



**Republic v Chesir & another (Criminal Case E013 of 2023)  
[2024] KEHC 16070 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16070 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL CASE E013 OF 2023  
JRA WANANDA, J  
DECEMBER 20, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**LUKA KIPKORIR CHESIR ..... 1<sup>ST</sup> ACCUSED**

**MACKSON KIBET KIPKORE ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. Before the Court is a renewed Application for bail.
2. The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 24/10/2023 at Kapyego sub-location, Kapyego location, within Elgeyo Marakwet County, they murdered one Hesmond Korir Kibet.
3. The accused, both represented by Mr. Robert Makori Ayora as pro bono Counsel appointed by the State, were arraigned before me on 17/11/2023 for plea-taking but which could not however take off as they were yet to be assessed for mental fitness to stand trial. Prosecution Counsel Ms Ayuma appeared for the State. The accused eventually took plea on 22/11/2023. They both denied the charge and respective pleas of not guilty were entered for each. Mr. Ayora then applied for release of the accused on bail/bond. I directed that pre-bail Reports be prepared and filed before I could make a decision.
4. The respective pre-bail Reports, both dated 24/01/2024 were then filed as directed. Both Reports were unfavourable and returned identical recommendations as follows:

“..... from the social inquiry findings, it is our considered opinion that whereas the accused is suitable to be released on bond/bail, there is still hostility on the ground that is yet to cool



down. We humbly recommend that the honourable Court defer his Application for bond/bail until such time when the home environment becomes conducive.”

5. The basis for the conclusions above was that the members of the community were still in shock over the occurrence of the incident, that there is a lot of hostility on the ground which culminated into the houses of the accused families being razed down as per the Marakwet culture and that the safety of the accused was not guaranteed were they to be released on bond. It was also reported that the family members of the accused and those of the deceased were in the process of conducting a cleansing ceremony which would cool down the hostility and that the community wanted the accused to remain in custody until the cleansing rituals were complete.
6. Pursuant to the above, by my orders made on 1/02/2024, I declined to grant bail/bond at that time but I informed the accused that they were at liberty to renew the Application at any time should the circumstances change.
7. It was therefore about 8 months later when Mr. Ayora, on 2/10/2024, renewed the Application for bail. In the circumstances, I ordered for fresh respective pre-bail Reports and which were then filed in Court on 24/10/2024.
8. The Reports were again unfavourable and, again, bore identical recommendations as follows:

“... bearing in mind the gathered information and also the given sentiments, it is our considered opinion that the accused is not currently suitable to be released on bond/bail. It is therefore our recommendation that his suitability for bond/bail application may be reviewed at a later date.”
9. The basis for the above recommendation was that the family of the deceased was against the release of the accused for fear of witness' interference and the fact that there are pending rites to be conducted as demanded by their customs. It was also reported that the family members of the deceased were still emotional concerning the incident which is a pointer that they still need time to heal before the accused could be released back to the community. According to the Report therefore, safety of the accused cannot be guaranteed if granted bail at this time.
10. Prosecution Counsel, Mr. Kirui stated that he is opposed to release of the accused on bail and in doing so, relies on the findings and conclusions made in the said pre-bail Reports.
11. On his part, Mr. Ayora filed the Submissions dated 28/11/2024. He pointed out that the pre-bail Reports dated 24/01/2024 opposed release on bail on the ground that the concerned families were meeting on 9/04/2024 to conclude local Marakwet customary rites and that, according to him, the same has now been done. He then cited the provisions of Article 49(1)(h) of the Constitution, the Bail/Bond Guidelines and also Section 123A(2) of the Criminal Procedure Code on the right to bail. He also cited various authorities. According to him, the accused have not been previously convicted, nor failed to surrender themselves to custody, are Kenyans of humble background and are not flight risks. He submitted further that the standard for denying bail is “compelling reasons” and which must be cogent, strong and specific. He submitted further that the accused having been in prison for more than a year are now eligible for release on bail/bond. He also cited the provisions Article 50(2)(a) of the Constitution on the right “to be presumed innocent until the contrary is proved”. He urged further that the tensions have ceased and that the accused have an alternative home in Trans Nzoia where they can relocate in the event of any tension or animosity.



