



**Ndirangu v Republic (Criminal Case E014 of 2024)  
[2024] KEHC 15943 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E014 OF 2024  
E OMINDE, J  
DECEMBER 19, 2024**

**BETWEEN**

**FRANCIS MWANGI NDIRANGU ..... ACCUSED**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that on the night of 22<sup>nd</sup> and 23<sup>rd</sup> June, 2024 at Shauri Yako Estate in Eldoret Town, within Uasin Gishu County, in the Republic of Kenya jointly with others not before Court he murdered Rael Cherop Biwott alias Racheal.
2. The accused took plea on 31/07/2021, before the Honourable Mr. Justice Wananda. He denied the charge and a plea of not guilty duly was entered. The State Counsel, Mr. Limo opposed the release of the accused on bond and indicated that he will be filing and serving Affidavits to that end. He further requested that a Pre-bail report be filed.
3. In opposing the Prosecution Counsel's submission, Counsel Mr. Ogongo, appearing for the accused submitted that the accused had already been in custody for almost one month. Counsel Mr. Lagat, watching brief for the victim's family echoed the sentiments of the Counsel for the State and added that the right to bail is not absolute. He also indicated that he would be filing Affidavits opposing the release of the accused person on bond.
4. The Court then directed that a Pre-bail Report to be filed, the State and the victim's family were each granted leave and time to file their respective Affidavits opposing the release of the accused on bond and the matter was assigned to this Court for hearing and determination.
5. Pursuant thereto, the Accused person, Paul Mwangi Ndirangu, Christabel Ndirangu, Zaberia Wacheke Kahoto and Joshua Ogongo all filed Affidavits seeking that the release of the accused on bond.



6. In his Affidavit, the accused states that he is married to Rael Cherop Biwott (the deceased herein) and that his late wife was killed in unclear circumstances and he has been charged with that murder.
7. He contends that it is his constitutional right to be admitted to bail and/or bond on favorable and reasonable terms and that this right may only be limited in accordance with the provisions of Article 49 (l) (h) of *the Constitution*. He stated further that he enjoys an unlimited Constitutional right to be presumed innocent until proven guilty as provided under Article 50(2) of the same said Constitution.
8. He added that he has been in custody since 5<sup>th</sup> July, 2024 to date and that as alleged by the prosecution, he has not in any way threatened the lives of his children and that the deponents of the Affidavits opposing his release on bond and/or bail on this assertion exhibit a crystal bias against him and have a pre-determined outcome that he is guilty even before the trial begins.
9. Further, the accused in response to the assertion that his safety cannot be guaranteed if released on bond, stated that he is able to take care of his safety once released on bail/bond and that further he shall undertake to abide by all conditions that may be attached to his release bond.
10. He stated that he has a fixed abode at Shauri Yako Estate in Eldoret which abode the Investigation Officers have visited more than twice in the course of the investigations and that he also has an alternative abode at Moi's Bridge in the locality where his mother resides where he can also move to if the court so directs. He added that his siblings are also willing to accommodate him if need be.
11. The contents of the other Affidavits in support of the bail Application basically reiterate the contents of the accused person's Affidavit save for the one sworn by Zaberia Wacheke wherein she states that she is ready to stand as surety for the accused person and that she owns motor vehicle registration number KCG 630V valued at Kshs.570,000/=.
12. In opposing the Application for bail, the prosecution relied on the Affidavit, sworn by No. 62024 CPL Reuben Mwanki on 31/7/2024 wherein he deposed that he is one of the Investigating Officers in the above matter attached to the Directorate of Criminal Investigations headquarters, Homicide Section.
13. He reiterated the charge that the accused is facing and all its particulars. He deposed that on 22/6/2024 at about 1830hrs, the deceased person while in company of the accused person, who according to the Investigating Officer, had earlier visited the facility for treatment upon feigning illness but just so as to spy on the deceased, left her place of work at Moi Teaching and Referral Hospital Eldoret. That the deceased's last mobile phone communication was on 22/06/2024 at around 1850hrs while at the Eldoret CBD area and was last seen alive on 22/6/2024.
14. That on 24/6/2024, parts of the deceased's body comprising of the lower half of the trunk and above the lower knee limbs, were recovered at Kapsilegaa village within Nandi County. On the same day in the evening, the upper half of the trunk and upper limbs were recovered at Lamaiywet village within Uasin Gishu County. On 27/6/2024 the other part comprising of both legs and abdominal viscera were recovered wrapped in a clear polythene bag at Mutwot village within Nandi County.
15. It is the view of the Investigating Officer that the evidence gathered against the accused person strongly ties him to the offence particularly because on 22/06/2024 at 1848hrs, CCTV footage obtained from the Moi Teaching and Referral Hospital captured the accused in the company of the deceased shortly before the deceased went missing.
16. That because of all the above, there is a high likelihood of the accused person interfering and intimidating the key prosecution witnesses if released on bond and more particularly because some of the witnesses are close relatives. Among these witnesses are the accused's three children two of whom



