



**Republic v Chebii & 2 others (Criminal Case E017 of 2023)
[2024] KEHC 9300 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL CASE E017 OF 2023
RB NGETICH, J
JULY 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

WILSON KIPCHUMBA CHEBII 1ST ACCUSED

WESLEY YEGO KIMAIYO 2ND ACCUSED

DENNIS KIPYEGO KEMBOI 3RD ACCUSED

RULING

1. The accused persons have been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the charge being that the accused persons on the 16th day of July, 2023 at around 8:00hours at Terren Bridge, Kinyach Sub-location in Baringo North Sub- County within Baringo County jointly with others not before court murdered Frankson Chebor Kamama.
2. The Charge and its full particulars were read over and explained to the 1st and 2nd accused on the 27th July, 2023.They denied the charge and defence counsels Ms. Kinyanjui holding brief for Mr. Mathai for the 1st accused and Mr. Chepkilot for the 2nd accused applied for bond on behalf of the two accused persons.
3. On 12th day of October, 2023 this court delivered a ruling rejecting the 1st and the 2nd accused’s bond application with leave to reapply at a later stage of trial. On the 5th February, 2024, Mr Buluma counsel for the 1st accused re-applied for bond for Accused 1.
4. The prosecution counsel Ms. Ratemo urged this court to call for a 2nd pre-bail report be done to confirm whether circumstances on the ground have changed. The court directed that a pre-bail report to be done by the probation. On the 5th March,2024, the state counsel informed the court that they



intended to consolidate this matter with criminal case No E022 of 2022 Republic v Dennis Kemboi as the witnesses are the same and the offence arose from the same transaction. On the 30th April, 2024, the two files were consolidated and the consolidated charge was read to the 3 accused persons herein who all denied. Counsel for the accused persons urged this court to release the three accused persons on favorable bond terms. Mr. Buluma for Accused 1 submitted that the accused is not a flight risk. He prayed that the 1st accused be released on bond.

5. On the 30th April, 2024, the court allowed the prosecution to file affidavit in respect to the 3rd Accused and a pre-bail report in respect to the 3rd Accused and upon filing the 2 documents, the court directed that ruling would be delivered in respect to all accused persons.
6. On the 9th of July, 2024 the case proceeded for hearing with one witness and after adjournment, Mr. Buluma counsel for the 1st accused re-applied for bond. He submitted that pre-bail reports had been availed and that he had difficulty holding a discussion with a client while in prison as there are no special facilities for clients in prison. He submitted that the letter dated 23rd February, 2024 citing security reasons to deny accused persons' court attendance during herein is an attempt to subvert the cause of justice and that this is an attempt to reinstate trial by ambush and urged this court to frown against such communication. He submitted that he has a problem with the letter because it is trying to influence the court. That if this letter had come before they made their submissions on bail, they would have had an opportunity to respond to it just the way they responded to the affidavit. He submitted that accused is innocent until proven guilty and urged this court to exercise its discretion and grant the 1st accused bond as the state has all the machinery to prevent any other crime that the state seem to be foreseeing as he is not a flight risk and urged this court to ignore any other extraneous matters.
7. Mr. Chepkilot for the 2nd accused submitted that in response to the letter dated 23rd February, 2024, the communication should not come in the manner it has come. That it is the police's mandate to provide security and its trite law that cogent reason should be given for denial of bond and the right of accused person to liberty should be protected. He prayed that this court grants the accused persons bail/bond and ensure their rights to privacy is protected as they proceed with the hearing before this court.
8. Mr. Chebii for the 3rd accused associated himself with the submissions by his colleagues. He submitted that the manner in which the letter was submitted to court is unprocedural. That secondly, it has not been stated that the state does not have resources to avail the accused persons in court. That on the said date, only 2 police officers have escorted accused 1 who had been availed to court. He urged the court to ignore the letter and process the issue of bond in the normal procedure.
9. In response, the prosecution Ms. Ratemo submitted that the issue cannot be taken lightly in light of the recent security events in the country. She submitted that the letter was sent after Accused 3 was rescued at Iten Hospital before he was arraigned in court and added that court has discretion to decide on bond upon looking at all materials presented in determining whether to admit the accused persons to bond. That the letter arose from multi agency approach to security and the contents of the letter have not been challenged and the letter has indicated security threats posed by availing the accused persons in court. She further submitted that there is no prejudice to the accused persons because the court was able to proceed virtually during covid-19 and their rights are not being violated.
10. She further submitted that the prosecution has filed a letter dated 23rd February, 2024, from the officer in charge, Eldoret main prison and addressed to the deputy Registrar, Kabarnet High Court referring to special watch inmates. That the letter indicates that basing on the multi- agency security organs report and intelligence report from different stake holders, they have identified those inmates who are of high risk of being rescued through ambush either on the way to their respective court or during court proceedings. That the following inmates have been identified: -



- i. Wesley Yego Kimaiyo
 - ii. Dennis Kipyegon Kemboi
 - iii. Lonyangapat Konate Pirinyang
 - iv. Wilson Kipchumba Chebii
 - v. Krop Tumuny
11. She submitted that the letter requests the court to assist the prison department to either be producing the above inmates virtually, to transfer their court files to Eldoret court or to advise on the way forward.
 12. Further that on record is an affidavit dated 13th May,2024 sworn by No 262002 PC Frank Opunga the investigating officer in this case opposing release of the three accused persons on bond on ground that they have been masterminds in organizing and executing banditry activities along Kerio river in Kinyach location within Baringo North Sub- County while armed with guns and shooting to kill which resulted in them being charged with the offence of murder.

Investigating Officer's Affidavit

13. That the investigating officer avers that sometime in the year 2023, the 1st and the 2nd Respondent organized rescue of the 3rd accused from Iten County Referral Hospital while he was wanted for the offence of murder by the DCI Baringo.
14. And further states that the 3rd Accused was later arrested by DCI Marakwet East and charged with the offence of robbery with violence vide CR No 861/73/2023 and court file No E2319/2023 at Eldoret Law courts and remanded at Eldoret G.K Prisons where they visited severally in order to escort the 3rd Accused to MTRH for mental assessment to enable him take plea vide HCCR No E022/2023 which was scheduled for 15th February,2024 for mention but he did not respond when he was called and the plea was deferred.
15. He avers that on the 29th April,2024, the 3rd Accused was presented to court and he was taken to MTRH for mental assessment where it was ascertained that he is fit to plead and, on the 30th April,2024, he pleaded not guilty through virtual link before the High court Kabarnet.
16. That since the three accused persons were arrested, the entire Kinyach location and communities in Baringo North Sub- County bordering Elkeyo Marakwet County has been peaceful and no cases of armed banditry attacks have been reported.
17. The officer states that the three Accused persons are dangerous in the society, they are a flight risk and they come from volatile background where their tracing might be much harder if they will be released on cash bail or bond. That the Tugen communities who were affected by the banditry attacks are in objection to the issuance of the bond to the three accused persons.
18. That the life of the three Accused persons is at risk since the Tugen communities affected with banditry attacks are promising to revenge if they will be released and for those reasons, it will be reasonable for the court to consider and deny the three accused persons bond and their case to be always heard through video link for the sake of their own safety and security and to avoid prisoner escape and for the security of Kinyach location and community at large.
19. The court directed that pre-bail reports be availed to the court. The reports were filed as ordered.



