



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Gachiku & 14 others (Criminal Appeal E107 of 2023)  
[2024] KEHC 15069 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E107 OF 2023  
DO CHEPKWONY, J  
NOVEMBER 27, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**CI PETER MUTHEE GACHIKU ..... 1<sup>ST</sup> RESPONDENT**  
**IP JAMES KIBOSEK TANKI ..... 2<sup>ND</sup> RESPONDENT**  
**CPL JOSEPH KAMAU MBUGUA ..... 3<sup>RD</sup> RESPONDENT**  
**CPL DAVID CHEPCHIENG KIPSOI ..... 4<sup>TH</sup> RESPONDENT**  
**CPL JOSEPH MWENDA MBAYA ..... 5<sup>TH</sup> RESPONDENT**  
**CPL/DRV JOHN MWANGI KAMAU ..... 6<sup>TH</sup> RESPONDENT**  
**CPL HILLARY LIMO KIPCHUMBA ..... 7<sup>TH</sup> RESPONDENT**  
**PC STEPHEN LUSENO MATUNDA ..... 8<sup>TH</sup> RESPONDENT**  
**PC SIMON MUHUGA GIKONYO ..... 9<sup>TH</sup> RESPONDENT**  
**PC SIMON NJOGU MURIITHI ..... 10<sup>TH</sup> RESPONDENT**  
**PC/DRV BONIFACE OTIENO MTULLA ..... 11<sup>TH</sup> RESPONDENT**  
**PC ELIKANA NJERU MUGENDI ..... 12<sup>TH</sup> RESPONDENT**  
**PC FREDRICK THUKU KAMAU ..... 13<sup>TH</sup> RESPONDENT**  
**JOHN WANJIKU MACHARIA ..... 14<sup>TH</sup> RESPONDENT**  
**WARDEN MICHAEL KIPLANGAT BETT ..... 15<sup>TH</sup> RESPONDENT**

*((An appeal from the Ruling of the Honourable G. Kiage (PM) delivered  
on 10<sup>th</sup> November, 2023 at the Chief Magistrate’s Court at Kahawa))*



## JUDGMENT

1. This appeal arises from the ruling delivered on 10<sup>th</sup> November, 2023 in Kahawa Chief Magistrate's Court Criminal Case No.E0124 of 2023, where the trial court granted the Accused Persons/ Respondents release on bond/bail terms. Aggrieved by the decision, the Appellant filed a Petition of Appeal dated 21<sup>st</sup> November, 2023, wherein it raised several grounds challenging the trial court's ruling.
2. The Appellant asserts that the trial court erred in law and fact by disregarding key considerations, including the gravity of the offenses, the likelihood of interference with witnesses, and the public interest in ensuring justice for crimes against humanity. The grounds of appeal are as reproduced below: -
  - a. That the Honourable Court erred in law by failing to specifically recognize and address in the ruling that torture, enforced disappearance and murder are identified as crimes against humanity by the Rome Statute that Kenya had domesticated by the enactment of the [International Crimes Act](#) No. 16 of 2008 thus an indicator of the seriousness of the offence therein and Kenya's resolve to punish the would be offender;
  - b. That the Honourable Trial Magistrate erred in law and fact by delimiting the issues for determination in the application opposing bond to only two and failing to appreciate that the several grounds as raised in the affidavit in opposition to bond were symbiotic;
  - c. That the Honourable Trial Magistrate erred in law by erroneously delimiting the issues for determination to only two and thereby failing to analyse and pronounce himself on the other cogent symbiotic and complementary grounds opposing release on bound;
  - d. That the Honourable Magistrate failed to appreciate the egregious and callous nature of the case, the public interest considerations and the jurisprudential value of the in light of the dark history of the Country in as far as enforced disappearances and extra judicial killings are concerned thereby downplaying the seriousness of the offence as a compelling reason to denial of bond.
  - e. That the Honourable Magistrate erred in law and fact by failing to appreciate the circumstances surrounding the commission of the offences, the egregious manner in which the offences were committed, Public interest considerations and security of the victims, required that bond be denied;
  - f. That the court proceeded irregularly by failing to heed to the dictates of Articles 50(9) of [the Constitution](#) and Section 20(b) of the [Victim Protection Act](#) as regards the right of a victim to submit information and/views for the consideration of the court when handling bail applications;
  - g. That the Honourable Court misapplied the law by elevating the rights of the Respondents to bond under Article 49(1)(h) over and above those of the victims which are non-derogable under Article 25(a) of [the Constitution](#), without putting into consideration the aggravating circumstances of the case on a balance of probabilities;
  - h. That the Learned Trial Magistrate erred in law and fact by proceeding to rely on a probation report that did not cater for the views of the Prosecution thereby limiting the role of the ODPP



in bail/bond proceedings and therefore an affront to the Constitution dictates as to the DPPs powers;