- are minors. That one of the deceased children namely Sammy Ndirangu has complained of being intimidated, harassed and threatened together with his siblings by the accused person.
17. The Officer further stated in the said Affidavit that the deceased's children have been expelled from their home by the accused person for reasons that they have been cooperating with the investigators against his will. That there have been attempts by the accused person to approach witnesses through proxies with an aim of manipulating them so as to interfere with their evidence and as such the said witnesses have expressed fears that they may be harmed by the accused if he is released on bond for turning down these advances.
  18. He also added that these witnesses are averse to being put under witness protection measures because it will mean separation from their families and source of livelihood. He therefore avers that unless the accused is held in lawful custody the deceased's children, some who are of school going age may have difficulties in going on with their studies in their current schools
  19. The Investigating Officer added that bearing in mind the manner in which the deceased was brutally killed, the deceased's children are now living in fear that the same violence may be applied to them by accused person and therefore the only way to address this concern is to have the accused remanded in custody until the matter is heard and determined.
  20. Further, he stated that the events of the incident are in the public domain and has attracted emotions owing to the manner in which the murder was executed and so in his opinion, the life of accused may be in danger if released. Further, that the charge against the accused person is serious and if convicted he is liable to be sentenced to serve a long-term prison sentence. That there is therefore a higher likelihood and incentive for the accused person to jump bail.
  21. The Affidavits on behalf of the victim's family opposing the release of the accused on bond were sworn by the following persons; John Kibiwott Tanui, the deceased's father, Sammy Ndirangu, the deceased's son, Hellen Chepngetich Biwott, the deceased's sister and Elias Kiprotich Biwott the deceased's brother.
  22. The common thread that runs across all these Affidavits is that they oppose the release of the accused on bond because: The accused person had become violent to the deceased and their relationship status as husband and wife could not be formalized as a result of this. That this virulent attitude of the accused towards the deceased eventually culminated into the brutal murder of the deceased and that they are very hurt and traumatized by the brutal manner in which their kin was murdered and her body dismembered.
  23. That the accused's person first born son one Sammy Ndirangu is an adult working at the Kenya Defence Forces while the other (3) children are school going children in need of care and protection, that and that the brutal manner in which the body was slaughtered, mutilated and dismembered was meant to hurt the deceased family. That considering that the accused person is known to the family his release would greatly prejudice the investigation as he is in a position to exert undue influence on witnesses so as to pervert the course of justice.
  24. A Pre-bail Report dated 3/9/2024 was subsequently filed by the Probation Department to aid the Court in determining and considering the accused person's suitability to be released on bail and I have read the said Report and noted its content as well as the recommendations therein made as regards the suitability for bond for the accused.
  25. The Application was canvassed by way of written submissions. The accused person filed his submissions on 9/10/2024 while the Victim's family filed on 31/07/2024.



