



**Republic v Njeri Alias Kakaski & 2 others (Criminal Case E060 of 2023)
[2023] KEHC 26861 (KLR) (Crim) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E060 OF 2023
K KIMONDO, J
DECEMBER 19, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

KEVIN GITAHI NJERI ALIAS KAKASKI 1ST ACCUSED

JOHN MWANGI MUTURI ALIAS MWAS 2ND ACCUSED

MOSES KAMAU GITAU ALIAS KAMA 3RD ACCUSED

RULING

1. All the three accused persons pray for bail pending trial. The applications were first made orally on October 11, 2023. Subsequently, learned counsel for the 1st and 3rd accused filed separate notices of motion dated October 11, 2023 and October 2023.
2. The motions are contested by the State through an affidavit sworn on October 2, 2023 by Police Constable Collis Shivaste.
3. On December 6, 2023, I heard further submissions from all the learned counsel for the accused and the Republic.
4. I should add that on the date the pleas were taken on October 11, 2023, the court called for probation officers' reports for each of the accused. Subsequent to the hearing of the bail applications, a set of probation reports under the hand of Albert Jaoko, Probation Officer, Nairobi, were filed on December 14, 2023. I will refer to them in the course of this ruling.
5. The submissions by learned counsel for the accused are three-pronged: Firstly, that the accused are deemed innocent at this stage and are entitled to liberty by dint of Article 49 (1) (h) of the Constitution.



Secondly, that contrary to the allegations by the investigating officer, all the accused have fixed abodes and strong family ties; and, that there is no firm evidence to demonstrate that they are flight-risks. Thirdly, that contrary to the allegations by the Republic, there is no proof that any or all of them will interfere with witnesses. I was urged to find that the investigations have closed.

6. In a synopsis, the accused contend that there are no sufficient or compelling reasons for denial of bail. Reliance was also placed on the decision in *Danford Kabage Mwangi v Republic*, High Court at Nyeri, Criminal Case 8 of 2016 [2019] eKLR among other cases.
7. Ms. Kigira, the learned Prosecution Counsel, cited Article 24 of the *Constitution* for the proposition that the right to bail can be limited. She argued that in the present circumstances, bail was not deserved because the accused persons are flight risks; that State witnesses will be intimidated; and, that the local community is opposed to their release.
8. I take the following view of the matter. By dint of Article 50 (2) (a) of the *Constitution* the accused are presumed innocent. Further, under Article 49 (1) (h) as read together with section 123A (1) of the *Criminal Procedure Code*, they are all entitled to bail unless there be compelling circumstances.
9. With regard to the phrase compelling reasons, I rely on the decision by Gikonyo J in *Republic v Joktan Mayende & 3 others*, High Court, Bungoma, Criminal Case 55 of 2009 [2012] eKLR.
10. Paragraph 4.9 of the Bail and Bond Policy Guidelines provides:

In terms of substance, the primary factor considered by the Courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the Courts face since the promulgation of the *Constitution* of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences. ... the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial....
11. Thus, the overarching objective of bail is to ensure the accused attend trial. See *Michael Juma Oyamo & another v Republic*, Court of Appeal, Nairobi Criminal Appeal 113 of 2018 [2019] eKLR; *Muraguri v Republic* [1989] KLR 181; *R v Fredrick ole Leliman & 4 others*, Nairobi High Court Criminal Case 57 of 2016 [2016] eKLR.
12. In the instant case, the accused persons are charged with murder. The Information dated September 27, 2023 states that on the August 7, 2023 at Mowlem area in Baraka Mowlem Sub-Location, within Nairobi County, they murdered Kelvin Ochieng.
13. The pre-bail reports are not positive and reinforce some of the averments by the Investigating Officer. They also capture the views of the victim's family and the surrounding community. The father of the deceased (D12) and the siblings of the deceased are still angst at the loss of their loved one. They oppose the release of the accused at this stage. I am alive that the Victims Protection Act now requires that the views of the victim's family be considered at this stage.
14. Like I stated, the incident occurred on August 7, 2023. However, the accused were arrested days later. Learned prosecution counsel submitted that the accused went underground. The 1st accused person was arrested on August 17, 2023, the 2nd accused on August 9, 2023 and the 3rd accused was only arrested on August 26, 2023. I should emphasize that the above dates are only indicative and will be the subject of evidence at the trial. But at this juncture, they point to a real risk that the accused persons may abscond.



15. I have also taken into consideration that a number of key witnesses such as D2, D5, D10 and D12 reside or carry on businesses in the same locality as the accused. From the copies of witness statements filed in court and in all the circumstances of this case, I find that the likelihood of interference with the witnesses or their evidence is not farfetched.
16. I must reiterate that although the investigations may have been concluded, none of these witnesses has taken to the stand. It bears repeating that the accused are still deemed innocent. But owing to the nature of the charge, and the current stage of the trial, the likelihood to abscond is heightened and the attendance at the trial cannot be guaranteed.
17. The upshot is that bail is denied. The accused persons shall remain in custody until the conclusion of the trial. In the interests of justice, the hearing shall be fast-tracked.
18. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2023.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of:

The accused.

Mr. Ndumano for the 1st accused.

Ms. Sifuna for the 2nd accused.

Ms. Njoroge for the Republic instructed by the Office of the Director of Public Prosecutions.

