



REPUBLIC OF KENYA



KENYA LAW
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**Maweu v Republic (Criminal Case E083 of 2021)
[2022] KEHC 13182 (KLR) (Crim) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 13182 (KLR)

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

**CRIMINAL
CRIMINAL CASE E083 OF 2021**

DO CHEPKWONY, J

MAY 31, 2022

BETWEEN

CLINTON WAMBUA MAWEU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, Clinton Wambua Maweu, has been charged with one count of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that:

“On the 17th October, 2021 at around 1930hours at Dandora area, Dandora sub location within Umoja 3 within Nairobi County murdered Consolata Wambui Kipsoi.

2. On 16th November, 2021, the accused person was arraigned before court whereby he was remanded in custody to await being assigned counsel and mental examination. Upon being assigned counsel and confirmed mentally fit to plead, the accused pleaded “Not Guilty” to the charge on 23rd November, 2021. He has filed an application before this court dated 14th December, 2021 seeking to be released on and/or admitted to bail/bond on reasonable terms pending trial.
3. The application is supported by the grounds stated on its face and the depositions made in the Supporting Affidavit sworn by the Applicant on even date where he deposed that he is a 24 years old, law abiding citizen and sole bread winner of his family, he is not a flight risk since he has a permanent abode in Nairobi, he is innocent until proven guilty therefore he has the right to be released on bail, he has no intention to interfere with the prosecution witnesses. It is his view that there are no compelling reasons to deny him bail and should thus be released.



4. The Respondent opposed the application through a Replying Affidavit sworn on 17th February, 2021 by CPL Casper Ratemo of DCI, Dandora where he deposed that the Applicant has the right to be released on bail however it is not absolute, the prosecution has a strong and irrefutable case against the Applicant which may tempt him to abscond the court's jurisdiction if released, the Applicant may interfere with prosecution witnesses who are his neighbors and that the Applicant has no fixed abode. It was his assertion that the prosecution intends to expeditiously conclude the matter considering that three witnesses have so far testified.
5. The application was disposed by way of written submissions. The Applicant's advocate Ms. Ario submitted that Article 49(1)(h) of *the Constitution* afford the Applicant the right to be released on bail and that the prosecution has the burden to prove why the same should not be granted to the Applicant. In support of this submission, she cited the cases of *R -vs- Julius Mwiti M'Toimathiu* (2018)eKLR and *R -vs- Danford Kabage Mwangi* [2016]eKLR. She was of the opinion that even though release on bail can be refused based on the seriousness of the offence, however the seriousness of the offence should not be the main consideration to be taken into account by the courts in denying an accused person bail or bond.
6. In opposing the application, the Respondent submitted four grounds; the first one being interference of prosecution witnesses. It was the Respondent's submission that some key prosecution witnesses are neighbors to the Applicant hence the need to preserve their evidence from interference by the Applicant. She cited the case of *R -vs- Fredrick Ole Leiman & 4 Others* (2019) eKLR.
7. Secondly, the Respondent submitted that the Applicant is facing a capital offence whose punishment is death sentence although not mandatory. In his view this is a serious offence and hence a good reason for the Applicant to abscond should he be granted bail. On this ground the prosecution counsel placed reliance on the following cases; *R -vs- Ahmed Mohammed Omar & 6 Others*[2010] eKLR, and *R -vs- Milton Kabulit & 6 Others*[2011] eKLR.
8. Thirdly, the prosecution counsel submitted that the Applicant has been supplied with the evidence that the prosecution intends to rely on, which is enough evidence on the strength of their case. She then has gone on to submit that it can be presumed that the Applicant would have an incentive to abscond and should thus be denied bail. She cited the case of *R -vs- Margaret Nyaguthi Kimeu* [2013] eKLR.
9. Finally, on the issue of abode, the prosecution counsel has submitted that the Applicant's house is still an active crime scene and therefore he cannot go back there if released on bond. She has thus urged the court to dismiss the application.
10. I have considered the application and the rival submissions made by learned counsel for both parties in support and in opposition to the application. I have also considered the Pre-bail Report dated 26th April, 2022 and filed by the Probation Officer in respect of the Applicant.
11. Grant of bail/bind for an accused person is governed by the provisions of Article 49(I)(h) of *the Constitution* of Kenya, 2010, which provides that, "an accused person has a right to be "released on bond or bail" on "reasonable" conditions pending a charge or trial unless there are compelling reasons not to be released".
12. In the Court of Appeal case of *Michael Juma Oyamo & Another -vs- Republic* [2019]eKLR, it was stated that: -