## The Accused Person's Submissions

26. On compelling reasons, Counsel for the accused person submitted that it is now trite law that all offences in Kenya are bailable as guaranteed by Article 49 (1)(h) of the Kenyan 2010 Constitution. He stated that whereas this right is not absolute, the state through the Director of Public Prosecutions has the onus to demonstrate that there are reasons that are sufficiently compelling to warrant an accused person being denied bond pending the hearing and determination of their trial.
27. That in the instant case the state has made efforts to provide the said compelling reasons vide the affidavits of the Investigation Officer and the victim's family. The reasons advanced therein may be summarized as follows: Safety and security of the accused; The possibility of interference with witnesses; The existence of evidence strongly linking the accused person to the offence; The investigations are still ongoing; and that the accused is a flight risk.
28. Counsel submitted that under Article 50 (2) (a) of *the Constitution* of Kenya the presumption of the innocence of the accused is preserved. Counsel maintained that because the accused person pleaded not guilty to the current charges then this presumption fully applies to him. Counsel relied on the decision of Justice F.M. Gikonyo in the case of Republic-v-Gibson Kiplangat Bett [2022] eKLR where the Hon Judge posited as follows: -
- “ 18 Although the accused faces the grave charge of murder; he is still deemed innocent and is entitled under Article 49(1)(h) of *the Constitution* to bail pending trial unless there are compelling circumstances. See Muraguri -v- Republic [1989] KLR and R-v-Richard David Alden (2016) eKLR.
- (9) The overarching objective of bail is to ensure the accused gets his liberty, but also attends his trial (Muraguri-v-Republic [supra]
29. Counsel contended that notwithstanding the express position of Article 50 (2) (a) of the Kenyan Constitution, the deponents of the affidavits in opposing the accused person's admission to bond have already pronounced the guilt of the accused person. That this is crystal clear as shown in the affidavit deposed by No. 62024 CPL Reuben Mwaniki to which is annexed a letter allegedly written by Sammy Ndirangu.
30. Part of paragraph 3 of the said letter reads, “This news shocked me and even, led to my conviction that he (Francis Ndirangu) had committed a crime against humanity and actually left me in a bad state with my siblings who are below the age of majority”.
31. That the affidavit deposed by Elias Kiprotich Biwott takes the same trajectory and reads at paragraph 6 as follows: “6) THAT subsequently, it dawned on me that the accused person had intentionally lied and tricked me having known that he had brutally murdered my sister, dismembered her body and dumped her body parts separately. Thus, the accused person is a very calculative, vicious, pathological liar, unremorseful and a very dangerous person in the society. He can do anything to evade justice.”
32. That further, the affidavit of Hellen Chepngetich Biwott equally states at paragraph 6 as follows:- “6 THAT I am not comfortable with the Accused's release as I had previously spoken with him, and he pretended to be sad and looking for the murderer, assuring me that Rael would get justice, only to discover that he was the one who orchestrated the murder of my beloved sister”
33. With regard to the issue of safety and security of the accused, Counsel submitted that it is unfathomable to hear an officer tasked with amongst others the duty to protect the citizenry allege that the security forces are unable to discharge their core mandate of protecting Kenyans.



34. He stated the Republic of Kenya is a democratic state aptly governed by laws in force and no person is above the law. According to Counsel if indeed there are criminal elements who want to harm the accused person regardless of his innocence they should be apprehended and charged accordingly.
35. Counsel urged that the accused person and his relatives have deposed in their Affidavits that they are ready to take charge of the security and safety of the accused person in addition to that role being constitutionally declared to be the preserve of the security organs. Counsel still relied on the decision of Hon Justice Gikonyo in the above case of Gibson Kiplangat Bett (supra) where the Hon Judge expressed similar sentiments and held that such an allegation by the security organs as compelling reasons are unacceptable and should not be considered as reasons sufficiently compelling to warrant the denial of bond
36. Counsel maintained that the accused person's relatives are ready and willing to stand as surety for the accused person and to welcome him home once he is released. Counsel urged the Court to be guided by case of Republic -v- Joseah Ngeno & another [2017] eKLR where lady Justice Mumbi Ngugi (as she then was) posited thus: -
- “ 27. In the present circumstances, it is apparent that the two accused persons are not known to have committed offence prior to the present charge. The hostility in the community and the destruction of farms appears to have arisen following the arrest of the accused persons. Their families are willing to welcome them home, and there is nothing before me that suggests that their security is at risk.
28. In the circumstances, I am not satisfied that there is a compelling reason for denying the applicants bail. Accordingly, I direct that the accused persons be released on a bond of Kshs.300,000/= each together with a surety of a similar amount.”
37. In regard to the likelihood of interfering with witnesses, Counsel submitted that even as the proponents of this position all base their allegation on the fact that some of then witnesses are related to the accused by being his children, Counsel contended that this allegation is unfounded.
38. Counsel maintained that the accused person is a victim of the circumstances leading to the death of his wife and that he was thoroughly interrogated for more than five hours over this death and he gave an account of his whereabouts at all material times.
39. That in actual fact, the accused person used to live with his children and wife in one house and that none of the prosecution witnesses actually claims to have witnessed the murder. Therefore, Counsel contended that the case of Gibson Kiplangat Bett (supra) can be distinguished from this case as in the said case the prosecution indicated in their affidavit that the witnesses included a minor who had actually witnessed the brutal murder.
40. Counsel added that the accused person will be raising the defence of alibi amongst others if need be and further that the witnesses, who are the accused person's children, are in the custody of the accused person's in-laws, and have been in their custody since the time the body of the deceased was discovered. Counsel added that the in-laws reside at Maili Nne while the accused resides at Shauri Yako estate approximately 5 kilometres away.
41. Counsel added that prosecution has availed a partial statement of Benson Shikuku who has made wild and baseless allegations seeking to tarnish the names of the people he has mentioned. That these



allegations of Benson who says he was approached while in police custody have been aptly responded to by the persons whose characters the said witness attacks.

