



REPUBLIC OF KENYA



**Republic v Kirobi (Criminal Case E003 of 2023)  
[2023] KEHC 22645 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22645 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL CASE E003 OF 2023  
AK NDUNG’U, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOSEPH LARION KIROBI ..... ACCUSED**

**RULING**

1. The Accused person in this case, Joseph Larion Kirobi is charged with murder contrary to sections 203 and 204 of the *Penal Code*. It is alleged in the information dated March 7, 2023 that on February 15, 2023 at Ntumai Area in Laikipia North Sub-County within Laikipia County murdered David Lesiyon Kirobi.
2. On April 17, 2023, he pleaded not guilty to the charge. The Republic has now opposed bail by an affidavit dated April 24, 2023 sworn by one of the investigating officers Godfrey Sitati. The reasons advanced for opposing bail are-
  - i. That there is a likelihood of interference and intimidation of prosecution witnesses who include Accused’s two minor nieces and his mother who witnessed the murder of the Deceased. That the Accused knows their place of abode hence he might interfere directly or indirectly with the said witnesses.
  - ii. That the two minor witnesses are considered vulnerable witnesses particularly due to their young age and there is a likelihood they will be traumatized if they see the Accused.
  - iii. That the Accused has not provided an alternative place of abode as he was residing with the deceased and their mother and upon his release he will go back to the same homestead where the key witnesses resides.
  - iv. That his release is likely to disturb public order since the situation at Ntumai is still volatile.



- v. That he is facing an offence that carries a death sentence hence there is a probability of the Accused absconding if released on bail.
  - vi. That the prosecution has overwhelming evidence that points to the guilt of the Accused hence when released on bail he may flee in fear of being sentenced.
3. The application on bail was canvassed by way of written submissions. The Accused's counsel argued that the prosecution did not prove that there was a likelihood of interference with the prosecution's witnesses since no communication between the Accused and the witnesses has been provided. That alternative place of abode is available and the vulnerable witnesses can be catered under the witness protection program. Counsel further argued that the pre-bail report indicate that the Accused will be able to reintegrate into the community and continue his boda boda business and that even though his family is not willing to stand surety for him, he can get a friend to do so.
  4. In opposing application for bail, the prosecution argued that there is a likelihood of interfering with key prosecution witnesses who include two minors who are ten years old and who are his nieces and neighbors as well as his mother. That there is a likelihood that he will contact the said witnesses and this will cause fear and anxiety to the witnesses thereby interfering with the trial. That the Accused has not provided an alternative place of abode and should he be released on bail, he will go back to the same homestead where the minors reside and this is likely to traumatize them hence, it will be in the best interest of the minors if the Accused is remanded pending trial.
  5. Counsel further argued that there is a likelihood that he might be lynched by the residents of Ntumai area who had attempted to lynch him immediately after committing the offence prompting him to run to his uncle's homestead which was 50 kilometers away from his home. Further, given the nature of the charge and seriousness of the punishment, there is an incentive for the Accused to abscond should he be granted bail or bond. It is urged that the Accused is aware of the strength of the case against him since he was supplied with the evidence the State will be relying on and, therefore, he might abscond if granted bail given the strength of the evidence against him.
  6. I have considered the rival arguments by the parties. At this juncture, I take note that the court was not supplied with copies of witnesses' statements and documentary and other evidence against the accused and the court remains disadvantaged in weighing the prosecution's case. That notwithstanding, I now delve into the merits of the arguments before me.
  7. Bail pending trial is now a constitutional entitlement in all criminal offences. It will be denied only for compelling reasons; and any conditions that the court might impose, again by constitutional edict, must be reasonable. Article 49(1) (h) of the [Constitution of Kenya, 2010](#) provides in clear language that;
 

every accused person has a 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.”
  8. “Compelling reason” is not defined in the [Constitution](#) or in any law that this court is aware of. The term is also not defined in [Black's Law Dictionary](#), Tenth Edition. However, the term “Compelling need” is defined there as –
 

“A need so great that irreparable harm or injustice would result if not met.”



A note following that definition states –

“Generally, courts decide whether a compelling need is present based on the unique facts of each case.”

