



REPUBLIC OF KENYA



**Owen & another v Republic (Criminal Case E018 of 2022)  
[2023] KEHC 338 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE E018 OF 2022  
GL NZIOKA, J  
JANUARY 26, 2023**

**BETWEEN**

**JAVAN KARAYA OWEN ..... 1<sup>ST</sup> APPLICANT**

**JOHN MACHARIA KIPRONO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants were arraigned before this Court on October 11, 2022, charged with offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. The particulars of the charge are that, on the night of 16<sup>th</sup> and September 17, 2022, at unknown time, within Karati village in Naivasha Sub-County, within Nakuru County jointly with others not before court, murdered Moses Maina Wanjiru.
3. On October 13, 2022, information was read to them and they pledged not guilty. By the subject notice of motion application dated November 23, 2022, the applicants are seeking to be released on reasonable bond or bail terms pending the trial.
4. The application is supported by affidavits sworn by each applicant. The applicants aver that, they are Kenyans and therefore will not abscond if they are released on bond. Further, the 1<sup>st</sup> applicant stays with his parents while the 2<sup>nd</sup> applicant stays in a rented room. Furthermore, they have not and will not attempt to interfere with investigations or witnesses.
5. That they are peace loving Kenyans with high ethical and moral standards and are not flight risk. Further, there is no iota of compelling reasons to deny them bond or bail. In addition, the probation officers' reports are favourable and they will abide by the conditions the court will set.



6. However, the application was opposed vide a replying affidavit sworn by No 85439 PC John Kinyonge, the Investigating Officer attached to the Directorate of Criminal Investigations at Naivasha. He avers that, the applicants have no fixed place of abode, known work place or permanent home where they can be traced. That they are likely to interfere with witnesses as they come from the same locality. Further, due to the magnitude or gravity of the offence and the evidence available, they are likely to disappear before the case is heard and determined.
7. The court ordered for a pre-bail reports and the same were prepared and filed in court. The report relating to the 1<sup>st</sup> applicant states, there is no risk if he released on bond/bail terms as he has a fixed place of abode and his father is willing to stand surety for him and ensure he attends the trial. The report in respect of the 2<sup>nd</sup> applicant indicates that the father was not cooperative for an interview, therefore supervision on bail may be a challenge. Ironically the report states that, he is suitable for release on bond and bail terms.
8. Further, the victim's family is opposed to the release of the applicants release on bond on the ground that they are still mourning the loss of the deceased and think it is unfair to release the applicant on bond.
9. Be that as it were, I have considered the application and note that, as a matter of fact an accused person is presumed innocent until otherwise proved. This is provided for under article 50 (2)(a) which states as follows:
  - (2) Every accused person has the right to a fair trial, which includes the right—
    - (a) to be presumed innocent until the contrary is proved;
10. In the same vein article 49 (1) (h) of the Constitution states that:
  1. An arrested 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.
11. Similarly, the provisions of section 123 of the Criminal Procedure Code empowers the court to admit the accused person to bond or bail on reasonable terms and states that: -
  - (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:
 

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
  2. The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
  3. The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.
12. In addition, section 123A provides that: -



- (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 fulfilment 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 Bail and Bond Policy Guidelines
    - (b) should be kept in custody for his own protection.
13. The *Bail and Bond Policy Guidelines* also make provisions for provision of bail and bond terms. The General Principles 3.1 states that bail and bond decision-making shall be guided by the following principles, which are derived from international best practices:
- a. The right of accused person to be presumed innocent. That every accused person shall be presumed innocent, as that is primary rationale for the requirement of the *Constitution* that an arrested person has the right to be released on bail or bond. Thus, pre-trial detention should not constitute punishment and they should be treated different from convicts as provided for under the *International Covenant on Civil and Political Rights* (ICCPR) provides that, “accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons.”
  - b. Accused Person’s Right to Liberty. That every accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to his/her guarantee to appear for trial.
  - c. Accused’s obligation to attend trial. That bail and bond provide guarantees that accused persons will attend trial.
  - d. Right to Reasonable Bail and Bond Terms: That bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. This is because the ultimate goal of bail or bond is to guarantee that an accused person attends his or her trial.
  - e. Bail determination must balance the rights of the accused persons and the interest of justice. Thus, where there is convincing evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the



evidence, then a need arises to either deny such a person bail or bond, or set stringent bail or bond terms. That the interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons.

- f. The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. As such, the safety of victims and victims' families in fixing the amount of bail and the release conditions for suspects and accused persons, should be considered.
14. The General Principle 4.9, states that the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. In a nutshell the following factors should be considered: -
- a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
  - b. The strength of the prosecution case.
  - c. Character and antecedents of the accused person
  - d. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.
  - e. Likelihood of interfering with witnesses.
  - f. The need to protect the victim or victims of the crime from the accused person.
  - g. The relationship between the accused person and potential witnesses.
  - h. Child offenders. Where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
  - i. The accused person is a flight risk.
  - j. Whether accused person is gainfully employed.
  - k. Public order, peace or security.
15. In the instant matter, the prosecutions concern is that the applicants may interfere with investigations and/or witnesses but there is no substantive evidence of the same or even any evidence that the applicants have done so in the past. Indeed, the pre bail report only indicate that the only party objecting to the release of the applicants is the victim's family that is in still in mourning.
16. The analysis of the legal principles herein relating to bail clearly state that bail and bond is a constitutional right of a suspect on the ground that he is presumed innocent until otherwise proved. However, against that right is the duty of the court to ensure that the accused turns up for trial.
17. To revert back to the instant matter, the relatives of the 1<sup>st</sup> applicant have taken the responsibility of ensuring that he turns up for trial, however the contrary apply to the 2<sup>nd</sup> applicant. In the given circumstances I decline to grant the 2<sup>nd</sup> applicant bail or bond at this stage. I however grant the 1<sup>st</sup> applicant bond on the following terms
- a. Bond of Kshs 1,000,000. 00 with one surety of like amount
  - b. Alternative cash bail of Kshs 500,000.00 with one contact person, who has to be a civil servant, with established permanent place of abode.



- c. The contact person to provide quarterly reports to court on his or her responsibility and performance thereof.
- d. The applicant not to interfere with investigations and/or witnesses before, during or after the trial.
- e. If proof of interference as stated in (d) above is provided, the bond shall be cancelled forthwith without further ado or reference to court.

18. Those are the orders of the court

**DATED, DELIVERED AND SIGNED ON THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

**Applicants present in court virtually**

**Ms Kirenge for Respondent**

**Ms Ogutu-Court assistant**