42. Counsel submitted that the deposition of No. 62024 CPL Reuben Mwaniki at paragraph 6 of his affidavit in opposition of bail/bond which the Investigating Officer contends has established that the evidence strongly ties the accused to the offence has fallen short of disclosing the alleged strong evidence, if at all, tying the accused to the charge he is facing and that further still the photo availed is not proof that the accused person committed the offence simply because he was seen in the hospital with his wife when he had gone to be treated.
43. Counsel cited Paragraph 4.26 (b) of the Bail and Bond Policy Guidelines which mandates the prosecution to disclose and supply to the accused person any evidence/information relied upon in objecting to bail. The said which guideline states as follows:-
  - “(b) The accused person shall be entitled to the disclosure of any information relied upon by the prosecution in objecting to bail, provided that there is no good reason for withholding such information, such as the protection of witnesses or the preservation of national security.”
44. Counsel therefore submits that in line with this provision, it follows that the investigation officer simply saying that there is evidence strongly tying the accused to the offence without substantiating in opposition of bail/bond should not be countenanced by the Court.
45. On the assertion that there are ongoing investigations, Counsel referred the Court to the ruling delivered by Honourable O. Mogire (SPM) on 11/7/2024 annexed to the affidavit of Francis Mwangi Ndirangu marked FMN 1 where the Trial Magistrate in allowing an Application by the Investigating Officer to have the accused further remanded to enable the completion of investigations, had the accused detained for a further 10 days.
46. Counsel submitted that on the mention date of 24/7/2024 set by the Hon Magistrate to ascertain if the investigations had been concluded, the investigation officer through the Court prosecutor Miss Sidi Kirenge confirmed to the trial Court that the investigations had been concluded and the state intended to charge Francis Mwangi Ndirangu with the offence of murder and on the same day 24/7/2024 and this cause was subsequently instituted and the accused was remanded at Eldoret G.K. prison pending mental assessment as can be deduced from the Court file proceedings
47. Counsel submits that it is therefore crystal clear from the above excerpt of the lower court proceedings that investigations had already been concluded at the time that the decision to charge the accused was made resulting in the institution of this case. Counsel submitted that investigation officer acknowledges this also by not deposing in his Affidavit that investigations are ongoing as one of the reasons for opposing bail/bond and that this is an assertion that has been made by the family of the deceased.
48. On whether or not the accused is a flight risk, Counsel contends that this is a conclusion reached by the the investigation officer by virtue of his assertion that the charge is serious of and so in light of the attendant punishment the accused person is likely to abscond. Counsel submitted that it has been established in the cause of investigations that the accused person is a business man who has established his home in Eldoret at Shauri Yako Estate and he runs his business within Eldoret as an electrician.
49. Counsel maintained that the accused person has no other home and neither does he own a passport to facilitate his movement elsewhere if at all. That the investigation team know the accused' fixed abode and have visited the same on several occasions in the cause of their investigations and that the accused



person has willingly cooperated with the said officers. Counsel added that the accused person has four issues from his marriage to the deceased who are his world and that three of them are school going and all he seeks is to regain his freedom and in due cause upon conclusion of this case be able reunite with them. Counsel therefore urged the Court to find and hold that the allegation that the accused person is a flight risk is baseless and unfounded.

50. On the bond terms, Counsel urged the Court to exercise its discretion and admit the accused person to reasonable and affordable bail/bond terms as constitutionally provided. Counsel submitted that the family of the accused are ready and willing to stand as surety to secure his freedom and further that Miss Zaberia Wacheke Kahoto has availed a valuation report of her motor vehicle registration number KCG 630V valued at Kshs.570, 000/- together with a copy of the Logbook to confirm her readiness to stand as surety for the accused.
51. That the other members of the family are equally ready and willing to stand as sureties and accommodate the accused person if need be depending on the Court's directions on admitting him to bail/bond. Counsel urged this Court to be persuaded by the decision of Francis Muriungi Nkuna (supra) where the Court admitted each of the accused persons to a bond of Kshs.500,000/=.
52. Counsel contended that the Pre-Bail report suggests that the accused person should continue being in remand and the issue of bail/bond be revisited within 3-4 months. Counsel submitted that the accused person has been in custody since 5/7/2024 which makes it now more than four months without having his right to bail/bond activated. Counsel further contended that this Court is not bound to follow the recommendation made in the pre-bail report as aptly captured by the Court in the case of Francis Mwangi (Supra).

