



REPUBLIC OF KENYA



**Gathugu v Republic (Criminal Case E082 of 2022)
[2023] KEHC 3371 (KLR) (Crim) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3371 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL CASE E082 OF 2022

DR KAVEDZA, J

APRIL 25, 2023

BETWEEN

STEPHEN MACHARIA GATHUGU ALIAS MACHA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Accused was 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 offence is that the accused on October 31, 2022 at around 22:00 hours at City Carton Slums in Buruburu within Nairobi County murdered Elvason Mwangi Irungu alias Mwas.
2. The Accused pleaded not guilty to the offence and was remanded at Nairobi remand. The accused made an oral application on November 6, 2022 seeking bail pending hearing of the case.

The submissions of the accused

3. The application was canvassed by way of written submissions. Mr Ang'awa Atanda, counsel for the accused has submitted that the accused has a right to be released on bail as directed by article 49 (1) (h) of the *Constitution* of Kenya unless there are compelling reasons to deny him bail. Counsel for the accused has submitted that the prosecution has not advanced any compelling reason to deny the accused bail.
4. Furthermore, counsel submitted that the accused is innocent until proven guilty and that the investigating officer should not imply that the accused committed the alleged offence until determination of the case.



5. Counsel submitted that the accused is a pauper and is therefore unlikely to abscond the jurisdiction of the court if released on bail/ bond.

The case for the Respondent

6. The respondent has opposed the application of the accused through the affidavit of No xxxx CPL Kennedy Musyoki who has deposed to a fourteen (14) paragraph affidavit in opposition to the application, whose major averments are as follows.
7. The accused and his accomplices who are still at large, fled from his place of residence at City Carton Slums from September 1, 2022 until November 6, 2022 when he was arrested. The prosecution witnesses are well known to the accused and there is a likelihood that if he is released on bond/ bail he will intimidate or interfere with witnesses.
8. The accused has no fixed abode and is not in gainful employment.
9. The prosecution has strong evidence against the accused and are apprehensive that he may flee from the jurisdiction of this Court for fear of being sentenced.

The submissions of the respondent

10. The learned prosecution Counsel (Mr Mulama) has filed written submissions in opposition to the application.
11. Counsel has submitted based on the affidavit of No xxxx CPL Kennedy Musyoki, the investigating officer, that the accused is a flight risk and likely to abscond court if granted bail/ bond. Counsel urged the court to consider that that offence took place on August 31, 2022 but the accused evaded arrest until November 6, 2022 when he was arrested at the City Carton Police Post.
12. Furthermore, counsel has submitted that the accused is likely to be at risk if released on bond/ bail. Counsel for the respondent referred to the accused's statement under inquiry where the accused noted that the deceased's friends were baying for his blood following the incident leading to the death of the deceased.
13. Furthermore, counsel has submitted that the prosecution's case is strong enough to secure a conviction and this may be an incentive for the accused to abscond court if released on bond/ bail. Counsel also submitted that it is in the public interest for the accused to be held in custody pending hearing of the case against him.

Issues for determination.

14. I have considered the parties' submissions, affidavits and the constitutional provisions cited. From the foregoing, the issues for consideration are whether the accused person is a flight risk, secondly, is he likely to interfere with witnesses and thirdly, would the seriousness of the punishment/ sentence be a motivating factor for the accused to abscond or jump bail?

Analysis and determination

15. Although Bail and bond is a constitutional right of an accused person under Article 49(1)(h) of the *Constitution*, there are circumstances under which an accused person may be denied bail if the prosecutor is able to demonstrate compelling reasons to warrant the denial.



16. In the case of *Republic V Danson Mgunya & Another [2010] eKLR*, which is a locus classicus on matters of bail/ bond, the issue was exhaustively addressed. The findings of the learned Judge are replicated in the Bail and Bond Policy Guidelines. The learned Judge stated:

' When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -

- (i) The gravity of the punishment in the event of conviction
- (ii) The previous criminal record of the accused, if any
- (iii) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him
- (iv) Detention for the protection of the accused
- (v) The necessity to procure medical or social report pending final disposal of the case.

The said court stated that the criteria was not exhaustive.

'The main function of bail is to ensure the presence of the accused at the trial. Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.'

17. The Judiciary Bail and Bond policy guidelines under paragraph 4.9 has also provided the factors that ought to be considered by courts in bail and bond applications, inter alia:

- i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
- ii. The character and antecedents of the accused person.
- iii. The likelihood of interfering with witnesses.
- iv. The accused person is a flight risk.
- v. Whether the accused person is gainfully employed.

18. Is the accused a flight risk? The pre-bail report by Mr Kanyutu dated January 18, 2023 is favourable. However, it should be noted that the report is not binding but only serves as a guide to the court.

19. It is noteworthy from the pre-bail report that the accused was born in Korogocho in 1982. At the time of the offence, he had lived continuously in City Cotton for over 10 years. He had previously lived in Dandora Phase One (1) for five (5) years with other garbage collectors. He also lived in Pipeline Estate in Nairobi for five (5) years.

20. It should be noted that at the time of the offence, the accused was a resident of City Cotton slums but he disappeared on August 31, 2022 only to be arrested on November 6, 2022 when he reappeared to collect his personal items from his house. It was submitted that the accused had no intention to surrender himself to the police and only went to the police station after threats of retaliation from the deceased's friends against his actions and after his household goods were stolen while he was on the run.



21. Further, even though the accused indicated to the probation officer that he had a relationship with one Miriam whom they lived together for five (5) years and got a child who is now eighteen (18) years, there is no evidence that he has contact with them. Interestingly, he does not know the second name of the said Miriam neither does he know the name of his child. He has not given evidence to show that he supports his said family.
22. Further still, the accused has no fixed abode. Indeed, he is a 'free-man' like a bird and can patch anywhere he wishes. The information provided to the probation officer by the accused himself reveals that he is not gainfully employed. Additionally, when members of his community were interviewed, they told the probation officer that the accused lived an 'independent' life from his family. This is evident that the accused has weak family ties and therefore if released on bond, nothing will stop him from fleeing. Ultimately, I find that the accused person is a flight risk.
23. Is the accused person likely to interfere with witnesses? The victim's brother intimated to the probation officer that he is apprehensive that if the accused is released on bail, the accused might harm him or interfere with the witnesses. It is not in dispute that the accused was a neighbor to the deceased and that key prosecution witnesses are well known to him. It is my view therefore that the likelihood of the accused interfering with witnesses if released on bond is high.
24. Thirdly, would the seriousness of the sentence be a motivating factor for the accused to abscond or jump bail? I do note from the pre-bail report that this is not the accused's first contact with the criminal justice system. The accused person disclosed to the probation officer that he has been arrested before. Although the nature of the cases were not disclosed, this information came from the accused person himself without coercion. This perhaps explains why he disappeared when he realized that the police were after him. The fact that he left his home for about four (4) months after his neighbor had died is reason to believe that he may be motivated to jump bail if released at this early stage of the proceedings.
25. For the foregoing reasons, the State has demonstrated compelling reasons to warrant denial of bail. Compelling reasons were defined *in Republic v Joseph Thiongo Waweru & 17 Others [2017] eKLR*: -

' 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.'
26. Accordingly, the application for bond fails and the accused shall remain in custody until the matter is heard and determined. I shall, however, endeavor to ensure that the matter is heard and finalized within four (4) months.
27. It is so ordered.

RULING READ, DELIVERED AND DATED THIS 25TH DAY OF APRIL 2023.

D. KAVEDZA

JUDGE

In the presence of:

