



**Kamau v Republic (Criminal Case E007 of 2022)
[2022] KEHC 11003 (KLR) (Crim) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11003 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E007 OF 2022
CW GITHUA, J
JULY 27, 2022**

BETWEEN

JAMES MBUGUA KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The accused, James Mbugua Kamau (hereinafter the applicant) is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
The particulars supporting the charge allege that on the night of November 30, 2021 at around 1830 hours, at Red Bufallo in Langata Sub County within Nairobi County, he murdered Dennis Kipkoech Sang.
2. The applicant was arraigned before this court on February 7, 2022 and he pleaded not guilty to the charges.
Subsequently, through the Law firm of J.M. Njoroge & Company Advocates, he filed an application by way of a notice of motion dated February 14, 2022 seeking that he be admitted to bond or bail pending conclusion of his trial.
3. In the grounds premising the motion and in the depositions made by the applicant in support thereof, besides narrating how he was detained in police custody for a long time before being presented before the court, the applicant urged me to admit him to bond pending trial arguing that he was innocent of the charges preferred against him and he was not a flight risk. He deposed that he has a permanent home at Gituamba Village in Lari Sub- County in Kiambu County where he intends to reside with his family if his application was allowed.



4. In addition, the applicant contended that if released, he cannot interfere with prosecution witnesses since majority of them are police officers and the pathologist who conducted the autopsy who were out of his reach. He promised to dutifully attend the court when called upon to do so and to abide by any terms the court may set as a precondition to his being granted bond as prayed. He implored me to allow his application and admit him to bail or bond pending trial on reasonable terms.
5. The respondent opposed the application through a replying affidavit sworn on March 28, 2022 by the investigating officer Cpl. Peter Kariuki. Cpl. Kariuki deposed that the applicant and one of the potential prosecution witnesses were involved in an intimate relationship for 7 years and when they parted ways, the witness entered into a romantic relationship with the deceased who was their taxi driver. For this reason, the deponent was apprehensive that there was a high likelihood that if the applicant was released, he would interfere with the said witness considering that they jointly owned a taxi business.
6. The deponent further averred that the accused was a flight risk demonstrated by the fact that after the incident, he set his rental house in Umoja 1 Estate on fire before he went into hiding in Mombasa and Nairobi; that he was arrested in Mombasa two months later on January 14, 2022; that though the applicant has a constitutional right to bail, the right was not absolute and was subject to the court's discretion.
7. To counter the averments in the replying affidavit, the applicant swore a further affidavit on April 19, 2022 in which he contended that no evidence had been availed to the court to prove the investigating officer's claim that he had set his rental house on fire or to prove how he would interfere with any prosecution witness if released on bail or bond.
8. The applicant further denied that he was a flight risk and stated that he had explained to the investigating officer that he had travelled to Mombasa to assist his cousin with his shoe business and on learning that police officers were looking for him, he willingly cooperated and informed them of his location from which he was arrested. He reiterated his right to be presumed innocent until the contrary was proved.
9. During hearing of the application, the accused filed written submissions which were briefly highlighted by his learned counsel Mr. Njoroge on July 3, 2022. In his written and oral submissions, Mr. Njoroge reiterated and expounded on the grounds anchoring the application and the depositions made by the accused in the supporting and further affidavits.

Counsel further submitted that the duty to demonstrate compelling reasons why an accused person should be denied bond pending trial lay on the prosecution; that the prosecution had failed to discharge that burden in this case.
10. On her part, Learned Prosecuting Counsel, Ms. Ogwen, relying on the replying affidavit sworn by Cpl. Peter Kariuki submitted that the respondent had disclosed compelling reasons sufficient to justify denial of bond or bail to the applicant given the claim that he was a flight risk and was likely to interfere with witnesses if released.
11. When the application was pending hearing, I called for a pre-bail report which was filed on July 13, 2022. The report confirms that the applicant used to have an intimate relationship with one Veronica Anindo, one of the prosecution witnesses who was opposed to his release on bond citing fear for her safety. The report however shows that during her interview, the witness admitted that the applicant had not issued any threats or intimidated her in any way since his arrest.