- i. That the Learned Magistrate erred in fact and in law by dismissing the weighty and specific averments as to the threats and unwelcomed overtures against witnesses made under oath by the Lead Investigating Officer at Paragraph 19 through 21 of the Affidavits in opposition to bond as being doubtful without the same being discounted by Affidavit or viva voce evidence;
  - j. That the Honourable Trial Court erred in law and fact by applying the ruling and bond in a blanket manner without considering the specific role each individual respondent played in the execution of the heinous act thereby leading to a disproportionate finding;
  - k. That the Honourable Trial Magistrate erred in law and fact by filing to handle each accused persons plea for bond individually noting that criminal responsibility attaches individually;
  - l. That the Trial Court erred in law and in fact by disregarding the role played by superiors in the disciplined forces under the *international Crimes Act* thereby arriving at a flawed decision on bond;
  - m. That the Honourable Court in doing so elevated the standard of proof for witness inference to be above a balance of probabilities to be beyond reasonable doubt;
  - n. That the Honourable Trial Court erred in law by basing the gist of the ruling admitting the Respondents to bond on flawed application of discretion in disregard of the totality of the grounds put forth by the prosecution.
3. Based on the above grounds, the Appellant seeks to have the trial court's decision set aside and substituted with an order denying the Respondents bail pending the conclusion of their trial.
  4. Following the filing of the appeal, the Appellant also filed a Notice of Motion application dated 28<sup>th</sup> November, 2023, seeking to stay the implementation of the bail orders pending determination of the appeal. Although the court was to initially issue a ruling limited to determining the issues canvassed in the Application dated 28<sup>th</sup> November, 2023, parties agreed to have the court determine the appeal in its entirety based on the pleadings and submissions already filed in court. And on 16<sup>th</sup> May, 2024, the respective counsel for the parties tendered their oral submissions in support and in opposition of the Appeal.

### **The Appellant's Case**

5. The Appellant, through written submissions dated 26<sup>th</sup> January, 2024 and oral highlights by counsel, Mr. Gacharia, argued that the charges against the Respondents emanate from the abduction and enforced disappearance of three individuals being Mohamed Zaid Sami Kidwai, Zulfiqar Ahmed Khan, and their driver, Nicodemus Mwanja Mwanja, on the night of 22<sup>nd</sup> and 23<sup>rd</sup> July, 2022. The Appellant contends that the offenses constitute crimes against humanity under the International Law as domesticated in Kenya through the *International Crimes Act*, 2008.
6. The Appellant submits that although Article 49(1)(h) of *the Constitution* provides the right to bail, this right is not absolute and may be denied if compelling reasons are demonstrated and in the present case, the prosecution advanced three such reasons: -



- a. Firstly, the Likelihood of Witness Interference, whereby is submitted that the Respondents, being officers attached to national security agencies with significant powers under Article 239 of *the Constitution*, are likely to use their positions to intimidate witnesses and tamper with evidence. The Appellant alleges that some witnesses received threats after the Respondents were arraigned and there were attempts to interfere with trial exhibits which were also noted.
  - b. Secondly, on the Seriousness of the Offenses, the Applicant submits that the offenses facing the Respondents carry severe penalties, and the likelihood of conviction creates an incentive for the Respondents to interfere with the trial process.
  - c. Thirdly, the Appellant raised the issue of Public Interest, wherein it is argued that the trial case involves crimes that have a profound impact on public trust in law enforcement, especially in light of Kenya's history with extrajudicial killings and enforced disappearances.
7. The Appellant has relied on case law, including R –vs- Jaktan Mayende & 3 Others, R –vs- Nahashon Muchiri Mutua [2015]eKLR, and Republic –vs- Benard Kipasi Moyongo & Another [2021]eKLR, to argue that bail may be denied to safeguard witnesses and preserve the integrity of the trial process.

