



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Joseph (Criminal Case E004 of 2023)
[2023] KEHC 17690 (KLR) (Crim) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17690 (KLR)

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

CRIMINAL

CRIMINAL CASE E004 OF 2023

DR KAVEDZA, J

MAY 26, 2023

BETWEEN

REPUBLIC APPLICANT

AND

MICHAEL JOSEPH RESPONDENT

RULING

The Case for the Accused/ Applicant

1. The applicant moved this court pursuant to article 49 (1) (h) of the *Constitution of Kenya*, section 123 of the *Criminal Procedure Code* (cap 75) laws of Kenya and all enabling laws to be released on bail pending hearing and determination of his trial on a charge of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya.
2. The application is based on the following major grounds. The offence of murder is bailable. There are no compelling reasons to deny the applicant his constitutional right to bail/ bond. The accused is 28 years old and runs private businesses to sustain his young wife, 8 months old daughter and his aging and sickly mother. He is not a flight risk as his disappearance would lead to unnecessary suffering of the said dependents. He lacks the capacity to intimidate and or interfere with witnesses as they are not known him. Furthermore, he is not at any risk of attack by irate villagers as the alleged murder was not witnessed. Lastly, he is an impecunious man and hails from a very poor family.
3. In addition to the grounds in support of his application, the applicant has deposed a fifteen (15) paragraph supporting affidavit whose major averments are as follows. The applicant is a resident of Kayole area in Nairobi county. He is the sole bread winner of his family. Additionally, that he has been in remand since 4/01/2023 following his arrest on a murder charge to which he pleaded not guilty on January 27, 2023. He has further averred that he is a theology student and desirous of becoming



a preacher. He also undertakes to abide by the terms of his release on bail/ bond that the court may impose upon him.

4. The applicant has further averred that the witnesses in the present case are unknown to him considering that he took the deceased to hospital when he learnt of his fragile condition and therefore, he has no capacity to interfere with witnesses.

The Submissions of the Accused/ Applicant

5. Mr Sonoiya, counsel for the accused submitted that the accused has a right to be released on bail as directed by article 49(1)(h) of the *Constitution* unless there are compelling reasons to deny him bail. Counsel for the accused has submitted that the prosecution has not advanced any compelling reasons to deny the accused bail.
6. Counsel further submitted that the prosecution has not adduced sufficient evidence to prove that the accused is likely to interfere with witnesses. He further submitted that the investigating officer is aware of the accused's abode and he is therefore not a flight risk.

The Case for the Respondent

7. The respondent opposed the application of the accused through the affidavit of No 98xxx PC Patrick Wachira of DCI Kayole, the investigating officer. He has deposed a fifteen (15) paragraph affidavit in opposition to the application, whose major averments are as follows. The accused is charged with the alleged murder of one Beckam Amika Oiriga alias Beckam Sylvester, a minor aged 16 years on the night of December 31, 2022 who he was living with in Nasra Garden Estate, Kayole. Upon conducting investigations, he established that the incident happened in a domestic setting where the accused's wife and his sister-in-law were present.
8. There is palpable apprehension that the applicant by virtue of being the head of the family and due to his close family ties to both witnesses, he is likely to exert undue influence, threaten and intimidate the two key prosecution witnesses with an aim of suppressing their evidence.
9. Furthermore, four of the prosecution witnesses are neighbors to the accused person residing in Nasra Garden Estate and are well known to him. There is therefore a likelihood that if the accused is released on bond or bail, he will interfere and/ or intimidate those witnesses.

Submissions of the Respondent

10. Counsel for the respondent (Mr Mulama) has filed written submissions dated 3/3/2023 in opposition to the application.
11. Counsel has submitted that following the assault on the deceased on December 31, 2022 by the accused, he attempted to cover up the incident by prevailing upon a key witness to make a falsified report at the Kayole Police Station to the effect that the deceased met his death after being assaulted following a botched robbery. The said report was captured vide OB Number 22/01/01/2023, done with a view of perverting the truth and interfering not only with key witnesses but also with the investigations that were to follow. It was submitted that the police relied on such falsified report and allowed Mama Lucy Hospital to release the body of the deceased to the morgue.
12. The learned counsel submitted that the accused is alive to the reality that the evidence of the key witnesses will be key in securing a conviction and therefore would give him even more impetus to prevent the truth from coming out by way of self-preservation.