12. The report further confirmed that the applicant has a fixed abode in his rural home in Gitobu village where he intended to reside if released on bond and that his local community was not opposed to his release; that members of the victim's family were apprehensive about the safety of prosecution witnesses especially the applicant's estranged wife, Veronica.
13. It is settled law that under article 49 (1) (h) of *the Constitution*, a person who has been arrested has a right to be released on bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons against such release. This right is guaranteed to any accused person irrespective of the gravity or seriousness of the offence charged including the offence of murder. However, as submitted by the prosecution, this right is not absolute. It is limited by existence of compelling reasons.
14. The Court of Appeal in *Michael Juma Oyamo & Another V Republic*, [2019] eKLR defined what amounted to compelling reasons and stated as follows:

“..... We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in *R v Joktan Malende and 3 others* Criminal Case No. 55 of 2009 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 standards set by *the Constitution*.”
15. It is trite that the duty to demonstrate existence of compelling reasons lies with the prosecution. In this regard, the Court of Appeal in *Patius Gichobi Njagi & 2 Others V Republic*, [2013] eKLR, pronounced itself in the following terms:

“.... where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the state must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case of *Jaffer V Republic, 1973 E.A. 39*, the court cannot be called upon to speculate.”
16. The above position has been adopted and incorporated in the Judiciary's Bail and Bond Policy Guidelines, March 2015 which sets out judicial policy on bail and enumerates factors which courts should consider in determining applications for bond or bail which if proved would amount to compelling reasons to justify denial of bond. The policy guidelines states as follows at page 25:
The following procedures should apply to the bail hearing:
 - a. The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:
 - a) That the accused person is likely to fail to attend court proceedings; or
 - b) That the accused person is likely to commit, or abet the commission of, a serious offence; or



- c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
- d) That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e) That the accused person is likely to interfere with witnesses or evidence; or
- f) That the accused person is likely to endanger national security; or
- g) That it is in the public interest to detain the accused person in custody.

17. Other considerations the court would bear in mind when exercising its discretion in deciding whether or not to grant bail or bond are stipulated in section 123 A of the *Criminal Procedure Code* which states 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.”

18. Applying the above principles to the instant application, the question that falls for my determination is whether the prosecution has sufficiently demonstrated that there are compelling reasons in this case which mitigates the right of the applicant to be released bond pending trial. It must be remembered that the primary consideration in deciding whether or not to grant bond or bail is whether an accused person will turn up for his trial or will abscond if released.

19. In this case, the prosecution has opposed accused's release on bond on grounds that if released, he is likely to interfere with one prosecution witness whose safety may be at risk. The prosecution has not however demonstrated how the applicant will interfere with the said prosecution witness who is said to be his estranged wife. Proof of perceived or actual interference has not been tabled before this court.

20. It is also worth noting that the pre-bail report indicates that the said witness admitted that she had not received any threats or been intimidated by the applicant in any way since his arrest; that the applicant intends to reside in his rural home in Gitobu village in Lari Sub County if released whereas his estranged wife lives in Nairobi.



21. The claim that if released an accused person will interfere with the safety and security of witnesses if proved is a serious matter since it has the potential of undermining the cause of justice. But for the court to act on such a claim, it must be backed by credible evidence demonstrating that the accused has in the past either personally or through proxy attempted to interfere with the safety of potential prosecution witnesses or evidence showing that there was a real likelihood that the accused will interfere with witnesses if released. No such evidence has been availed to the court in this case.
22. It is also important to point out that even if the claim that if released an accused will interfere with prosecution witnesses was proved, it may not amount to sufficient reason to justify denial of bond if the court was satisfied that the alleged risk can be managed by imposition of appropriate bond terms or placement of the prosecution witnesses under the witness protection agency.
23. The other reason relied on by the prosecution in opposing the application is that the applicant is a flight risk because after the incident, he fled to Mombasa where he was arrested after about two months. The applicant in his further affidavit denied this claim and explained that he had gone to Mombasa, not to avoid arrest but to assist his cousin with his shoe business; that he is the one who told the police where to find him to effect arrest. These claims have not been controverted by the prosecution.
24. In determining applications for bond or bail pending trial, the court strives to balance an accused person's right to liberty in view of the constitutional guarantee that each accused person is presumed innocent until proved guilty and the public interest in having suspected perpetrators of crimes punished after undergoing due process.
25. Having considered all the material placed before me, I am satisfied that the prosecution has not discharged its burden of establishing existence of compelling reasons to justify denial of the applicant's constitutional right to bond pending trial in this case.

In the circumstances, I find merit in the application and it is hereby allowed on the following terms:

- i. The applicant will be released on bond of KShs.500,000 with one surety of a similar amount. The surety will be approved by the Deputy Registrar of this court.
- ii. Upon his release, the applicant will not contact, intimidate or interfere with one *Veronica Anindo* or any other prosecution witness in any manner whatsoever whether personally or indirectly through proxy.
- iii. The applicant shall attend this court whenever required without fail.
- iv. Failure to observe any of the terms and conditions set out above may result in the cancellation of the bond granted herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF July 2022.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present in person

Ms Oduor for the respondent

Ms Karwitha: Court Assistant