### **The Respondents' Case**

8. The Respondents collectively opposed the appeal, while asserting that the trial court correctly exercised its discretion in granting them release on bail. They have advanced several arguments challenging both the procedural and substantive basis of the appeal, maintaining that the Appellant has not demonstrated compelling reasons to justify interference with the trial court's ruling.
9. Counsel for the 1<sup>st</sup> Respondent, Mr. Mwale highlighted that the appeal is procedurally defective and does not meet the requisite criteria for appellate intervention as set out under Section 350(c) of the Criminal Procedure Code. Specifically, counsel has argued that the appeal lacks essential supporting documents necessary to provide a complete record for review. So that without these documents, the 1<sup>st</sup> Respondent's counsel asserts that this court lacks the proper foundation to reevaluate the trial court's decision.
10. It is further argued that the orders initially issued by the trial court on 10<sup>th</sup> November, 2023 had been implemented prior to the filing of the stay application especially in respect of the 15<sup>th</sup> Respondent. It is stated that by the time the Appellant sought to stay the release of the Respondents, some of them had already complied with the bail terms thus rendering the application and, by extension, the Appeal moot.
11. The Respondents have emphasized their constitutional right to be presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* of Kenya. They contend that the right to bail, as provided for under Article 49(1)(h), is directly tied to the principle of presumption of innocence and must be exercised in favor of the accused unless compelling reasons are demonstrated.
12. The Respondents also argued that the prosecution's allegation of witness interference are speculative, unsubstantiated, and lack evidentiary support. They submit that assertions of threats to witnesses or tampering with evidence should be backed by concrete proof, such as affidavits or testimony, rather than mere conjecture. They contend that these allegations do not meet the threshold of compelling reasons required to deny bail.



13. Further, the Respondents assert that the trial court properly applied the legal principles governing bail and acted within its discretion. They submit that for this court to interfere with the trial court's ruling, the Appellant must demonstrate that the lower court either misapprehended the facts or misapplied the law or failed to consider relevant legal principles or relied on irrelevant considerations and or exercised its discretion in a manner that was wholly unreasonable or manifestly unjust.
14. The Respondents went on to submit that none of these conditions have been demonstrated in this case and maintain that the trial court carefully weighed the prosecution's objections, considered the Respondents' individual circumstances, and found no compelling reasons to deny them release on bail/bond.
15. The Respondents aver that the prosecution's concerns about witness interference and tampering with evidence can be addressed through existing mechanisms, such as the Witness Protection Program under the *Witness Protection Act*. They emphasize that the denial for accused to be released on bail should be a last resort and that the court must explore all less restrictive means of safeguarding witnesses before infringing on the Respondents' constitutional rights to freedom and liberty.
16. Counsel for the 2<sup>nd</sup> to 13<sup>th</sup> Respondents, Mr. Achieng, submitted that the prosecution has access to various tools to ensure witness safety, such as placing witnesses under protection or restricting contact between the accused and witnesses. He argued that reliance on these measures, rather than the blanket denial of bail, strikes a fair balance between the rights of the accused and the need to protect witnesses.
17. The Respondents also contend that the prosecution's allegations of threats to witnesses and interference with evidence are based on hearsay and lack corroboration. Their argument is that unsupported claims should not form the basis for denying one release on bail, particularly in light of the Respondents' constitutionally protected rights.
18. In essence, the Respondents have collectively urged this court to dismiss the appeal and assert that the trial court exercised its discretion judiciously in balancing the rights of the accused with the prosecution's concerns, and that no compelling reasons have been demonstrated to justify Appellate interference. They further contend that any alleged risks to the trial process can be mitigated through alternative measures to ensure both the integrity of the proceedings and the preservation of their constitutional rights.

### **Analysis and Determination**

19. This court has considered the grounds in the Petition of Appeal, submissions by all parties, alongside the applicable legal principles as laid out in case law and statute. The main issue which arises for determination herein is:-
  - a. whether the trial court misapprehended the facts and applicable law in admitting the Respondents to bail and bond terms; and,
  - b. whether there are reasonable grounds demonstrated by the Appellant to warrant cancellation of those bail and bond terms.
20. However, it is imperative to first state that as the first appellate court, this court's duty is to re-evaluate the evidence and analyze the findings of the trial court so as to determine whether the decision was



correct, lawful, and reasonable. This principle was clearly articulated in the cited case of Okeno -vs- Republic [1972] EA 32, where the Court of Appeal stated that:-

“The first appellate court has a duty to reconsider the evidence, evaluate it itself, and draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

21. In the context of bail Appeals, the appellate court is tasked with determining whether the trial court misdirected itself in law, misapprehended the facts, or acted on wrong principles. This court must also consider whether the trial court exercised its discretion judicially, as emphasized in the case of Mbogoh -vs- Republic [1986] KLR 1, where the Court held: -

“An appellate court can only interfere with a trial court’s discretion if it is satisfied that the decision was based on a misapprehension of the law, irrelevant considerations, or was plainly wrong.”