9. Compelling reason therefore, in this court’s view, is a reason that must militate against granting the accused bail, such as proven likelihood of him/her not attending court, interference with witnesses, harm to witnesses or to himself/herself, and the like. The important word here is proven. It is not just a matter for the discretion of the court. He who seeks to deny an Accused person his constitutional right to bail pending trial must therefore place evidence before the court as would establish, on balance, the compelling reason urged. It is not enough to merely allege without evidence.
10. The reasons advanced by the prosecution for denial of bail are;
  - i. Interference and intimidation of witnesses.
  - ii. That his release will disturb public peace and order.
  - iii. That he is facing a serious offence with a harsh sentence.
  - iv. That the prosecution has overwhelming evidence that points to his guilt.
11. The strength of the prosecution’s case and the seriousness of the offence and the sentence are recognised in the [Bail and Bond Policy Guidelines](#) as key considerations in determining issues of bail/bond. Am quick to add, however, that this is an area where the court must tread with caution. The court must not lose sight of the fact that Article 49(1)(h) grants an Accused the right to bail irrespective of the seriousness and the nature of the offence. On this, I agree with the court in the decision in [R v Mwangi](#) [2016] eKLR where the court held that: -

“Bail cannot be refused simply because the accused has been charged with a very serious offence but the seriousness of the offence can be taken into consideration as a factor in determining if one of the ground for refusing bail exists.”
12. On the question of strength of the prosecution’s case, again, the constitutional edict at Article 50(2) (a) of the [Constitution](#) on presumption of innocence comes into play. Thus, the strength of the prosecution’s case in isolation cannot alone constitute a compelling reason to deny bail.
13. Interference with witnesses and disturbance of public peace and order if proved on balance, are compelling reasons to deny an Accused person bail, one because interference with witnesses will be subversion of justice, and two, he might suffer harm if released to the community which is not ready to accept him back.
14. In the present case, have those allegations been proved on balance? The prosecution has stated that there are two minor witnesses aged 10 years old and who are the Accused’s nieces. It is stated that the minors witnessed the heinous killing of the deceased therefore if the Accused is released, he might attempt to contact them which will cause genuine fear and anxiety thereby interfering with the trial. The counsel stated that the minors are Accused’s neighbours.
15. The Accused’s mother, who is also the mother of the victim, is another person whom the prosecution fears would be interfered with by the Accused. The mother is said to have witnessed the heinous killing of the deceased. She lives in the same compound with the Accused and therefore he might attempt to contact her as he will return to his mother’s homestead.



16. I have given due consideration to this argument by the prosecution. On the material before court, the fear cannot be said to be unfounded. It is quite obvious to me that the minors are vulnerable witnesses who would feel threatened and fearful if the Accused was to be released and to be in their vicinity and presence. There is every likelihood that they would be afraid to testify freely knowing the Accused is within their vicinity. This instant case falls on all fours with the decision in *Republic v Gibson Kiplangat Bett* [2022] eKLR. Where court while denying the Accused bail stated that;
- “The circumstances of this case are; that one of the witnesses is a minor and his mother, and two others are neighbours who live close to the home of the accused. It is stated that the heinous act of murder happened in the presence, inter alia of the minor and the mother. In these circumstances, likelihood of interference of witnesses, directly or indirectly, is not far-fetched. The minor, who is a witness in this case would be intimidated by the presence of the Accused.”
17. It is also noteworthy that the deceased and the Accused were brothers. They lived in the same compound and as per the pre-bail report, the deceased’s wife and his children are still living in the said compound. This might cause fear and traumatize the deceased’s family who are yet to come to terms with the heinous killing of the deceased.
18. The other reason advanced by the prosecution is that his release might disturb public order and peace. According to the pre-bail report, his mother and his family members are still mourning and opposed his release on bail. His mother and his family members also refused to volunteer to stand in as surety for the Accused. The report further indicated that the area leaders said that he was a law-abiding citizen and he will continue with his boda boda business with no threats from the residents and his family.
19. The report did not indicate whether he might face any harm from the members of the public or not. With that, this is not a compelling reason that can lead to denial of bail.
20. The upshot is that there is indeed one compelling reason sufficient to deny the Accused his constitutional right to bail pending trial. The application for bail is thus declined and is dismissed.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023**

**A.K. NDUNG’U**

**JUDGE**

