



REPUBLIC OF KENYA



**Nzyimi & 2 others v Republic (Criminal Case E002 of 2023)  
[2023] KEHC 25763 (KLR) (Crim) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E002 OF 2023  
DR KAVEDZA, J  
NOVEMBER 23, 2023**

**BETWEEN**

**BENEDICT MASILA NZYIMI ..... 1<sup>ST</sup> ACCUSED  
DOUGLAS MUTUA MUKITI ..... 2<sup>ND</sup> ACCUSED  
RICHARD KYULE NDONYE ..... 3<sup>RD</sup> ACCUSED**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The accused persons are charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code* (Cap 63) Laws of Kenya, in respect of the deceased Moffat Njuguna. They pleaded not guilty to the charge. On 10/2/2023, this court dismissed their application for bail pending trial. The court however allowed the accused persons to renew their application for bail//bond once the two key witnesses or vulnerable witnesses have testified.
2. The accused persons have now through an application sought for bail pending trial. The counsel for the accused persons submitted on the ground that the crucial witnesses have testified. For the respondent, learned counsel urged that four prosecution witnesses have since testified and left the matter to the court's discretion.

**Issues for determination.**

3. Having considered the application, and the applicable law, the issue for determination is whether the court should grant the bail/bond review orders sought.



## Analysis and determination.

4. Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. An accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated. Section 123 of the [CPC](#) makes bail available at all times - where any arrested person “is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.”
5. In [Republic vs. Francis Maina Wairimu](#) [2020] eKLR, Wakiaga J held that:

“In an application for review for denial of bail, the applicant is under a duty to convince the court that there had been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders”.
6. The changed circumstance test allows an unsuccessful applicant to apply for review of bond if his circumstances have changed in such a manner as to favour his release on bail. Likewise, the prosecution may urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.
7. The question therefore before court is whether the applicants have demonstrated changed circumstances to warrant the exercise of the court’s discretion to review bond terms.
8. In the instant application, the applicants were denied bail by this court on 10/2/2023 on the basis that at the time there was a likelihood of interference with key prosecution witnesses. The prosecution had argued, and the court agreed with them, that two of the prosecution witnesses who worked at the bar where the crime was committed were yet to testify and identify the CCTV footage allegedly linking the accused persons to the crime. The court was of the view that the possibility of interfering with such witnesses was not farfetched considering that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons admitted to having families near the same locality.
9. While the burden of proof with regard to changed circumstances may appear to fall on the accused/ applicants, it is a matter that falls for consideration under the general principle that an accused person is entitled to bail unless compelling reasons exist for refusal.
10. It is not in dispute that four prosecution witnesses, including the two key witnesses who formed the basis of denial of bail have adduced evidence with respect to the CCTV footage at the scene of crime. In this regard, it is my considered view that there is no compelling reason to warrant denial of bail/bond to the applicants. Although the victims have opposed the application for the release of the applicants on bail for fear of their security, this can be taken care of by attaching conditions to the bond terms which if breached will lead to a cancellation of the said bond terms. Importantly, it should be noted that all offences are bailable unless compelling reasons are demonstrated by the State. As indicated above, there is no longer any reason that is compelling enough to keep the applicants in custody.
11. For the above reasons, I allow the application for review and admit the applicants/accused persons to bail/bond in the following terms:
  - a. The applicants shall be released on bond of Kshs. 300,000/= with one surety of similar amount.
  - b. For the 1<sup>st</sup> and 3<sup>rd</sup> accused, the bond shall be a fixed asset. This therefore rules out moveable properties as security for the said accused persons.



- c. In the alternative, the 2<sup>nd</sup> accused shall be released on a cash bail of Kshs. 200,000/=
- d. The accused persons are prohibited from contacting the witnesses who have testified or those yet to testify, and are further prohibited from setting foot to the scene of crime where some witnesses still conduct their business.

12. It is so ordered.

**RULING DATED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023.**

.....

**D. KAVEDZA**

**JUDGE**