22. Before exploring much on the duty of this Court as highlighted above, it is important to first address the contentions by the 1<sup>st</sup> Respondent’s counsel as regards the competency of the instant Appeal. This Court is reminded of Section 350(1) of the Criminal Procedure Code which outlines the requirements for filing a competent appeal, which states that the Appellant must file a Petition of Appeal containing the grounds to be relied upon, supported by the relevant records of the trial proceedings. Subsection (c) requires that the Memorandum of Appeal and any accompanying documents must be complete and filed within the prescribed time.

23. In the present case, the 1<sup>st</sup> Respondent’s Counsel argue that the appeal is defective since the Appellant failed to file necessary documents, particularly the full record of appeal. However, this court notes that the record contains the trial court’s record, the proceedings and the ruling dated 10<sup>th</sup> November, 2023, which form the basis of the appeal. While a more complete record may assist in providing context, it is this Court’s view that the absence of additional documents is not fatal to the appeal before this court. On this, the Court is guided by the finding in the case of Julius Kamau Kithaka -vs- Republic [2015] eKLR where the Court of Appeal emphasized:-

“An incomplete record does not render an appeal incompetent unless the missing documents are so crucial that their absence makes it impossible for the appellate court to determine the appeal.”

24. In this instance, the appeal herein has raised substantive issues of law and fact that this court can evaluate based on the existing original record of the Trial Court. Accordingly, the appeal herein is deemed competent.

25. The gist of the Appeal is the ruling dated 10<sup>th</sup> November, 2023 in which the court found that the Prosecution had not provided compelling reasons to justify their plea for denial of release of the Respondents herein, on bond/bail terms. With that in mind, having considered the lower court record which speaks out loud that the Respondents are jointly and severally charged with seventeen (17) counts all related to events around the alleged abduction and disappearance of Mohamed Zaid Sami Kidwai, Zulfiqar Ahmed Khan, and their driver, Nicodemus Mwanja Mwanja, on the night of 22<sup>nd</sup> and 23<sup>rd</sup> July, 2022. The Accused persons took plea on 17<sup>th</sup> October, 2023 and pleaded “Not Guilty” on all the Counts. Subsequently, on 10<sup>th</sup> November, 2023, the trial Court ordered the release of each Respondent on a bond of Kshs.3,000,000.00 or in the alternative, a cash bail of Kshs.1,000,000.00 with one contact person.



26. Aggrieved by that decision, the Applicant has majorly highlighted on the need to consider and appreciate the seriousness of the offences the accused persons are facing while stating that the offences have an international recognition and the possibility of the accused persons/Respondents interfering with prosecution witnesses and or the possible evidence to be considered against them by virtue of the nature of their work. According to the Appellant, the need to protect the witnesses and evidence against interference takes precedence over the Respondent's right to bail.
27. For this Court, the beginning is by reiterating Article 50(2)(a) of *the Constitution* which guarantees every accused person the right to be presumed innocent until proven guilty. This foundational principle underpins the right to bail under Article 49(1)(h) of the Constitution which states that: -
- “An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”
28. The presumption of innocence ensures that an accused person is treated as an innocent person until proven guilty through due process and this protects an accused against punitive pre-trial detention unless there are compelling reasons that justify such restriction of liberty.
29. Courts have also widely accepted that the seriousness of an offense is not, in itself, a compelling reason to deny an accused release on bail while citing that bail is a constitutional right and must not be denied arbitrarily. This principle ensures that even individuals facing grave charges, such as murder or crimes against humanity, are entitled to bail unless compelling reasons are demonstrated and proven on a balance of probabilities. Such are the decisions as those recited in the case of Republic –vs- Danson Mgunya & Another [2010] eKLR, where the Court observed:-
- “The seriousness of the offense alone is not sufficient to deny an accused person bail unless it is demonstrated that the accused is likely to abscond or interfere with the trial process.”
30. Therefore, taking cue from the above-cited authority, the fact that Respondents are facing serious offences which according to the Appellant can be deemed as being against humanity, does not by its own warrant the denial of the Respondent's right to be released on reasonable bail and bond terms
31. Furthermore, in as much as the Court's consideration of the potential interference with witnesses is a valid and compelling reason to deny an accused release on bail, Section 123A(1)(b) of the Criminal Procedure Code provides that:-
- “A court may deny an accused person bail if there are compelling reasons, including the likelihood that the accused may interfere with witnesses or the evidence.”
32. In the case of R –vs- Jaktan Mayende & 3 Others [2012]eKLR, the court denied release of Police Officers accused of murder on bond/bail, citing their positions of authority and the potential for witness intimidation. Similarly, in the case of Republic –vs- Nahashon Muchiri Mutua [2015] eKLR, the Court emphasized that:-
- “Where credible allegations of witness interference are made, the court must consider the likelihood of such interference in determining whether bail should be granted.”
33. In the present case, it is not contested that the Respondents, are officers attached to National Security Agencies, and may have the means and opportunity to intimidate witnesses. The prosecution has