1st Accused Pre-bail Report

20. From the report, the 1st accused is aged 40 years and married with 6 children all in primary school. He comes from a closely-knit family of average economic ability where they rely on subsistence farming and casual jobs within the community for a living. The family is in support of the accused person to be released on bond. The accused has been working as NPR leader since 2017 to the time of his arrest for his sub-location. The 1st accused does not use any drug and substance. This is the first offence hence he has no history of adherence of bond/ bail terms.
21. The 1st accused's wife and elder sister Penina were available for interview and pleaded for the release of the accused on bond stating that he has a young family, all his children are school going; he needs to be at home to provide for them since the wife is a housewife. The 1st accused's wife stated that when the accused was arrested community members did a fundraising and she was given 50,000/= as school fees for his second born son, 10,000/= as family up keep and some amount was used to fuel vehicles to Kabarnet Court. The sister indicated that as a family they have a surety in form of a title deed to bail him out and ensure he abides by the terms and conditions of bond throughout his trial period.
22. The accused understands the gravity of the offence and believes he will soon be vindicated. He prays for release on bond with a pledge to abide by its terms and conditions. He added that he is the bread winner to his school going children and his continuous stay in custody would have a negative impact on them.
23. The victim in this matter was a resident of Kinyach Sub-location within Baringo County who used to work as a boda rider; he was single and blessed with one child who is currently with the mother at her paternal home.
24. The secondary victims who were available for interview were his father and the sister. They all opposed the 1st accused being given bond at the moment. Their main reasons were that since the accused persons were arrested, there is peace within the community and they will live in fear if released as the accused know them very well and may harm them.
25. The local administration and village elders of both the victim and 1st accused were available for interview. The village elder from Kapchebar village where accused hail from indicated that the 1st accused is well known to him and for a living, he has been doing farming and running of food kiosk business. He did not oppose the 1st accused being admitted into bond terms on ground that he is not a threat to any one and he is a person who will abide by the conditions set by the court.
26. The chief and village elder of Kinyach location where the offence took place are all opposed to the accused being admitted into bond terms stating that since the arrest of the 1st accused, the community has been peaceful and his community members are moving freely and doing business very well with members of community where the accused comes from. To them if the 1st accused is released now, the community peace will not exist and they will always live in fear. They raised concern that the 1st accused's community members did fundraising of 147,000/= and they used the raised money to fuel vehicles to attend court and they feel the accused has a big social capital thus once release, he will threaten community members.
27. The area chief of Arror location stated that the accused is well known to him and he was the chairperson of Arror Location National Police Reservist, he is not opposed to him being released on bond stating that he is not flight risk and not a threat to the community where the offence took place. He confirmed that a fund raising was held in support of 1st accused's family and total cash collected was 147,000 /=. That the cash collected was used to fuel vehicles to Kabarnet court, 50,000/= paid school fees for the accused second born child's school fees and some amount the accused wife was given for family upkeep.



He denied the allegation that his community members are planning to attack the Prison Vehicle when ferrying him to Kabarnet court.

2nd Accused Pre-bail Report

28. From the report, the 2nd accused is aged 29 years old. He dropped out of school in the year 2007 and in the year 2008, he relocated to Kapcherop and worked as a milk vendor. He later purchased motor cycle and worked as motor cycle rider at the time of his arrest. He is married with one child who are at their maternal grandparents as the mother does casual jobs within Nairobi.
29. The 2nd accused's sister prayed for his release on bond so that he can assist his children and take care of family property since the other siblings are not available at home due to their excessive consumption of alcohol. She stated that the 2nd accused has a case at Iten High Court where he was released on bond and were able to deposit title deed as security.
30. From the report, the 2nd accused relocated to Arror in the year 2017 to follow up on land survey that is still ongoing and rented a house at Mzee Koito Simeon and in the year 2020, he was able to build his own house at Chepkum Sub-location, Samar village. The accused was arrested in February 2022 and charged for the offence of murder at Iten High court and has been in remand from February 2022 to November 2023; he was admitted into bond terms in late November 2022. From November 2022 to July 2023, he was on bond and was involved in farming activities and motor cycle business. The 2nd accused does not use any drug and substance and his bond at Iten High court has not been cancelled.
31. The sentiments given by the victim's family and the local administration from where accused 2 reside and where the incident occurred is as captured under the first accused above.
32. The 2nd accused's sister who is married at Tot showed willingness of talking to friends and relatives who will stand surety to accused.
33. From the report, the 2nd accused has history of bail application and his bond term at Iten High Court has not been cancelled. He prays to be admitted into bond terms and pledges to adhere to the conditions set by the court.

