



**Republic v Kemboi (Criminal Case E006 of 2021)  
[2022] KEHC 10948 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE E006 OF 2021  
GWN MACHARIA, J  
JULY 27, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER KIPKURUI KEMBOI ..... RESPONDENT**

**RULING**

1. The ruling herein relate to bail application by learned counsel, Mr. Owour for the accused person. The accused herein is charged with Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). He pleaded not guilty.
2. Mr. Owuor submitted that bail is a Constitutional right and that the accused had been in custody since April 2021. She stated that the investigating officer's allegation that the accused was arrested elsewhere does not mean he was fleeing but fled as a reaction at the heat of the moment. He submitted that circumstances had since changed in that it had been over a year since the arrest of the accused. Learned counsel stated that the accused would avail a surety who would ensure that he attends court.
3. In opposing the application, the Investigating Officer, PC Laban Amule has tendered into court a Replying Affidavit dated 04/11/2021. Hedepones that the accused person was arrested in Njoro sub-county while on the run and in his possession was recovered a blood stained panga, blood stained bag and clothes. He alleges that the blood stains on the articles found on him are suspected to be in relation to the blood found at the scene of the crime where the body of the victim was found.
4. The investigating officer contends that bail ought not to be granted as the suspect was already on the run at the time of arrest making him a high flight risk having been arrested in Njoro whereas the crime was committed in Naivasha. He stated that the suspect had no immediate relatives nor friends who came to familiarize themselves with the investigating officer casting aspersion on the reliability of his social and family background to help in tracing him when need arises.



5. The investigating officer further stated that the suspect would interfere with witnesses who are family members of the deceased and are well known to him.
6. Learned State Counsel, Miss Maingi basically reiterated the averments in the Replying Affidavits in further emphasizing why the Accused person should not be granted bail/bond. She further stated that the Accused had no permanent residence in Naivasha and this is a compelling reason to deny him bond. She further stated that considering the charge, the Accused if released was likely to interfere with witnesses who are from the deceased's family. She lastly pointed that, without going into details of the evidence the prosecution had lengthy evidence including the Accused's admission.
7. Mr. Owuor in reply stated that Njoro is within Nakuru County. Further on the availability of family members to testify, he submitted that it is not a requirement for grant of bond. Furthermore, no pre-bail report had been called for to demonstrate that the Accused was likely to interfere with witnesses. As regards the alleged admission, counsel submitted that that was a matter of evidence and the same cannot be used to deny the Accused his right to bail/bond.

### **Determination.**

8. The sole issue for determination is whether the Accused person should be admitted into Bail or Bond and if so, under what terms.
9. 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.”
10. The [Constitution](#) however has not identified what qualifies under the term “compelling reasons.” According to Collins dictionary compelling reasons may be defined as “A compelling argument or reason is one that convinces you that something is true or that something should be done”
11. In Criminal Case 25 of 2019 [Republic v Mbiti Munguti](#) [2020] eKLR Odunga J. Stated that ,

“ ... It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted.” [Emphasis supplied]



12. 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.”

13. In Miscellaneous Criminal Application 64 of 2017 *Kelly Kases Bunjika v Republic* [2017] eKLR the court held 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.”

14. The Bail and Bond Policy Guidelines has listed considerations in determining whether or not to grant bail as follows:

“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.”

15. It is a well settled principle that the main consideration for grant of bail/bond is whether the Accused shall attend court. The seriousness of the offence should not be a major consideration unless where it is demonstrated that it is likely to compel the Accused to attend to the trial. Kelly Kases Bunjika v Republic (supra).
16. Amongst the grounds advanced by the prosecution as compelling reasons to deny the Accused bail/ bond is that he a flight risk. It is submitted that he was on the run before his arrest. The alleged crime was committed in Naivasha Sub County whereas he was arrested in Njoro sub-county in possession of a bloodied panga and clothes. On the likelihood of the accused interfering with the witnesses, it was contended that he knows the witnesses who are part of the deceased’s family.
17. As submitted by learned counsel, Mr. Owour for the Accused, it is likely that the Accused fled the scene in the heat of the moment but necessarily that he intended to abscond even after his arrest. This is a normal reaction. Indeed, he was found in possession of a blood stained panga believed to be the murder weapon as well as blood stained clothes. If truly he ever intended not to be traced he would have thrown away these articles which was not the case. I therefore find that the prosecution has not tendered compelling reason to show that the Accused is a flight risk in this regard.
18. As regards knowledge and friendship of the Accused with witnesses, the same does not oust his right to bail. In Nairobi High Court Criminal Case 61 of 2012 Republic vs. Dwight Sagaray & 4 Others 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. In the present case, it has not been demonstrated how the Accused has had direct or indirect incriminating communication between the himself and the witnesses. For instance, no single relative of the victim’s family deposed that the Accused has attempted to reach out to them, making such assertion by the prosecution mere allegations.



20. The allegation that the Accused has no permanent abode is has not also been supported by evidence. As rightly pointed out by counsel for the Accused no pre-bail report was tendered indicating the social and situational arrangement in terms of where he lives, hails from or conducts business before this court.
21. It is contended that the offence with which the accused is charged is punishable by death hence the accused is likely to be a flight risk. In Criminal Case 14 of 2010 *Republic v Ahmed Mohammed Omar & 6 Others* [2010] eKLR the court cited the authority of Criminal Case No. 36 of 2010 *Republic v Dorine Aoko Mbogo & Another*, where it was stated that;
- “Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person’s life, disloyalty to the state of one’s nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society’s sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.’ [Emphasis my own]
22. The circumstances are that the accused was alleged to have murdered the victim in Ndabibi Naivasha sub-county and was arrested by members of the public at Njoro sub-county while in the possession of a blood stained panga and clothes. It does raise questions of interests as to why he would first, be so far away from where he cohabited with the deceased at the time of her death. secondly, that at the time of the deceased’s death being discovered, he was in possession of a bloodied articles to wit, a panga and clothes. The absence of a pre-bail report being filed in this court and even after this court’s several requests on January 26, 2022, 21/2/2022, March 29, 2022 and May 5, 2022 as a testament that the prosecution was not ready to avail supporting evidence of the alleged Accused’s surmise likelihood to flee if granted bail. And I earlier said, the immediate flight without attended evidence of permanently absconding trial cannot warrant the denial of the bail to the Accused person.
23. From the foregoing, I find that the prosecution has failed to demonstrate that there exists compelling reasons to warrant the denial of bail/bond to the Accused. The Accused has on the other hand submitted to abide by any conditions that may be attached to the bail terms.
24. In view therefore, I order as follows:
- a. The Accused person is hereby released on a bond of Ksh. 500,000/ with one surety of a similar amount. The surety shall be assessed by the Deputy Registrar of this Court.
  - b. In the alternaive, the Accused shall deposit a cash bail of Ksh. 200,000/-
  - c. The Accused shall also be reporting to the investigating officer once a month on day to be agreed between both of them.
  - d. The Accused must not get in touch with any of the family members of the deceased or prosecution witnesses failing which his bail/bond terms shall be cancelled on application by the prosecution.
  - e. The Accused must also ensure he attends court at all times and must not leave the jurisdiction of the court without the permission of the court failing which again, his bond/bail terms shall be cancelled on application by the prosecution.



**DATED AND DELIVERED AT NAIVASHA THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

Mr.Owour for the Accused person

Miss Maingi for the Prosecution.

