



**Republic v Mayende (Criminal Case E010 of 2023)
[2023] KEHC 21259 (KLR) (Crim) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21259 (KLR)

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

**CRIMINAL
CRIMINAL CASE E010 OF 2023**

DR KAVEDZA, J

JULY 28, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

ANTHONY KULOVA MAYENDE ACCUSED

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 offence are that on the night of December 19, 2022 within Nairobi county, the accused jointly with others not before this court murdered Marko Thiik Kenyang.
2. The accused took plea on March 16, 2023 and denied the charges. His counsel, Mr Isoe, promptly applied that he be admitted to reasonable bail terms pending trial.
3. The state has opposed his release on bond claiming that there are compelling reasons to do so. According to the affidavit in opposition of bond by No 888012 PC Moses Lihanda, the Investigating Officer (IO), the offence took place on December 19, 2022. He carried out investigations into the circumstances surrounding the murder of the complainant and established that there was sufficient evidence against the accused person. According to him, the deceased was together with his two friends when they were attacked and injured by security guards manning Harambee Sacco estate main gate. He averred that the accused and his colleagues who are still at large failed to report the matter to any police station and also absconded their duties after the incident indicating a guilty state evidence that points to the accused person’s guilt and if found to be guilty there is real apprehension that the accused is likely to abscond court as well as intimidate, threaten or even coerce the witnesses. He also stated that there is a strong and irrefutable evidence that if the accused is granted bail/bond, he will regroup with his accomplices and undermine the prosecution case. He averred further that the accused does not quality



to be admitted to bail as the prosecution has strong and irrefutable forensic evidence that points to his guilt. Lastly, he averred that the nature of the charges facing the accused are serious attracting the death penalty and thus could be an incentive enough for the accused to jump bail.

4. Mr Isoe, counsel for the accused person submitted inter alia that; the right to bail was absolute unless there were compelling reasons; the averments in the affidavit by the investigating officer were not supported by any evidence; and that the continued detention of the accused may compromise the quality of the accused's defence as he needs ample time and a conducive environment to prepare a robust defence.
5. A pre bail report filed in court on July 3, 2023 recorded that the accused person at the time of arrest was working as a Security Guard Supervisor of Pride Kings Security Company. That on December 10, 2022 in the wee hours of the night he was called by one of the guards to a scene at the Harambee Sacco estate. There had been an incident during which a member of the public had been seriously injured in an altercation with the soldiers. The area assistant chief indicated that little is known about the accused in the area hence his release may not He further stated that the character of most of the accused's family members is wanting and as such, the accused could not be expected to be of positive behavior while on bail.

Issues For Determination

6. I have considered the parties' submissions, affidavits and the constitutional provisions cited. From the foregoing, the main issue for consideration is whether the prosecution has established compelling reasons not to release the accused on bond/bail. The prosecution has raised two main grounds, namely; interference with witnesses and strength of the prosecution case.

Analysis And Determination

7. 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.
8. 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.”

9. 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 likelihood of interfering with witnesses.
 - iii) The accused person is a flight risk.
 - iv) Whether the accused person is gainfully employed.
10. Is the accused person likely to interfere with witnesses? The prosecution alleges likelihood of interference with prosecution witnesses. On this ground, the court in *R v Jaktan Mayende & 3 others*, stated that:

“- In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to *Constitution of Kenya 2010*.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...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.”

11. Furthermore, it is the duty of the court to give effect to the rights of victims expressed in section 10 of the *Victim Protection Act* No. 17 of 2014, as follows: -

10 (1) 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.
12. Interference with witnesses has another facet. It undermines the criminal justice system and dents the integrity of the criminal process. This would in turn interfere with the administration of justice or prejudice the trial. It is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in *R v Fredrick Ole Leliman & 4 others*, Nairobi criminal case No. 57 of 2016 (2016) eKLR where she succinctly stated that:-

“Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere



with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.”

13. Firstly, I note that the investigating officer (IO) averred that he is apprehensive that if the accused is granted bond/bail he will regroup with his accomplices who are still at large with the aim of absconding or further undermining the prosecution case since he is aware of the prosecution evidence against him. This court however notes that there was no specific proof that the accused communicated with the said accomplices or that he is likely to regroup with them if released on bail will interfere with the prosecution evidence. It must not be mere allusions and in the absence of any specific proof of the alleged regrouping and interference with witnesses, this ground lacks any feet to stand on and I dismiss it.
14. I now turn to the second issue for determination. As to the nature of the offence and the seriousness of the punishment likely to be meted if the accused person is ultimately found guilty. There is no gain saying that in the current constitutional order, murder is an offence like any other for the purposes of bail pending trial; and therefore, a bail application in a murder case, as in any other case, has to be looked at from the prism of article 49(1)(h) of the Constitution; and the key question that takes centre stage is whether the accused person will turn up for his trial if released on bond.
15. I note that at paragraph 8 of the affidavit in opposition to bond by the Investigating Officer (IO) that the accused does not qualify to be admitted to bail as the prosecution has strong and irrefutable evidence that points to the accused person’s guilt.
16. It is noteworthy however that section 123A(1)(d) of the Criminal Procedure Code makes reference to “...the strength of the evidence of him having committed the offence...” and for purposes of the Evidence Act, chapter 80 of the Laws of Kenya, “evidence” denotes:

“the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity.”
17. To my mind, such evidence can only be that which has been duly proved, tested and formally admitted before the court, either by way of affidavits or *viva voce* evidence. In a case where documents are involved, such can only be introduced either as annexures to affidavits or by the makers in the usual manner of production by a witness testifying before the court. In making the distinction between filed documents and “evidence” properly so called, Hon Ngugi, J in Republic v Jane Muthoni Mucheru & another [2017] eKLR held thus:

“22. In the ruling of December 20, 2016, I explained the proper context of when the strength of the prosecution case can be a legitimate factor in denying bail. The Bail/Bond Policy Guidelines at p. 16 (paragraph 4.9(b)) is couched in the following language:

An accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence of the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is



aware of the weight of the prosecution’s case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.” (emphasis mine).

18. Likewise, in *R v Danson Mgunya & another* (Supra) the court observed that:

“criteria (ii) ... the strength of the evidence which supports the charge ought not to apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that shows that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence.”

19. In light of the above, it is my considered view that it is premature at this stage of the proceedings, to engage in an appraisal of the prosecution evidence, and determine which direction it will lead to. That being the position, I am not convinced that the strength or weakness of the prosecution is so apparent at this stage of the proceedings as to be a helpful factor in determining the instant bail application.

20. I therefore find that the prosecution has not proved the existence of compelling reasons good enough to make this court deny the accused the constitutional right to bail. I accordingly dismiss the application of the accused for bail and order that accused be remanded in custody until primary witnesses have testified.

21. It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.

D. KAVEDZA

JUDGE

In the presence of:

