



**Republic v Kamau (Criminal Case Ed019 of 2024)
[2024] KEHC 15046 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL CASE ED019 OF 2024
FN MUCHEMI, J
NOVEMBER 28, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOHN GACHERU KAMAU ACCUSED

JUDGMENT

Brief Facts

1. The accused person was charged with two counts of offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offences are that on diverse dates between 30th March 2024 and 2nd April 2024 at Kizito area in Githurai sub-county within Kiambu county, he murdered Raymond Kamau, a child of 9 years and Oliver Ng'ang'a, a child of 1 year and 5 months. On 31st October 2024, the accused person entered a plea of not guilty on both counts.
2. The prosecution has filed an Affidavit of Compelling Reasons which they have labelled an Affidavit in Opposition to Bond dated 28th October 2024 sworn by PC Dominic Ayoti who is the investigating officer in the instant matter. He deposes that the accused person is likely to interfere with the witnesses who their places of residence are well known to the accused. The investigating officer further avers that the accused person's permanent place of abode is not known and that he was a student at Makerere University in Uganda and thus as a passport holder, and can easily escape the territorial borders of the Republic of Kenya.
3. The investigating officer further avers that the situation on the ground is very hostile and releasing the accused person on bail/bond is likely to cause public unrest. The deponent thus 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.



4. The victims are the mother of the deceased, and the aunt who both filed affidavits in opposition to this application both sworn on 28th October 2024. The victims stated that the accused person is likely to interfere with them as he used to live with the deceased and their mother as a family before the incident occurred. The mother of the deceased children fears for her life as the accused person knows where she lives and may go and cause her harm. The grandmother and aunt of the deceased children aver that the accused person knows their residences and may harm them if released on bail/bond.
5. In opposition to the Affidavit in opposition of Bond, the accused person filed a Replying Affidavit dated 8th November 2024 and states that the reasons provided by the prosecution for denying him bail are not compelling reasons within the meaning of Article 49(1)(h) of *the Constitution*, the Bail and Bond Policy Guidelines and Section 123A of the Criminal Procedure Code.
6. The accused person avers that his place of abode is Rongai in Kajiado County and his passport has expired, therefore he has no chance of leaving the country.
7. The accused person states that he has no intention of harming any of the witnesses in this case. The accused person argues that the denial of bail/bond based on the apprehensiveness of the investigating officer is discriminatory to him and curtails the court's duty to impose reasonable conditions to grant him bail/bond.
8. The accused person assures the court that if he is granted bail/bond, he will ensure his availability to the court when required.
9. Parties put in written submissions.

The Prosecution's Submissions

10. The prosecution relies on Article 49(1)(h) of *the Constitution*, Section 123A of the Criminal Procedure Code, the Bail and Bond Policy Guidelines and the case of Michael Juma Oyamo & Another vs Republic [2019] eKLR and submits that the prosecution has presented compelling reasons to warrant the denial of bail or bond to the accused. The prosecution submits that the accused person is likely to interfere with the key witnesses who are relatives and personally known to him forming the basis of the prosecution's opposition in granting the accused person bail/bond. The prosecution is apprehensive that if the accused person is granted bail/bond, he shall go back to where his close relatives live and interfere with them thus they will not be able to freely give their testimony.
11. The prosecution further submits that the accused person is a flight risk as he does not have a fixed place of abode. Further his permanent place of abode is not known or his family background and rural home. The prosecution argues that after the murder incident, the accused person fled from his usual residence and went into hiding in Rongai where he was arrested after one month. Thus demonstrating that the accused person is likely to abscond if released on bail/bond. Furthermore, the accused person used to school in Uganda and bears a passport hence he may escape outside the territorial borders of Kenya.
12. The prosecution further relies on Section 123(2)(b) of the Criminal Procedure Code and paragraph 4.9 of the Bail and Bond Policy Guidelines and submits that the accused person's life is in danger as tension and hostility is still high on the ground and members of the public may retaliate if the accused person is released on bond.

The Law

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

13. 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.

14. 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.

15. 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.”

16. 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.”
17. The issue that arises is whether the reasons adduced by the prosecution are compelling reasons under Article 49(1) (h) of *the Constitution*.
 18. The prosecution argues that the accused person is likely to interfere with the prosecution’s crucial witness as the key witnesses are his family relatives and are well known to him. Furthermore, the prosecution contends that the accused person is a flight risk as he does not have a fixed place of abode and he has a valid passport as he used to attend school in Uganda.
 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 is a flight risk is not supported by any evidence, which is yet another matter of speculation. Moreover, the accused person has sworn an affidavit stating that his place of abode is in Rongai in Kajiado County. 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*.
 20. A court in granting bail shall consider the seriousness of the offence including any other facts surrounding the circumstances of the applicant. In this regard, this court cannot lose sight of the fact that two young and innocent children lost their lives in the incident.
 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 view that the reasons given do not pass the test set out under Article 49(1)(h) of *the Constitution*.
 22. Accordingly, I am of the opinion that the prosecution has not proved on a balance of probabilities that there are compelling reasons to warrant the denial of bail.
 23. This application for bail is hereby allowed in the following terms:-
 - a. That the accused shall be released on bond of KSh.3,000,000 with two sureties of a like amount.
 - b. That upon release, the investigating office shall, with the assistance of the accused visit his residence at Rongai with a view of identifying his place of abode.
 - c. The accused shall not leave the jurisdiction of this court without its permission.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 28TH DAY OF NOVEMBER 2024.

**F. MUCHEMI
JUDGE**