## Determination

12. Evidently, the issue that arises for determination is whether there are justifiable grounds for denying bail to the accused persons.
13. In regard thereto, it is not in dispute that under Article 50(2) of the Constitution, every accused person is presumed innocent until the contrary is proved. In relation thereto, the right to bond or bail is recognized under Article 49(1)(h) which provides that every accused 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”.
14. Regarding what amounts to “compelling reasons”, the Court of Appeal, in the case of Republic v Nuseiba Mohammed Haji Osman [2018] eKLR stated as follows:

We stress the key words “unless there are compelling reasons” and adopt the definition of what amounts to compelling reasons in the High court decision of R V Joktan Mayende & 3 Others, Criminal Case 55 of 2009 as follows:

“...And accordingly, the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.”
15. From the foregoing, it is evident that the right of an accused person to be released on bail is a balance between the rights of the accused person and the interest of justice, law and order including factoring in the interest of the victim, or in a case of murder, his family (see Supreme Court decision in Waititu v Republic (Petition 2 of 2020) [2021] KESC 11 (KLR) (22 October 2021) (Judgment)).
16. As was correctly observed in the said case of Republic v Nuseiba Mohammed Haji Osman (*supra*), the liberty of every person is sacrosanct and being presumed innocent until proved guilty is a constitutional principle that is intended to keep intact the general fabric of the accused person’s life. On the other hand, the State has a constitutional duty to prosecute those who commit crimes, to ensure public safety between the time of arrest and trial of an accused person, and to protect the integrity of the criminal justice system. In the course of realizing these goals, the individual right to liberty may be qualified. The Court then added as follows:

“It follows that where there is sufficient and compelling evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the evidence, or fleeing the jurisdiction of the court, or by posing a danger to himself or to any other individual or to the public at large if released, then there will be justification to either deny such an accused person bail, or set stringent bail or bond terms in the interests of justice.
17. The above principles are also captured in Section 123A of the Criminal Procedure Code and the Judiciary Bail and Bond Policy Guidelines.
18. In this instant case, although the Prosecution opposed the Application for release on bail, no Affidavit from the Investigating Officer was filed to bring out any factual grounds for opposing the Application. All that is on record therefore is only the pre-bail Reports.



19. The Reports indicate that the family of the deceased strongly insists that the accused should continue being confined in custody until conclusion of the trial. Needless to state, the views of the family of the deceased, as bitter or aggrieved as the family may still understandably be for the loss of their loved one, would not “tie the hands” of this Court in making an independent decision devoid of emotions since the accused are, as aforesaid, presumed innocent until proved otherwise.
20. Having considered this matter in totality, I am not satisfied that there has been demonstration of the existence of sufficient and/or compelling evidence that the accused persons may intimidate witnesses or interfere with the evidence, or that they are a flight risk. It has also not been denied that their fixed abodes are well-known. There is also no allegation that the accused have threatened any witnesses or the family of the deceased. Regarding the allegation that the community may harm the accused if released, no evidence was adduced. In any case, the Reports acknowledge that any hostility on the ground or threat of retaliation has reduced. Mr. Ayora has also submitted that the accused persons have alternative dwellings in Trans Nzoia where they can relocate should the tensions or animosity re-emerge.
21. I also note that the initial Reports dated 24/01/2024 and the new set filed on 24/10/2024, despite the passage of time, give almost the same reasons for not recommending bail. What is however conspicuous is that while the Reports of January 2024 recommended that release of the accused on bail/bond be withheld pending conclusion of cleansing ceremonies to be conducted under the Marakwet customs, the new set of October 2024 still gives the same reason. The indication given in the initial Reports was that the ceremonies and rites were about to be concluded at that time. However, 8 months later, it is turning out that the same have not been concluded and may not even have been conducted in the first place. No indication is also given on timelines or how much longer it would take for the same to be conducted and concluded.
22. In my assessment, no compelling reasons or evidence has been adduced to demonstrate that the accused may, if released on bail, intimidate witnesses or interfere with the evidence, or flee the jurisdiction of the Court, or pose a danger to anyone. My view is that having been in custody for about 1 year now, the accused ought to now be allowed their liberty pending trial of the case.

### **Final Orders**

23. Trying as much as possible to balance the competing interests set out above, I admit the accused persons to bond on terms that they shall each be released on respective bonds of Kenya Shillings Four Hundred Thousand (Kshs 400,000/-) each with two sureties of a similar amount.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 20<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the presence of:

N/A for the State

Mr. Ayora for both 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons

Both for 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons present

Court Assistant: Brian Kimathi