“...Article 49(1) (h) of *the Constitution* states that an arrested person has the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons”. It is therefore clear that such constitutional right can only be limited



if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person...”

13. Therefore, where the prosecution presents compelling reasons to justify such denial, the court will not grant release of an accused person on bail/bond.
14. In the present application, the State is opposed to the application by the accused being released on bail on the grounds that he is likely to interfere with witnesses if he is released on bail.
15. In the case of *Republic -vs- Richard David Alden* [2016]eKLR, the Hon. Lesiit J. held that;

“for the prosecution to succeed in persuading the court on this criteria (of interference) it must place material before the court which demonstrates actual or perceived interference at least some facts must be placed before the court otherwise it is asking the court to speculate.”
16. In my view, apart from the allegations of likelihood of interference with the witnesses, no proof or evidence of the same has been placed before the court by the prosecution to confirm the claim. In the circumstances, I am not convinced that the prosecution has proved this ground as a compelling reason.
17. The second ground raised by the prosecution on why the accused should not be released on bail/bond is on the nature of the charge and seriousness of the offence. She submitted that the Applicant has been charged with a capital offence whose punishment is a mandatory death sentence hence there are probabilities and incentives for the Applicant to abscond if granted bail. The Applicant’s counsel has however submitted that the prosecution ought to have proved that the seriousness of the offence will increase the risk of the accused not appearing for his trial.
18. While it is appreciated that the offence with which the accused is charged with carries a mandatory death penalty, the accused person is however presumed innocent until proven guilty. I wish to associate myself with the opinion expressed in the case of *Rep -vs- Dwight Sagaray & Others*, High Court Criminal Case No. 61 of 2012, where it was held 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. Therefore, in my view, the court is required to explore the possibility of achieving the primary objective of granting bail, which is ensuring the attendance of the accused for the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to fair trial.
20. The third ground raised by the prosecution is with regard to the strength of the prosecution’s case. Although it is true that some evidence has been adduced, and the Applicant knows the case or evidence against him, he is yet to be heard hence his guilt cannot be decided at this stage. To say that based on the evidence adduced, the accused person may abscond trial, in my view, amounts to judging the accused before he is heard.
21. Finally, the prosecution submitted that the Applicant has no fixed abode. The prebail report indicates that the Applicant was residing in Umoja 3. Additionally, from the report it appears the Applicant’s family is willing to accommodate him once he is granted release on bail/bond.



22. In view of all the aforementioned findings, it is clear that the prosecution has not demonstrated/proved any compelling reasons to warrant the denial of the Accused's constitutional right to bail. What is important and prudent is that reasonable conditions for such bail be imposed which will ensure that he attends court as and when required for his trial. I therefore proceed to allow the application dated 14th December, 2021 on the following terms:-

- a. The accused person may be released on a bond of Kshs.500,000/= with one surety of a similar amount to be approved by the Deputy Registrar of the court.
- b. The accused person to provide details and particulars of place of abode and work of the surety.
- c. The accused person to provide particulars and details of place of abode and work of the contact person.
- d. The accused person to desist from getting in contact with any member of the deceased's family.
- e. Failure to abide by any of the above conditions, the bail terms will stand cancelled.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Gikonyo for State

Mr. Ario together with Mr. Orlando counsel for accused

Accused – present

Court Assistant - Gitonga