3rd Accused Pre-bail Report

34. From the report, the 3rd accused person is aged 18 years old. He did his KCSE in the year 2022 and managed to score a mean grade of D+. After finishing his secondary education, he started working as a motor cycle rider within the community. He indicates that in June 2023 he received a gun shot on his right hand and was not able to continue riding the motor cycle. The 3rd accused is single with no dependants. He does not use any drug and substance. His father and the elder cousin prayed for the 3rd accused to be admitted into bond terms.
35. From the report, the 3rd accused has a robbery with violence case at Eldoret Court under Court File Number E514/2023. He however stated that he has reconciled with the victim and there is no need of having him admitted into bond terms in that matter.
36. The accused understands the seriousness of the offence and believes he will soon be vindicated. He prays for release on bond with a pledge to abide by its terms and conditions.
37. The 3rd accused's father showed willingness in standing surety for him. However, at the time of interview he did not have any prospective surety but promises to look for surety if accused 3 is released on bond.



38. Sentiments from the local administration and victims are as captured under the 1st accused above.

Determination

39. Bail is a constitutional right of every citizen. Article 49(1)(h) of the Constitution is explicit that, unless there is some compelling reason, an accused person, be he a citizen or foreigner, ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case.

40. Moreover, by dint of Article 50(2) of the Constitution, every accused person is entitled to the presumption of innocence. The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.

41. Accordingly, Section 123A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, stipulates 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 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.

42. The accused persons have been jointly charged with the offence of murder. There is no doubt that the offence is serious but that should not be reason to deny them bond as they are innocent until proven guilty as provided under article 50 of the Constitution. The overarching objective of bail is to ensure the accused attends his trial. Relevant matters to be considered by the court include: the nature of the charge, the likely sentence, previous criminal records, the views of the family of the victim, the possibility of interference with witnesses, the temptation to abscond and the safety of the accused.

43. I called for prebail reports for the second time to ascertain the prevailing circumstances on the ground. From the reports, the local administration from where the offence occurred, are opposed to bond. They say the area has been peaceful since accused persons were arrested. On the other hand, the local administration from where accused persons come from are not opposed to bond.

44. I also note that even though the Investigating Officers say the accused persons are flight risk, their details have been given in the reports. Their places of residence are known. their families are known to local



administration, the work they engaged in before arrest was known. In my view, it is not true that the accused persons are flight risk.

45. On seriousness of the offence, the accused persons are still innocent until proven guilty. The intention of bond is to ensure that they attend court when required and comply with all conditions of bond. Accused 2 who has a case pending in Iten court has been granted bond which has not been granted and accused 3 who has a case in Eldoret court stated that he has reconciled with the complainant in that case. A clear position will however need to be ascertained before processing bond in this matter.
46. On the allegation that the accused persons were likely to be rescued while being brought to court, I believe the prisons authorities will be required to seek reinforcement if they strongly feel there is such a possibility as it would be in the interest of justice for the accused persons to attend court for their trial so as to be free to interreact with counsels during trial.
47. From the foregoing, I am inclined to allow application for bond and further direct that in the event that any of the accused persons will not have secured sureties on the day of hearing, they be availed to court for hearing. The prison will be at liberty to seek reinforcement of security.
48. Final Orders:-
 1. Each accused may be released on bond of Kshs 500,000 with one surety of a similar amount.
 2. During hearing, any accused person who will not have been released on bond to be produced in court for hearing.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 29TH DAY OF JULY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis

Ms.Ratemo for state

Mr.Buluma for Accused 1

Mr.Chepkilot for Accused 2

Mr.Chebii for Accused 3

