



REPUBLIC OF KENYA



**Osengo v Republic (Criminal Case E025 of 2023)  
[2024] KEHC 10658 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE E025 OF 2023  
DO CHEPKWONY, J  
AUGUST 16, 2024**

**BETWEEN**

**WYCLIFF OSENGO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. What is before the court for determination is the Notice of Motion application dated 14<sup>th</sup> September 2023 which seeks the following orders:
  - a. That the Applicant be admitted on reasonable bail and bond terms pending trial.
  - b. That the costs of this application be provided for.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Wycliffe Osengo sworn on 14<sup>th</sup> September, 2023. The Accused person has averred that he has a constitutional right to be admitted to reasonable bail and bond terms and that no compelling reasons to deny him the same have been demonstrated. The Accused person holds that he has a right to be presumed innocent until proven guilty. The accused goes on to contend that he has a fixed place of abode with a possible surety who he will be likely with and undertakes to provide his particulars, hence he is not a flight risk. He further holds that he does not have capacity to interfere with the prosecution witnesses since his place abode is far from the alleged scene of crime. He also confirmed that he is ready and willing to abide by any terms that the court may impose as preconditions to his release on bail/bond.
3. The Application was opposed through a Replying Affidavit sworn by No. 62967 SGT Samuel Kimanga who has purported that there are compelling reasons why the accused should be denied release on bail and bond terms on factors provided for under Section 123 (1) of the *Criminal Procedure Code* and the Bail and Bond guidelines.



4. According to the State, the deceased was murdered on 15<sup>th</sup> June, 2021 at her residence in Matopeni area within Ruiru Subcounty where the deceased and the accused person were living as husband and wife. It is stated that after the crime, the accused went into hiding for two years until he was arrested by members of the public on 29<sup>th</sup> July, 2023.
5. It is State's contention that the community where the accused stays is agitated by the crime so that if released, his safety and security will be at risk. It is further stated that the accused does not have a fixed abode as he resides in town and is therefore a flight risk. The state contends that there is overwhelming evidence against the accused and therefore, it would be in the interest of justice that he remains in custody until all the witnesses have testified before the court can consider the issue of releasing him on bail/bond.
6. On 23<sup>rd</sup> August, 2023, the court directed parties to canvass the application by way of a written submissions. Later, the court called for a social inquiry to be conducted and pre-bail information to be filed in court. It was filed on 7<sup>th</sup> August, 2024.

### **Determination**

7. The court has considered the grounds advanced by either party in support of and against the application by the accused to be released on bond. The court has also taken note of the sentiments advanced by either party in their respective submissions. Having done so, the court finds the only issue arising for determination being whether or not there exists compelling reasons to warrant the accused to be denied release on bond/bail.
8. Under Article 49(1) of the [Constitution](#), bail and bond is a right for an accused person. However, it is not automatically granted if it is demonstrated that there exists compelling reasons to deny it. Article 49 (1)(h) 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. What should be considered is if the reasons tendered are compelling enough to warrant the denial of bail and bond terms. The Court in *Republic v Joseph Thiongo Waweru & 17 Others* [2017] eKLR defined compelling reasons as follows: -

“The Constitutional standard for denying bail is “compelling reasons” test. The burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify denial of bail. Our emerging jurisprudence on the question is clear as to the kind of evidence needed to establish the “compelling reasons”: The evidence presented must be “cogent, very strong and specific evidence” and that mere allegations, suspicions, bare objections and insinuations will not be sufficient.”
10. Section 123A of the [Criminal Procedure Code](#), Chapter 75 of the Laws of Kenya provides for various factors which ought to be considered in bail and bond application. They include;
  - (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.
11. This has been restated in the [Bail and Bond Policy Guidelines](#), as a general guideline at Paragraph 4.9 that:
- “In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the [Constitution](#) of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”
12. In this case, the court in considering the grounds advanced by the Accused person in his application, affidavit and submissions alongside the grounds relied on by the state in opposing his release on bond/bail in the replying affidavit, the court has also read through the Pre Bail report which has been presented before it. The Pre Bail information report has clearly captured the background of the Accused person, his personal history, drugs and substance use, previous adherence to bail and bond terms, seriousness of the offence, victim's concerns, community ties, bail and bond sureties and securities and come up with conclusions and recommendations. There has been no rebuttal by either party over the recommendation given by the Probation Officer.
13. From the report, to the victim's family confirms that the accused was married to the deceased who was a mother to two children. It indicates the family was affected financially as they had to bear the burden of taking care of the deceased's children and they pray for justice. It is also noted that they are not opposed to the accused person being placed on lenient bail and bond terms provided he attends court as and when required. The local administration and elders of the community where the accused hails from were interviewed and they do not view the accused as a flight risk, hence are not opposed to his being released on lenient bail/bond terms. On the part of surety, that the Accused's father confirms that he is ready and willing to stand as his surety to secure his release.
14. The court has considered the recommendation of the Probation Officer which indicate that the Accused person is aged 35 years and is a resident at Ruiru. It also indicates he understands the seriousness of the offence he is facing and has promised to comply with the bail and bond terms. Based on that the Probation Officer has recommended that the court can considers the accused for release on reasonable bail and bond terms while taking into account the sentiments of the victim's family. The report confirms that the accused has a ready and available surety in his father.
15. In line with this, the court has also considered the circumstances under which the deceased died, the relationship she had with the accused, being that of husband and wife and notes that some of the



prosecution witnesses are likely to be family members of the deceased whom the accused may or may not know.

16. It is worth noting that the prosecution has not rebutted the recommendation by the Probation Officer on the accused persons stating to be released on bond and neither have they provided evidence to demonstrate that the accused is likely to interfere with witnesses or is a flight risk. In the circumstances, the notice of motion application dated 14<sup>th</sup> September, 2020 be and is hereby allowed on the following terms:-

- a. The accused to be released on his own bond of Kshs 50,000/- with one surety of a similar amount.
- b. In the alternative, the accused may be released on cash bail of Kshs 500,000/-.
- c. The accused to provide a contact person and particulars thereof.
- d. The accused to ensure he does not contact or interfere with any of the prosecution witnesses during the proceeding of the trial.
- e. The accused to attend court as and wherever he is required to until the case is finalised.
- f. Failure to comply with any of the above set terms, the bond terms will be cancelled by the court and accused remanded in custody until the case is finalised.

It is so ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 16<sup>TH</sup> DAY OF AUGUST, 2024.**

**D.O. CHEPKWONY**

**JUDGE**

In the presence of;

M/s Ndeda Counsel for the state

M/s Githinji counsel for Accused

Accused

Martin - Court Assistant

