



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wairimu v Republic (Criminal Case 3 of 2019)
[2022] KEHC 10429 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE 3 OF 2019
RM MWONGO, J
JUNE 23, 2022**

BETWEEN

DAVID MUCHIRI WAIRIMU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The accused is charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that on the 12th day of March, 2019 at Mwangaza estate in Ngurubani township within Kirinyaga County, he unlawfully murdered Elizebeth Wanjiku Muthee.
2. He has filed an application for bail filed under certificate of urgency on 22nd April, 2022. It seeks an order that the Accused person/Applicant herein be released on bond and surety pending hearing and determination of this case.
3. The grounds of the application contents of which are restated and expanded in his 29 paragraph supporting affidavit are founded on the following:
 - 1) That the Accused person/Applicant has been in custody for the last 3 (three) years without having been heard and/or admitted to bond.
 - 2) That the Accused person/Applicant is desirous of being heard and consequently admitted to bond.
 - 3) That the Accused person/Applicant pleads innocence, avers that he did not commit the offence and has pleaded not guilty.
 - 4) That the Accused person/Applicant has a constitutional right to bail or bond pending trial.



- 5) That the Accused person/Applicant is willing to present himself to this Honourable court at all times as at and when needed.
 - 6) That the Accused person/Applicant is ready and willing to abide by any condition(s) that may be imposed by this Honourable Court with regard to the granting of bail or bond to him.
 - 7) That the accused person has a known fixed abode and is a resident of Kirinyaga county wherein he was born, raised and has lived all his life including the time of his arrest which county is within the jurisdiction of this Honourable court and is therefore not a flight risk.
 - 8) That the accused person/Applicant has a young child with the deceased who was his wife and the child needs to be provided for.
 - 9) That there are no compelling reasons as to why the accused is not suitable for bail or bond.
4. The prosecution filed ground of opposition dated 26th April, 2022 and stated that: the Applicant has not satisfied the conditions and principles for grand of Bond/Bail; the Applicant's rights on Bail/Bond are not absolute where there are compelling reasons to deny the same; the presumption of innocence is a matter before Court; there are compelling reasons to have the applicant denied Bail/Bond and that there are no exceptional and unusual circumstances as the case is fixed for hearing on the 26th September 2022 and shall proceed without delay.
 5. A prosecution witness, Naomi Muthoni Karume, filed a supporting affidavit dated 12th May, 2022. She stated that: she was present on the date that the offence of murder was committed and the applicant verbally threatened to kill her and take the child he had with her daughter, the deceased; on or about the 28th of January 2022, the applicant while in prison remand called her threatening to harm her; she reported to the Police and was directed by to make a formal complaint at the Police Station; she was issued with an OB Number 41/02/02/2022; that sensing that her life was in danger, she wrote to court a letter dated 28th May 2020 which was received by the Office of the Director of Public Prosecution on 7th February 2022 (attached as NMK 2); that she had since recorded a statement with police after being threatened by the applicant; that she is informed that the Police are investigating the matter after which they will take appropriate action
 6. Nicholas Wambua, one of the Investigating Officers, attached to the Directorate of Criminal Investigations, Homicide Section Wang'uru, filed a supporting affidavit dated 12th May, 2022 and deponed as follows: that he is properly seized of the facts in this matter; that on the 2nd of February 2022 the complainant in this case, Naomi Karume, visited the Police Station with allegations that the applicant and the accused herein had called her while in prison threatening to harm her; that the complainant was directed to make a formal complaint at the police front desk and she was issued with an OB Number 41/02/02/2022;
 7. Further, he stated that having interrogated the witnesses/complainant herein, he noted that she was vulnerable and would be soft target should the accused make good his threats; that the processes of investigating the threats allegedly made by the Applicant herein are still ongoing; that the witness has since recorded a statement with police after being threatened by applicant who called using a phone number being investigated threatening her; and that it would be wise for the court to defer the Bail/ bond application until the process of securing the witnesses is done.
 8. Parties made oral submissions in open court on 12th May 2022. The only issue is whether the state has laid a basis of compelling reasons to deny the accused his constitutional right to be released on bail.



