



**Republic v Kimani (Criminal Case E010 of 2024)
[2024] KEHC 10430 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL CASE E010 OF 2024
FN MUCHEMI, J
AUGUST 22, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

AMOS JOMBA KIMANI ACCUSED

RULING

Brief Facts

1. The accused person has been charged with 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 14th day of April 2024 at Moonlight Area in Githurai Sub county, Kiambu county murdered Kelvin Kabue Maina. On 10th June 2024, the accused person entered a plea of not guilty.
2. The prosecution has filed an Affidavit of Compelling Reasons which they have labelled an Affidavit in Opposition to Bond dated 10th June 2024 sworn by PC Gayland Kirui who is the investigating officer in the instant matter. He deposes that there is a strong likelihood that the accused person will interfere with a crucial witness in the case who resides within Githurai area and he is very conversant with her residence where the offence occurred. The investigating officers avers that the accused person threatened to harm the said crucial witness and a report was made at Kimbo Police Station vide OB 18/8/4/2024.
3. The deponent states that if the accused person is released on bail, he will abscond court proceedings and/or investigative procedures and they may be unable to trace him. The deponent further argues that the court has a duty to balance the rights of all persons including the victims and thus the court ought to provide a conducive environment for the prosecution of the complainants and witnesses to testify without any interferences by declining to allow the accused person bail or bond.



4. The investigating officer contends that the accused person is a flight risk as he does not have a fixed place of abode. The deponent further urges the court to find that there are compelling reasons as to why the accused person should not be released on bail or bond and exercise its discretion and not grant the accused person bond.
5. In opposition to the Affidavit in opposition of Bond, the accused person filed a Replying Affidavit dated 19th June 2024 and states that his family is willing to relocate him to keep him away from the family of the victim, consequently guaranteeing his safety.
6. The accused person further states that if he is released on bond, he will not interfere with the witnesses as he has no history of violent behaviour and that the family of the victim and the witnesses are unknown to him. The accused person further states that he lived at Githurai prior to his arrest, he worked as a bodaboda at the same area.
7. The accused person further states that he is aware of the gravity of the charges against him and has no intention of absconding court. He further states that he is willing to comply with any conditions imposed by the court to ensure the witnesses safety, his attendance in court and his safety.
8. The accused person states that any offence is bailable and Article 49(1)(h) of the [Constitution](#) provides that an arrested person to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. The accused person avers that the investigating officer has not presented compelling reasons and substantive evidence thereto to oppose bond.

The Law

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

9. 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.
10. 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 exist compelling reasons to deny an accused person bail.
11. 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.”

12. In *Republic vs 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 vs 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.”

13. 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.

14. The prosecution argued that the accused person is likely to interfere with the prosecution’s crucial witness as he has threatened the said witness before. The prosecution contends that the accused person is a flight risk as he does not have a fixed place of abode.

15. In regard to interference with the key witness, the prosecution provided an OB extract No. 09/1/3/2024 which demonstrated that the accused person assaulted her and took away her phone. The investigating officer deposed in his affidavit that the accused person knows her home very well.

16. In the case of *R vs 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*.

17. The law requires that the prosecution present before the court reasons that are forceful, powerful, convincing to an extent that the court will have a sound basis of denying bail to the accused. The accused denies that he has no fixed abode and says before arrest he was doing business of boda boda in Githurai and that if need be his family can make arrangements to move him from Githurai area where the witness resides instead of him being denied bail. He also denies that he is a flight risk.
18. The prosecution have facilities of witness protection under the *Witness Protection Act* where a witness can be kept in a safe place pending giving their testimony in court. The court has not been told why such an option cannot be used in this particular case.
19. If the said witness was assaulted by the accused and that accused knows her house, the prosecution have not told the court whether police acted on the assault report. If the police investigated the matter and found sufficient evidence to charge the accused, they should go ahead and prefer charges. The accused should not be allowed to get away with a criminal offence.

The purpose of bail is to ensure the accused gets his right under Article 49 of the *Constitution* and that he attends court when required to do so. Attending of court can be managed by the court based on the terms for bail that are set. As such, this should not be a fear by the prosecution.

It is further noted that, in the event that the accused assaults the witness or by any chance harasses her, the law should take its course and the accused dealt with accordingly.

I reach a conclusion that the prosecution have failed to give compelling reasons why the accused should be denied bail

I accordingly make the following orders:-

- a. That the accused shall be released on bond of Kshs 1,000,000/= with one surety of alike amount. He will provide a second person to leave the court with a copy of the identity card.
- b. That he shall vacate his rented house in Githurai and look for alternative residence and accordingly inform the investigating officer of his new place of abode.
- c. That he will not leave the jurisdiction of this court without its permission.

20. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF AUGUST 2024.

**F. MUCHEMI
JUDGE**