### **The Victim's family Submissions**

53. Counsel for the victim's family submitted that the right to bail is not absolute. He cited Article 49(1)(h) of *the Constitution* and Section 123A of the Criminal Procedure Code) in support of this submission and further submitted that Under the Bail and Bond Policy Guidelines the following non-exhaustive factors should be considered in bail applications: the likelihood of interfering with witnesses; the need to protect the victim or victims of the crime; the relationship between the accused person and the potential witnesses; protection of the accused persons; and public order, peace and security.
54. In the instant matter, Counsel submitted that the Victim's Family is opposed to the 1<sup>st</sup> Accused person's release on bail owing to the antecedent of the accused with the Victim's family and the influence it may have on them as they are material witnessess to this case; that members of the victim's family have already been threatened by the Accused and hence, the victim's family's apprehension that once the accused person is out on bail he will resume his interference with potential witnesses.
55. Counsel submitted that the above fears are not mere whims and that the danger of witnesses being driven into a corner by the presence of the accused persons soon after the ghastly death of the deceased person is a real possibility. Further, Counsel submitted that murder is a serious offence and attracts the death penalty. That self-preservation is a natural reaction or response of any human being and it may take the form of ensuring critical evidence is suppressed forever and as such, potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case.
56. Counsel therefore submitted that this is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety and may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety. Counsel placed reliance on the case of Republic v Selote (Criminal



Case E020 of 2023) [2024] KEHC 1314 (KLR) where the Court in ruling against the Application to release the accused on bail held as follows:

“On the issue of the likelihood of the accused interfering, threatening or intimidating the witnesses, the Respondent has argued, what has not been denied by the accused, that the matter was subjected to an inquest hearing and therefore the accused was aware of the evidence likely to be adduced in Court and by which prosecution witnesses.”

57. To further buttress their arguments, Counsel cited the case of *Republic v Joktan Mayende & 3 Others* [2012] eKLR:

“All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in Court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the Court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

58. In conclusion, Counsel submitted that under the law, this Court has a duty to give effect to the rights of victims expressed in Section 10 of the *Victim Protection Act* because a victim has a right to: be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse; and have their safety and that of their family considered in determining the conditions of bail and release of the offender;

59. Counsel maintained that interference with witnesses is highly potent and such it is reasonable, justifiable and necessary to subject the accused persons to pre-trial detention as a way of safeguarding the administration of justice.

60. The State on the other hand did not file any submissions but stated that they associate themselves with the submissions filed by Mr. Lagat, on behalf of the Victim’s family.

61. Subsequent to the filing of the submissions, both Counsel orally highlighted their submissions in open court and I have duly considered and addressed my mind to the same as well.

### **Determination**

62. In light of the above, I find that the only issue that arises for determination herein is;

Whether the reasons advanced by the prosecution are sufficiently compelling to warrant the denial of bond to the accused.

63. As already herein above stated, Article 50(2)(a) of *the Constitution*, provides that in every trial and in order to uphold and protect and safeguard the non-derogable right of every accused person to a fair trial as provided under Article 25 (c) of *the Constitution*, every accused person is presumed innocent until the contrary is proved. In relation thereto, the right to bail pending trial is provided for under Article 49(1)(h) precisely for the reasons that until proven guilty after the hearing of the case against an



accused person he is presumed innocent and so his liberty should not be constrained and/or restrained without any just cause otherwise referred to as compelling reasons. The said Article provides as follows:

“Every Accused person has 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”.

64. Even though compelling reasons are not defined in *the Constitution*, Section 123A of the Criminal Procedure Code, provides the parameters for the grant or denial of bail as follows;

- (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 fulfillment 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.

65. Whereas I agree with the finding of Mativo J. In the case of Republic –vs- Danford Kabage Mwangi (2016) eKLR where the Hon Judge held that:

“Granting bail entails the striking of a balance of proportionality in considering the rights to the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. incarcerations before trial, when the outcome of the case is yet to be determined, cuts against this principal. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and positive...”

66. I also associate myself with the view of Muriithi J in the case of Kelly Kases Bunjika vs. Republic [2017] eKLR, where the Hon Judge was of the following view on the denial of bail to an accused person:

“...It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of *the Constitution* to refuse bail in the particular case.”