Parties submissions

9. The applicant's counsel relied article 49 of *the Constitution*, and Bail and Bond Policy and authorities. She stated that the prosecution could not produce the phone number used by the accused to call and threaten the complainant. Further, the letter by the complainant alleging threats by the accused had not been filed; and that the only thing that needed proof in an application for bail is that the accused would attend court for trial. She further argued that the accused has remained in custody for the three years since he was arrested. He has a physical abode and the Pre-bail report indicates that he is suitable for bond terms.
10. The prosecution submitted that the two affidavits by their witnesses indicated that the complainant was facing imminent danger from the accused. Further, that the accused had called the complainant while in remand threatening her life. The complainant recorded a statement with police after being threatened by applicant. Thus, the prosecution opposes is that the bail application on the ground of imminent danger of the accused harming the complainant.

Analysis and determination

11. It is trite that under Article 50(2) of *the Constitution*, every accused person is entitled to the presumption of innocence, a provision firmly entrenching the accused's rights. Further, in the Judiciary Bail and Bond Policy Guidelines, 2015, it is recommended that:

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.

12. In addition, Article 49(h) of *the Constitution* envisages the accused's entitlement to bail as follows:

“(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.”

13. The question is whether the prosecution evidence enables the court to make a finding that there are compelling reasons to deny bail. I note that the defence submitted that the two affidavits sworn by the prosecution witnesses were based on hearsay, and that the prosecution could not produce the phone number used by the accused to call and threaten the complainant. Further, the letter by the complainant alleging threats by the accused had not been filed.

14. In *Republic v William Mwangi Wa Mwangi* [2014] eKLR Muriithi, J held that:

“It is now settled that in the event that the State is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the constitutional right to bail... It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to be believed that he is likely to abscond if released on bail.”



15. What constitutes “compelling reasons” is not defined in *the Constitution*. However, Section 123A of the *Criminal Procedure Code* provides as follows:

- “(1) Subject to Article 49(1)(h) of *the Constitution* and notwithstanding Section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular –
- (a) The nature or seriousness of the offences;
 - (b) The character, antecedents, associations and Community ties of the accused persons;
 - (c) The defendant’s record in respect of the fulfillment of obligations under previous grants of bail; and
 - (d) The strength of the evidence of his having committed the offence.

16. In *Republic v Joktan Mayende & 3 others* [2012] eKLR the phrase “compelling reasons” that would lead to denial of bail/bond were defined as follows:

“...the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by *the Constitution*”. (Emphasis added).

17. The Court of Appeal in *Moses Kasaine Lenolkulal v Republic* [2019] eKLR held as follows concerning the right to bail:

“Essentially, both *the Constitution* and the law stipulate that an arrested person may be released on bond or bail on reasonable conditions. And in granting bail or bond to an accused person, it must be borne in mind that the court is being called upon to exercise its discretion. In such exercise, the court is guided by certain well- established principles such as those enumerated in the case of *Republic vs Pascal Ochieng Lawrence* [2014] eKLR where it was stated;

“It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the state. The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:-

- The seriousness of the offence although this carried greater weight under the old constitutional dispensation;
- The weight of the evidence so far adduced if the case is partly heard;
- The possibility of the accused interfering with witnesses;
- The safety and protection of the accused once he/she is released on bail/bond;
- Whether the accused will turn up for trial;
- Whether the release of the accused will jeopardize the security of the community.”

18. Having perused all the documentation and considered the submissions, and further taking into account the Probation Report dated 10/5/2022, it is clear to me that: there is imminent danger that



the accused may harm the complainant considering he is accused of murdering her daughter; that the complainant is a star witness in this case and lives with the accused; that there is likelihood of the accused attempting to harm this witness.

19. The above notwithstanding, the grounds provided by the state urging the denial of bail do not appear to me to reach the level of compelling grounds for outright denial of bail. To reach that level the grounds must be so forceful, so convincing and so strong as to oblige the court to outrightly deny bail.
20. Accordingly, I will allow bail on stringent terms to be determined when parties appear for the delivery of this ruling.
21. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 23RD DAY OF JUNE, 2022

.....

R MWONGO

JUDGE

Delivered in the presence of:

1. Otuke for the Applicant/Accused
2. Accused Present in Person
3. Mr. Mamba for the Respondent/State
4. Murage Court Assistant

