



**Republic v Omondi alias Rambo & another (Criminal Case
E007 of 2022) [2022] KEHC 11030 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E007 OF 2022
RPV WENDOH, J
JULY 29, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DAVID OMONDI ALIAS RAMBO 1ST ACCUSED

REGEAN ODHIAMBO AGER 2ND ACCUSED

RULING

- 1 The accused persons herein, David Omondi alias Rambo and Regean Odhiambo Ager face the charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 for which a plea of not guilty was entered. The particulars of the offence are that on 24/4/2022 at Riosiri Market, Rongo Sub County within Migori County in the Republic of Kenya, the accused persons murdered Thomas Onduru Osuku.
- 2 The accused persons through their Counsel Ms. Everlyne Kijana applied for bail/bond on reasonable terms pending the hearing and determination of the case. The application is supported by the affidavits of each of the accused persons.
- 3 According to the accused persons, they have a Constitutional right to be granted reasonable bail and bond terms which right cannot be unreasonably denied; that they have been in police custody for more than one month now despite the court order which stated that they should be in custody for 17 days pending conclusion of investigations thus the police ought to have concluded their investigations; that they are Kenyan citizens and residents of Rongo Sub County hence they are not at flight risk. Each of the accused persons further stated that they are the sole bread winners in their respective houses. They denied that they will interfere with any of the witnesses as alleged by the police.
- 4 The application was opposed by the prosecution vide an affidavit dated 15/6/2022 sworn by Kiplangat Shadrack, the investigating officer attached to the Directorate of Criminal Investigations. He deposed



that after committing the murder, the accused persons escaped with a motorbike as members of the public chased them for revenge; that the incident happened at a border between two communities that is the Kisii and Luo; that the deceased was a Kisii while the accused are Luos; that at the time of the arrest, there was an intelligence report that the neighbors had planned to attack the accused persons and kill them as revenge; that the accused persons on 5/8/2021 assaulted one Jared Owour Onguka occasioning him grievous harm and escaped to Tanzania where their wives are believed to come from; that if they are released, they might travel to Tanzania and fail to appear before court; that if released, the community might turn against them and harm them. The investigating officer annexed a letter from the Senior Chief Central Kamagambo dated 14/6/2022.

5 Both parties filed their respective submissions which I have considered.

6 Article 49(1)(h) of the Constitution provides that: -

An accused person has the 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.

7 The right to bail or bond is not absolute. Where there are compelling reasons not to release an accused person, the right to bail or bond is restricted. The court will ordinarily look at the circumstances of each case to determine whether to grant bond. The most important consideration is that an accused person will show up for trial.

8 It is well settled that the onus of demonstrating why an accused person should not be released on bail or bond lies with the prosecution. See: Republic V Danson Mgunya V Another, (2010) eKLR; Republic V Daniel Musyoka Muasya, (2010) eKLR.

9 In interpreting the right to bail, section 123A of the Criminal Procedure Code gives the parameters for the grant of the right to bail 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 offence;
 - (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
 - (d) the strength of the evidence of his having committed the offence;
- (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
 - (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection.



10 In *Kelly Kases Bunjika vs. Republic* (2017) eKLR, Muriithi, J was of the view that:

“The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused ‘if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody’...Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court’s mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case.”

11 Courts have previously dealt with what would constitute compelling reasons not to grant bail or bond. Muriithi J in *Kelly Kases Bunjika vs. Republic* (*supra*) and *Republic vs. William Mwangi Wa Mwangi* (2014) eKLR was of the view that the cardinal principle which the court should consider in deciding whether to grant bail or not, is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.

12 In this case, the opposition to release the accused persons by the prosecution is three pronged: - First, the ground is hostile and the accused persons are likely to be harmed or killed in the process of revenge. Secondly, the accused persons are at flight risk since their wives are from Tanzania and they are likely to escape there and the accused persons are not engaged in gainful employment to tie them down in the country. Third, they are likely to interfere with the witnesses. The prosecution through the investigating officer Kiplangat Shadrack annexed a letter from the Senior Chief in Central Kamagambo Location where the accused persons reside to demonstrate why the accused persons are not to be released on bail.

13 On the allegations that the accused persons are likely to interfere with witnesses, the prosecution has left to this court to speculate the manner in which the interference is likely to occur. In *Felity Sichangi Nyangesa vs. Republic* (2014) eKLR it was held that: -

“Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where a person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The Court is then entitled, if not bound to infer that the intention of the accused in accosting the witness had been to dissuasive the witness from giving evidence.”

14 It has been stated on oath that the accused’s lives were threatened. The court has a duty to ensure that the lives of the accused are secure and protected and cannot allow them to go home to be lynched.

15 On the allegations that the accused persons wives are from Tanzania and they do not have any children, hence, they are at flight risk; no evidence was adduced in support of that allegation. The prosecution also alleged that the accused had once disappeared to Tanzania on 5/8/2021 after assaulting Jared Owour. The allegation has not been challenged. That is an issue of concern if the accused escaped to Tanzania in another case.

16 For the reasons that the accused’s lives may be in danger and the fact that the accused had once ran to Tanzania to escape arrest, the prosecution’s apprehension is not without basis. This court takes cognizance of the fact that murder is a serious offence. This being a border town, cases of people absconding and crossing into Tanzania are not uncommon. In order to address the prosecution’s apprehensions, the court will give more stringent bond as follows: -



- i. Each of the accused persons may be released on a bond of Kshs. 800,000/= with two sureties of similar amount to be approved by the Deputy Registrar Migori High Court.
- ii. Upon their release, the accused persons shall find a different abode within Migori County other than the areas within Rongo Sub County.
- iii. The accused persons either in person or through their relatives or any other proxy will not contact or intimidate witnesses.
- iv. The accused persons shall report to the OCS Rongo Police Station every fortnight on 1st and 15th of each month and attend court when required to do so till further orders.
- v. In the event any of these conditions are violated, their bail/bond will be cancelled automatically.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF JULY 2022.

R. WENDOHO

JUDGE

Ruling delivered in the presence of;

Ms. Kijana for the Accused.

Mr. Omooria for the State.

Nyauke Court Assistant.