67. The decision to grant or deny bond is one that is made at the discretion of the court, which discretion the law requires be made judiciously having taken into consideration all the particular and peculiar circumstances pertaining to any case before it. The discretion is also one that a Court makes in the



interest of justice and so as to ensure that the ends of justice are met to both the accused person as well as to the victim precisely because justice cuts both ways.

68. With regard to the justice of the accused person, the court must ensure that all the rights to a fair trial as envisaged and guaranteed under article 50(2) of *the Constitution* including the presumption of innocence, and therefore the right to be released on bond as provided under Article 49(1) h) are safeguarded and upheld at all times throughout the trial.
69. With regard to the justice of the victim, the court must equally ensure that the rights of the victim as provided under the same said Article 50 (9) of *the Constitution* and as amplified under the Victims Protections Act CAP 79A LOK which Act was enacted by Parliament as mandated under the said Article 50(9) to provide for the protection, rights and welfare of victims of offences are equally safeguarded and upheld throughout the trial.
70. Section 10 of the said Victims Protection Act provides as follows;
10. Right to protection
- A victim has a right to—
- (a) be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
  - (b) have their safety and that of their family considered in determining the conditions of bail and release of the offender; and
  - (c) have their property protected.
71. In any bail application, the primary consideration that a court needs to take into account is whether an accused person if released on bail/bond will attend court to enable the case proceed to its logical conclusion. Secondary to this is whether, if released on bond, there is a possibility of the accused acting in any manner that may compromise the hearing of the case with a view to subvert a just and fair determination of the same. Lastly, the other consideration that the court needs to take into account is whether an accused person if released on bond will faithfully adhere to the conditions that the court may impose if it deems this to be necessary in granting bond.
72. These three considerations are what then would broadly comprise of compelling reasons as provided under Article 40(1) (h) of *the Constitution* and as spelt out in Section 123A of the Criminal Procedure Code. If the prosecution is able to satisfactorily demonstrate to the court that the possibility of an accused person acting in any manner as is envisaged under Section 123A is not just a remote possibility but that given the circumstances as demonstrated in an affidavit sworn by the officer investigating the case is highly probable, then the court can then make a finding that the circumstances that militate against the release of an accused on bond are sufficiently compelling to warrant a denial of the same. What the compelling reasons are, however, will depend on the circumstances of each case.
73. In the case of *S vs. Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), the court gave a very well detailed exposition of what should comprise compelling reasons and as follows:
- “The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice [emphasis mine] where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will: -
- (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or



- (ii) not stand his or her trial or appear to receive sentence; or
- (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the Court should be taken into account...In considering any question... the Court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody...

74. These considerations have also been set set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25 as follows:

- (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:
  - a. That the accused person is likely to fail to attend Court proceedings; or
  - b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
  - c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
  - d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
  - e. That the accused person is likely to interfere with witnesses or evidence; or
  - f. That the accused person is likely to endanger national security; or
  - g. That it is in the public interest to detain the accused person in custody.

75. Further, compelling reasons were also defined in the case of Republic –vs- Joseph Thiongo Waweru & 17 Others [2017]eKLR, 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.”