Pre-Bail Report

13. The pre-bail report dated May 25, 2023 indicates that the accused is married to one Rachel Mumbi and has one child namely IJ who is aged 11 months. The accused's wife indicated to the probation officer that the accused was their sole breadwinner and that he also cared for his parents who are economically poor. According to the said report, the accused has no fixed abode in Nairobi, however, his mother, Josephine Moraa, indicated that the accused will be based in their rural home at Bwotori village in Kisii County if he is released on bail/bond.
14. The family of the deceased strongly opposed the accused's application for bail/bond as they believe he is likely to interfere with key witnesses. The investigating officer shares the same sentiments with the deceased's family and further indicated that the accused person attempted to interfere with witnesses during his investigations and thus, he had to exclude some potential witnesses due to their connection with the accused. Lastly, the probation officer recommended that the accused be considered for admission to bail/ bond once the evidence of the key witness has been taken by court.

Issues for determination

15. I have considered the affidavits of the parties and their submissions and the authorities cited in light of the applicable law. As a result, I find that the main issues for determination are whether the accused/ applicant is likely to interfere with witnesses and whether he should be granted bail/ bond.

Analysis and Determination

16. 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.
17. 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 strength of the evidence which supports the charge
- (ii) The gravity of the punishment in the event of conviction
- (iii) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him

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.”



18. 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 strength of the prosecution case.
 - ii. The likelihood of interfering with witnesses.
 - iii. The relationship between the accused person and the potential witnesses.
19. Is the accused person likely to interfere with witnesses? It was submitted that the accused in an attempt to cover up the incident prevailed upon a key witness to make a falsified report at Kayole Police Station to the effect that the deceased met his death after being assaulted following a botched robbery incident vide OB Number 22/01/01/2023. I however do note that the said statement was not supported by any evidence. A copy of the occurrence book (OB) statement was not produced by the prosecution. I therefore reject the allegation for lacking evidentiary basis.
20. On the other hand, at paragraph 6 of the replying affidavit in opposition to the bond application, the investigating officer, Patrick Wachira, averred that the incident happened in a domestic setting where the accused's wife and sister in law were present. As much as this averment is yet to be challenged at the trial, he has sworn an affidavit which is evidence on oath. In fact, he has attached the statement of GWN (the accused's sister-in-law) to support his argument that the applicant is likely to interfere with the said witness.
21. At this juncture, it is important to interrogate the relationship between the accused and the said witness. According to the investigating officer (IO), some of the witnesses lived in the same house as the accused including his wife and sister-in-law. Even assuming that the sister-in-law was to relocate from the house, the question that would linger and disturb this court is whether the accused could easily have access to the said sister-in-law.
22. It is on record that the witness is a minor (17 years old) and therefore a vulnerable witness. It is trite that when faced with a vulnerable witness, such as a minor, it is the court's duty to protect the said witness. Protection of witnesses is not limited to protection under the witness protection program. The court is mandated under the [Witness Protection Act](#) No 16 of 2006 (WPA) to ensure safety of witnesses in and out of court. However, not all witnesses can be protected under the witness protection program.
23. In this case, the minor is a school-going child and I take judicial notice of the fact that the witness must be in school, and further it is not in the best interest of such a young witness to be placed under the witness protection program.
24. Moreover, it should be noted that the witness has close family ties with the accused, specifically being the younger sister of the accused person's wife. This familial connection renders her particularly vulnerable, as her evidence may be perceived as betrayal against the family.
25. Indeed, the likelihood of witness interference is not far-fetched. The pre-bail report has also highlighted the opposition of both the victim's family and the investigating officer to the accused being released on bond/bail. Their concerns primarily revolve around the accused's potential interference with the key witness, G (the accused's sister-in-law), given their close family ties. It is expected that the witness will testify against the accused in the trial as she has recorded her statement, and the presence of the accused at home is likely to induce significant fear and/or intimidation. In light of these concerns, the probation officer recommended withholding bail until the key witness has testified.
26. I would agree with the recommendations of the probation officer for the reason that the key witness is a close relative of the accused person. Secondly, the two used to live under one roof prior to



the commission of the offence. Thirdly, and most importantly, the said witness is a minor hence a vulnerable witness who requires protection of this court. It should be noted that protection need not be under the witness protection program, as indicated hereinabove. It is the duty of the court to ensure that all witnesses are accorded protection, whether within the court premises or at home. Although under the *Constitution of Kenya* bail is a right of an accused person, article 24 does permit this court to limit the said right provided that there are compelling reasons.

27. Indeed, protection of a key witness, particularly a minor, is a compelling reason that would warrant denial of bail. To my mind, temporary denial of bail pending the testimony of the witness is justifiable and reasonable in an open and democratic society.
28. For the foregoing reasons, it is my view that the application for bail at this juncture must fail. I however hasten to state that the accused is at liberty to apply for review after the testimonies of the vulnerable witnesses.
29. It is so ordered.

RULING READ, DELIVERED AND DATED THIS 26TH DAY OF MAY 2023.

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D. KAVEDZA

JUDGE

In the presence of:

