of the incident hence addressing the question of their safety. Whether or not he will have a fixed place of abode will be addressed by availability of a surety.
29. In the result since the accused should benefit from the presumption of innocence until proven otherwise, I grant each accused bond of Kenya shillings One million (1,000,000/-) with a surety of an even sum.
30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 30TH DAY OF JULY, 2024.

L. N. MUTENDE

JUDGE