76. Compelling reasons having been defined as I have broadly demonstrated above, all that the Court needs to determine in this particular case is whether the circumstances enumerated in the Affidavit of the Investigating Officer as summarized above as well as the depositions made in the Affidavits filed by the family of the victim as weighed against the depositions made by the accused and on his behalf have met this threshold.
77. However even in reaching its determination, notwithstanding the fact that the primary consideration is always first and foremost whether an accused person will attend court if freed on bond, it is my considered opinion that the court also must keep in mind the need to ensure that the trial is free and fair not just to the accused, but also to the complainant and/or victim as the case may be. This balanced approach to any issue at hand is in my view the cornerstone of the justice of every case.
78. Having said the above, I will now consider the reasons advanced by the prosecution in seeking that the court finds that they have established reasons that are sufficiently compelling to warrant the denial of bond to the accused.
79. On whether the accused will attend court, the court notes that the Accused relative one Miss Zaberia Wacheke Kahoto as already herein above summarized has stated that she is able ready and willing to stand surety for the accused person. She has proffered her motor vehicle as security and she is willing to avail the same to court to secure the release of the accused on bond.
80. In this regard then, I am satisfied that if released on bond, the accused would attend court as and when required because he has a person who is willing to stand surety for him and who as is required of a surety will ensure that he attends court. I therefore find that the submission by the prosecution that that the accused will not attend court if released on bond is without merit.
81. On the ground that bond maybe denied if an accused has breached previous bond terms the Pre-Bail Report availed to court and dated 3rd September 2024 states that the accused has no history of any previous criminal records. The accused also stated that he is ready to abide by any bond terms that the Court will set. It follows therefore that the issue that the accused may jump bail if released for reasons that he had been previously released on bond and failed to attend court does therefore not arise and ins not up for consideration.
82. On the ground that the accused has no fixed abode, the accused has sufficiently demonstrated to the court that he lives and works within the jurisdiction of the court and that he has a fixed abode that is known even to the investigating team. Further it has also been sufficiently demonstrated by his siblings that they are willing to accommodate him even out of jurisdiction if the court will deem it appropriate to so order. They have given their full particulars in the said affidavits whose contents have not at all been controverted by the prosecution. Being satisfied with the depositions made by the accused and his relatives, I find that this ground too lacks merit.
83. On whether the accused should be denied bond for his own personal security, to an extent I associate myself with the reasoning of Justice Gikonyo in the herein above cited case of Republic-v-Gibson Kiplangat Bett [2022] eKLR that in this age and time, it cannot be that the very security organ that is tasked with the responsibility of ensuring the safety and security of all the citizens of the Republic of Kenya no matter their circumstances, are the ones to turn around and say that they cannot guarantee the safety of an accused person if released on bond, and seeks that the court finds that this is a reason sufficiently compelling to warrant the denial of bond.
84. Of particular significance however is that the Affidavit of the Investigating Officer has not sufficiently demonstrated how the accused life is in danger and that if released, his safety will be compromised. Further, even as the Pre-Bail Report also alludes to this issue, it is not emphatic on denial of bond on



this ground. In actual fact, in its conclusion, it recommends that the issue of the release of the accused on bond be deferred for three to four months to accord time to tensions on the ground to quell down. The court notes that this report was prepared in September approximately three months ago. I am therefore of the finding that this ground is not sufficiently persuasive.

85. On the possibility of the accused interfering with witnesses, the decision in the case of *Rep vs. Dwight Sagaray & Others* High Court Criminal Case No. 61 of 2012, is instructive. the Court in this case observed as follows:

“For the prosecution to succeed in persuading the Court on this criteria (of interference), it must place material before the Court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the Court otherwise it is asking the Court to speculate.”

86. The observations of the Court in the case of *Republic v Joktan Mayende & 3 Others* [2012] eKLR herein above cited with the relevant excerpt reproduced is also relevant.
87. In the instant case, it is common ground that the deceased was the accused wife. The prosecution through the Investigating Officer has stated that some of the key witnesses are children of the accused and two of them are minors. This assertion too has not been controverted by the at all by the defense.
88. The court at this juncture finds it necessary to reiterate the deposition of the Investigating Officer on this ground. He averred that because the evidence of the last time the victim was seen alive is that which was captured in the CCTV camera retrieved from the MTRH is of the accused and the deceased leaving the hospital before her mutilated body was found scattered in different places, then there is a high likelihood of the accused person interfering and intimidating the key prosecution witnesses if released on bail or bond to compromise their evidence.
89. That more particularly some of the witnesses are close relatives. Among them are the accused persons three children two of whom are minors. One of the deceased child namely Sammy Ndirangu has complained of being intimidated, harassed and threatened together with his siblings by the accused person.
90. He stated further that the deceased's children have been expelled from their home by the accused person for reasons that they have been cooperating with the investigators against his will and that there have been attempts by the accused person to approach witnesses through proxies with an aim of manipulating them so as to interfere with their evidence and as such they have expressed fear that the accused might harm them if released for turning down these advances.
91. He also added that these witnesses are averse to being put under witness protection measures because it will mean separation from their families and source of livelihood. He therefore avers that unless the accused is held in lawful custody the deceased's children, some who are of school going age may have difficulties in going on with their studies in their current schools
92. The Investigating Officer added that bearing in mind the manner in which the deceased was brutally killed, the deceased's children are now living in fear that the same violence may be applied to them by accused person and therefore the only way to address this concern is to have the accused remanded in custody until the matter heard and determined.
93. The accused eldest child, a son named Sammy Ndirangu, has filed an Affidavit dated 7<sup>th</sup> August 2024 in which he deposes inter alia that he has been threatened by the accused person through phone calls



and messages and that he wrote to the Director of Criminal Investigation complaining about these threats vide a letter dated 23<sup>rd</sup> July 2024 which he annexed to his Affidavit as SN-1

