



**Republic v Githinji (Criminal Case E015 of 2022)
[2023] KEHC 284 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE E015 OF 2022
FN MUCHEMI, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

STEPHEN MURIITHI GITHINJI ACCUSED

RULING

Brief facts.

1. This is a ruling on bail pending hearing and disposal of the trial. The applicant was charged with murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence are that on the 19th day of May 2022, at Unjiru village, Icuga sub location, within Mathira West sub county within Nyeri county unlawfully murdered Lydia Nyaguthii Gachara.
2. The prosecution filed an affidavit of compelling reasons dated September 27, 2022, sworn by the investigating officer IP Obed Mulunga. He deposes that the accused is facing a serious charge of murder which attracts a maximum sentence of death if convicted and thus increases the temptation for him to abscond.
3. He further deposes that the evidence gathered so far indicates that the accused participated in the brutal murder of the deceased. He states that immediately after the incident, the accused fled the scene and went into hiding to an unknown place and was later arrested on August 12, 2022 after he surrendered himself at Busia Police Station. The deponent states that although the accused surrendered himself, he is apprehensive that the accused is a flight risk and if he is released on bail, he is likely to abscond.
4. The investigating officer further stated that the situation on the ground is very volatile and he has reliable information that if the accused person is released on bond, members of the public are likely to harm him in a revenge attack and therefore security of the accused cannot be guaranteed if he is released at the current stage. Moreover, the investigating officer states that most of the key prosecution



witnesses are relatives to the accused person and therefore his release poses a real or conceived threat to the witnesses who were his immediate neighbours in Unjiru area where the incident occurred. There is also a very high risk of interference of the witnesses which will adversely affect the integrity of the evidence.

5. The deponent states that he is ready to avail all civilian witnesses for a special hearing to fast track the case before the accused is released on bond pending trial. The deponent further states that the accused person has no fixed place of abode and he is likely to disappear to an unknown place in an effort of defeating justice.
6. The pre bail assessment report dated 22/9/2022 indicates that the son of the accused and the victim's family are objecting to the accused being released on bond. The son of the accused is bitter and fears for his life for he assisted in the arrest of the accused. The area administrator reported that the community is living in fear and they state that in the event the accused is released on bond, he ought to source for an alternative accommodation. The area administrator however ruled out the possibility of the accused being attacked by the agitated members of the community.
7. The accused made his application for bail on 8/9/2022 and stated that he is ready and willing to comply with any conditions set by the court.
8. This application was canvassed by written submissions.

The Victim's Family Submissions

9. The victim's family submits that one of the complainant's is the biological son to the accused person and fears for his life in the event the accused is released on bond. The victim's family further submits that the complainant had to initiate complaints up to the DCI headquarters in Nairobi upon which the accused person was arrested at the Busia border. Furthermore, the accused person is a flight risk as he ran away after the heinous crime was committed and was apprehended three months and therefore the victim's family submits that nothing prevents him from running away when granted bail.
10. The victim's family submits that the court has the constitutional mandate to secure the safety and security of the victims and thus granting the accused bail may be tantamount to allowing the accused escape justice and cause further harm. The complainants submit that they are ready and willing to testify as soon as possible to expedite the hearings.

Analysis and Determination

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

11. 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.
12. It is trite law that the right to bail is not absolute and that 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 exists compelling reasons to deny an accused person bail pending trial.



13. 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.”

14. 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 Chesonji 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.”

15. The issue that arises is whether the reasons adduced by the prosecution are compelling reasons such that the court should not grant bail pending trial.



16. The prosecution states that the applicant is a flight risk as he fled the scene after committing the heinous crime. Further, the prosecution claims to have reliable information that members of the public are likely to harm the accused if he is released on bond. Moreover, the prosecution states that the accused's release will pose a real or conceived threat to some witnesses who are his immediate neighbours in Unjiru area and his relatives. Although the prosecution states that the accused is safer in custody than being on bond, the pre-bail report indicates that the area administrator in the accused's area has ruled out the possibility of the suspect being attacked by members of his community.
17. In regard to interference with the witnesses, the prosecution did not demonstrate by way of affidavits or other evidence that such a thing was likely to happen. Furthermore, in regard to witnesses, for example the son of the applicant who is a witness, there is in place the *Witness Protection Act* which provides for the manner in which such witnesses may be protected from perceived or likely harm. The prosecution did not explain why such measures for protection cannot be applied.
18. The applicant may have absconded after the commission of the crime as alleged but this is not enough to describe him as a flight risk. The paramount consideration in granting bail pending trial is whether the accused will turn up for trial. The court in granting bail must ensure that the terms and conditions it imposes addresses the issue of turning up for trial.
19. It is my considered view that the prosecution has not established any compelling reasons as to why the applicant shall not be released on bail.
20. The court hereby orders that the applicant be and is hereby released on bail pending trial in the following terms:-
 - a. The applicant shall execute a bond of Kshs 1,500,000/- with one surety of a like amount.
 - b. That the applicant shall not leave the jurisdiction of this court without its permission.
21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

