



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Maina (Criminal Case E007 of 2023)
[2023] KEHC 25907 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE E007 OF 2023
AK NDUNG’U, J
NOVEMBER 29, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MERCY WAIRIMU MAINA ACCUSED

RULING

1. The Accused persons in this case, MERCY WAIRIMU MAINA is charged with murder contrary to sections 203 and 204 of the Penal Code. It is alleged in the information dated 29/06/2023 that on the night of 31st March and 1st April 2023 at Muthaiga Village in Kieni East Sub-County within Nyeri County murdered PETER MWANIKI NJAGI.
2. On 17/07/2023, she pleaded not guilty to the charge. The Republic has now opposed bail by an affidavit dated 18/07/2023 sworn by one of the Investigating Officers ERICKSON NYAMWEGA. The reasons advanced for opposing bail are-
 - i. That there is a reasonable apprehension that there will be interference of witnesses including the Deceased’s family members who lived in the same compound with the Accused.
 - ii. The Accused is likely to abscond court if granted bail since after commission of the crime, she moved from her known place of abode in Nyeri County to unknown place in Kiambu County and in order to arrest her, the Investigating Officer had to engage crime intelligence bureau to track her number and travel to Kiambu for her arrest on 04/07/2023.
 - iii. There is no known place of abode of the Accused person and no known mean of livelihood thereby increasing the likelihood that she may abscond.
 - iv. That there are more probabilities and incentives that she might abscond since she is facing a murder charge that attracts a death sentence.



- v. That the prosecution has an overwhelming case against the Accused and she may fear being sentenced hence she may flee the jurisdiction of the court.
 - vi. That the bail be denied considering the unprovoked and violent manner in which the Accused caused the death of the Deceased.
3. In response to the prosecution's application opposing bail, Ms. Nyakundi, counsel for the Accused filed a response dated 13/09/2023. She stated that the prosecution did not demonstrate to this court as to what extent the release of the Accused on bond will be prejudicial to the Deceased's family; that the allegation that the Accused is likely to abscond court on account that she left her known place of abode to be arrested in Kiambu is entirely not true since she stayed in her matrimonial home and buried the Deceased but after the burial, she was chased away by the Deceased's family; she went to live with her sister in Kiambu and used her sister's number to escape threats and harassment; that she is entitled to bail and presumption of innocent; she is a mother of two young children, six and two years old; that she has a place of abode at her parent's home in Mbereri Village, Kaboro location, Nyeri County and the prosecution has not proved that the Accused has in any way interfered with the witnesses and investigations.
 4. The application was canvassed by way of submissions. The Accused's counsel in her written submissions argued that the Accused pleaded not guilty and therefore the principle of innocence until proven guilty applies to her. That Article 49(1)(h) of *the Constitution* guarantees the Accused person right to bail unless there are exceptional circumstances. In this case, the Accused is 28 years, a mother to two minors and still mourning the death of her husband. She will therefore attend court whenever required. That she is not a flight risk as suggested by the Investigating Officer since she left her matrimonial home after being driven away by her in-laws. She went to live with her sister and only changed her number to avoid harassment from her in laws. At the time of the arrest, she cooperated with the police and that she comes from a stable family who lives in Nyeri County.
 5. As to interference with witnesses, she relied on the case of R vs Dwight Sagaray & Others High Court Criminal Case No. 61 of 2012 where the court held that some material must be placed before the court to demonstrate actual or perceived interference. That the Accused since the demise of her husband has not tried to interfere with witnesses. Further, there is no material before court to show that the Accused has interfered with investigations whatsoever. She fully cooperated with the Investigation Officer at the time of her arrest.
 6. The state counsel in her oral submissions argued that right to bail is not an absolute one and can be denied if compelling reasons are shown. That the compelling reasons in this case are that the Accused was living in the same compound with the Deceased's parents and his brother and due to familial relationship, there is a reasonable apprehension that she will either directly or indirectly interfere or intimidate them since they are witnesses. That the Accused is a flight risk since after the investigations were concluded, the Investigating Officer tried to get in touch with her but she failed to go to their offices. Further, she left the village and registered her phone number using her sister's ID and the Investigating Officer had to use the crime intelligence bureau services to trace her. Therefore, if she is released on bond, she will escape the jurisdiction of this court. This is also coupled by the fact that she has no known place of abode. That the seriousness of the offence and the strength of the prosecution's case are also compelling reasons and therefore, the prosecution has proved on a balance of probabilities that there are compelling reasons to deny the Accused bail.
 7. I have considered the rival arguments by the learned counsel. I have also considered the pre-bail report which was filed herein. 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. See Article 49(1) (h) of the Constitution of Kenya, 2010 which states 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. Flight risk
- iii. That she is facing a serious offence with a harsh sentence.
- iv. That the prosecution has overwhelming evidence that points to her guilt.
- v. Bail should be denied based on unprovoked and violent manner the Accused caused the death of the deceased.

11. The perceived seriousness of the offence and the sentence in my view can never be a compelling reason to deny an accused person the constitutional right to bail. Though the Judiciary Bond and Bail Policy 2015 lists the seriousness of the offence as a tenet for consideration, 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. See *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. Further, the perceived strength of the prosecution case in my view is not a compelling reason to deny an accused person his constitutional right to bail. The accused person has a right to be presumed innocent until proven guilty. This right must be guarded throughout the trial until one is convicted of the offence charged. This also apply to the fifth reason above.



13. Being a flight risk and likelihood of interference with witnesses if proved on balance, are compelling reasons to deny an accused person bail, one because he/she will not turn up for the trial as and when required, and two because interference with witnesses will be subversion of justice.
14. In the present case, have those allegations been proved on balance? The prosecution has maintained that the Accused is a flight risk on the following grounds-
 - i. That she has no fixed place of abode.
 - ii. That she disappeared after the commission of the crime to unknown place in Kiambu, registered her phone number using her sister's ID and that the investigating officer had to engage crime intelligence bureau to track her.
15. As for the first reason, it is really within the realm of an Accused person, in response, to provide adequate details of his/her permanent abode if he/she has one, so that the same can be verified. The Accused's counsel told the court that she has a permanent place of abode at her Parents' home in Mbereri Village, Kabaro Location, Nyeri County. The pre-bail report filed herein also indicated that she hails from the said location and her two children are now under the care of her parents. The prosecution did not rebut this therefore it is proved that the Accused has a place of abode in case she be released on bail.
16. On the second reason, it was argued that the Accused left her matrimonial home and fled to unknown place in Kiambu. Counsel for the Accused however stated that she was driven out of her matrimonial home three days after the burial of the Deceased by the Deceased's family. In the pre-bail report, it also indicated that she fled owing to some misunderstanding between her and the Deceased's family. The report further indicated that she had gone to Ruiru where she was working as a house girl. On changing her phone number, the Accused's counsel stated that she registered her phone number using her sister's ID to avoid harassment and threats from known and unknown people.
17. This information was not disputed by the prosecution. For the prosecution to persuade court in denying bail, it must place material to demonstrate the allegations. It was stated that the case was still under investigations even after the burial of the Deceased. The Accused became a person of interest after the investigations were concluded. Therefore, she had not escaped from her matrimonial home to avoid arrest as investigations had not been concluded. The prosecution did not dispute the allegation of misunderstanding between the Accused and the Deceased's family as the reason why she left her matrimonial home. In my considered view, it has not been shown that the accused person is a flight risk.
18. As to interference with witnesses, it is trite that the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground. The Accused's counsel quoted the case of *R. V. Dwight Sagaray & 4 others*, 2013 eKLR, where the court stated that: -

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.”
19. In the present case, it has not been demonstrated how the Accused has had direct or indirect incriminating communication between her and the witnesses. For instance, no single relative of the victim's family deposed that the Accused had attempted to reach out to them, making such assertion



by the prosecution mere allegations. Furthermore, the said witnesses are the victim's family who have a different abode from where the Accused would be living should she be released on bail. The likelihood of interfering with witnesses would be remote. I have also considered the sentiments made in the pre-bail report that the chief and the community are also opposed to bail. The chief fears about her security which is at stake as the community may avenge. The community is not willing to accept her back in the village.

20. On the material before court, it is not clear whether the Accused hails from the same location with the family of the Deceased. The threat to the live of the Accused is not substantiated.
21. On the whole, I find no compelling reason to deny the Accused bail. She is admitted to bail in terms 500,000 plus a surety of like sum.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER 2023

A.K.NDUNG'U

JUDGE