cited instances of threats being via messages and coercion directed at some of the witnesses following the Respondents' arraignment. Additionally, the Appellant has alleged that the nature of the alleged offenses, enforced disappearances and extrajudicial killings serve to amplify the likelihood of witness intimidation due to the Respondents' positions of authority.

34. However, having gone through and read the proceedings before the trial Court and the Appellants pleadings and oral submissions, this Court finds these allegations were not and have not been substantiated with affidavits, documentary evidence, or testimony to demonstrate their credibility. Courts have emphasized the importance of substantiating allegations of witness interference so as to ensure that such claims are neither speculative nor baseless. Therefore, witness interference is a claim that must be proven on a balance of probabilities, so that mere allegations, without supporting evidence, are to be found insufficient to warrant denial of an accused person's release on bond/bail terms. It is worth-noting that the absence of sworn affidavits, specific details of the alleged threats, or testimony to corroborate the claim, only serves to weaken the prosecution's argument in this regard. A careful reading of the proceedings and pleadings herein has revealed no evidence that the threats allegedly received by the witnesses were sent or caused by the Respondents.
35. Without sufficient evidence to substantiate the alleged threats, this court cannot conclude that the Respondents' release would pose an immediate and credible risk to witnesses. Furthermore, the Court is not benefit of the powers to put in place measures or set terms to avert such fear or apprehension. This Court thus finds that the trial Court did not err and was right in emphasizing that unsubstantiated allegations of interference do not meet the threshold of compelling reasons to deny an accused (the Respondents) release on bail/bond terms.
36. In the upshot, this Court finds that the prosecution's concerns over witness interference while valid in principle, lack the evidentiary support necessary to meet the threshold of compelling reasons as stipulated under Section 123A of the Criminal Procedure Code. It is hereby reiterated that allegations of threats and coercion must be substantiated through affidavits or testimony to provide a basis for denying accused release on bond and bail. In the absence of such evidence, this Court finds that in this case, the prosecution's arguments have not outweighed the Respondents' constitutional rights to bail and the presumption of innocence.
37. Consequently, the Appeal before this Court is found without merit and for the reasons advanced in determination thereof, the Court proceeds to dismiss the Appeal but with no orders as to costs. And for avoidance of doubt, since the bond and bail terms set out by the trial Court were not challenged, this Court adopts the same and orders that:-
  - a. The Respondents to comply with the said terms, in order to be released on bond.
  - b. For those who had already complied with the said terms, the same to be confirmed by the trial Court so that they can be released forthwith.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27<sup>TH</sup> DAY OF ...NOVEMBER ....\, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Makori counsel for the State/Republic



Mr. Wandugi counsel for 2<sup>nd</sup> and 15<sup>th</sup> Respondents

Mr. Mwale counsel for 3<sup>rd</sup> – 13<sup>th</sup> Respondents alongside Mr. Wandugi for the 2<sup>nd</sup> Respondent

Mr. S. Ogolla counsel for 14<sup>th</sup> Respondent

C. Omanga holding brief for Victims.

Court Assistant - Martin