94. He has also deposed that the gruesome murder has not only brought severe pain, mental anguish to his siblings and himself but has also left them scared for their safety. That most of the witnesses are known to the accused person and the victim's entire family and that the release of the accused from custody will jeopardize their safety as well as the integrity of the justice of the trial process as the accused might intentionally interfere with the justice process.
95. This last limb of this deponent's affidavit has also been echoed in the affidavits of all the members of the victim's family in their affidavits in opposition to the release of the accused person on bond as already herein above summarized and more particularly also because according to them, the relationship between the accused and their deceased loved one during the subsistence of their marriage was not good at all because in their view, the accused had exhibited violent tendencies towards the deceased.
96. The Court notes that the accused and his relatives on their part have vigorously denied all these allegations and have on their part also made various allegations against the family of the deceased as already herein summarized. It is not lost on the court that the victim in this case is the wife of the accused who has been charged with her murder and part of the witnesses lined up to testify against him are his own children one of whom has already alleged that he has been threatened by the accused. The Court also takes note of the assertion that the children of the accused and the deceased have been and are still living with the relatives of the victim since her demise
97. Also, much as the accused has denied that he has threatened his son, the court notes that the said son deposed that he did make a report to the DCI to that effect that the accused had threatened him and the said Report was availed to court. Over and above that, the court notes that the son then again proceeded to swear an affidavit to the effect that he had been threatened by the accused. In considering the possibility that the said Sammy Ndirangu could have been threatened as he alleges, the court notes that he is the son of the accused and further that he has persisted in his assertion to the extent of filing an affidavit against his own father.
98. The court also notes that the depositions of the Investigating Officer have been corroborated by the depositions of the family of the victim and more particularly the accused son. The court further notes that it is not denied by the defense that it is members of the deceased family and more particularly his own children that have been lined up as the key prosecution witnesses for these reasons I am satisfied that the possibility of interference with the witnesses to this case by way of threats and/or intimidation or howsoever manner by the accused person himself does exist.
99. Further the accusations and counter accusations that have been levied by each of the families against the other as evidenced by the depositions made in their various affidavits sworn in support of and against the release of the accused on bond. The family of the accused on behalf of their kin maintain that he is innocent and that the case against is a fabrication by the family of the victim who in their view have adjudged the accused guilty even before the commencement of the trial.
100. This scenario only goes to confirm that there exists a deep-seated animosity between the two families who are related by virtue of the marriage of the accused to the deceased. Given these circumstances, I am persuaded that the possibility of interference with the witnesses from the family of the victim by the family of the accused hence the interference of the witnesses through proxies of the accused therefore also does exist.
101. As I have already stated above, justice cuts both ways and so even as the court considers the justice of the accused that his rights are upheld at all times, that the trial is free and fair and that the innocence of



the accused is presumed throughout the trial, the court is also duty bound to consider that the justice of the victim as well is upheld and that the trial be free and fair and the witnesses on behalf of the victim are free from manipulation, interference intimidation and threats during the pendency of the hearing.

102. Given my finding on this ground I am satisfied that the release of the accused on bond will jeopardize the right of the victim to a fair trial which then will ultimately impact on the justice of this case for the reasons given I therefore find that the prosecution has adequately demonstrated that the possibility of witness interference does exist and that this is a compelling reason sufficient to warrant the denial of bond to the accused
103. On the ground that because this is a serious charge that attracts a long term prison sentence upon conviction and that this reason is sufficient to tempt an accused person to jump bail if released on bond, and particularly considering that the charge against the accused is the alleged murder of the his wife with their children lined up as key witnesses. Counsel for the accused submitted that the prosecution has not proffered sufficient evidence to warrant the court making such a finding, it should be noted that the trial is yet to commence and that such evidence is the preserve of the hearing.
104. Further to the above, on this ground and without much to add to what the Hon Justice Ochieng says in the authority below, I wholly associate myself with the sentiments of the Hon Judge as expressed in the case of *Republic vs. Ahmed Mohammed Omar & 6 Others* [2010] eKLR where his Lordship expressed himself as hereunder;

“Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in *Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010*; His Lordship expressed the view that;

‘Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person’s life, disloyalty to the state of one’s nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society’s sense of fairness and justice, and more so, the kith and kin of the victim, [emphasis mine]to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.’

105. In light of my findings as above, I am well satisfied that the prosecution has sufficiently demonstrated compelling reasons to warrant the denial of bond to the accused person. The accused person’s application that he be released on bond in the circumstances is denied.

106. Right of Appeal 14 days

**READ DATED AND SIGNED AT ELDORET ON 19<sup>TH</sup> DECEMBER 2024**

**E. OMINDE**

**JUDGE**

