



REPUBLIC OF KENYA



**Republic v Obambo & 5 others (Criminal Case E033 of 2022)
[2022] KEHC 11535 (KLR) (Crim) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E033 OF 2022
LN MUTENDE, J
AUGUST 12, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

CPL JOSEPH OJODE OBAMBO 1ST ACCUSED

PC HENRY MUTAI 2ND ACCUSED

PC BASHIR ALI 3RD ACCUSED

PC CHARLES KIRIMI 4TH ACCUSED

CPL VINCENT ODHIAMBO 5TH ACCUSED

IP.JAMES NGIGE 6TH ACCUSED

RULING

1. CPL. Joseph Ojode Obambo, (1st accused); P.C. Henry Mutai, (2nd accused); P.C. Bashir Ali (3rd accused); Charles Kiriri (4th Accused); IP. James Ngige (5th accused); and, CPL. Vincent Odhiambo (6th accused) are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. They seek to be released on bail/bond pending trial. Particulars of the information indicate that they jointly murdered Wycliffe Vincent Owuor, an offence, that is alleged to have been committed at Kayole Junction. Each accused person filed the application separately prior to the information being consolidated. But, the gist of all applications is that the applicants/accused are citizens of Kenya and Police Officers based at Kayole Police Station; there are indications that investigations that were being conducted by the Independent Policing Oversight Authority (IPOA) have been concluded, the alleged



- offence having been committed on the 24th day of March, 2022. That there are no compelling reasons for continued detention of the accused persons and the victims have not deposed to having been threatened or unduly influenced by the accused persons with a view of interfering with investigations and conduct of the case.
3. They urged that they all have permanent places of abode with families that depend on them. That they have constitutional rights to fair trial, a right to be presumed innocent until proven guilty; and, there is no compelling reason to violate the right.
 4. The respondent/State through No. IPOA00107 George Otieno Ayoo, the Investigating Officer, opposed the application. He deposed that following investigations carried out regarding the shooting of the deceased, it was established that there is sufficient evidence against the accused persons, serving Police Officers who are seized of lethal power and command and have ways and means to easily access, trace and locate witnesses.
 5. That evidence collected is compelling to secure a conviction of murder against the accused, an offence for which punishment could be death. That the accused are part of the dreaded SPIV SQUAD based at Kayole which is the jurisdiction where the offence occurred; Witnesses who are vulnerable, including relatives and neighbours of the victim will be threatened, intimidated or interfered with by the accused persons.
 6. He called upon the court to balance the rights of all persons including the victim so that they testify without fear, and, urged that it is in the interest of justice to deny the Accused bail pending trial.
 7. In a rejoinder, the accused persons urged that following arraignment in court they were interdicted and benefits that were vested in them as police officers ceased to apply and it will be discriminatory to deny them bail on account of being police officers.
 8. The application was canvassed through oral submissions. Mr. Omari Danstan, Counsel for the accused urged that the accused, officers having been interdicted they could not interfere with witnesses. That there were no compelling reasons in form of data or evidence that the accused would interfere with witnesses. That the officers have alternative homes to stay hence they will not be near Kayole Police Station; they are not flight risks, and, that article 49(1)(h) of the Constitution is available to them.
 9. Ms. Martinas Swigas, learned Counsel, also appearing for the accused submitted that what should be considered is the likelihood of the accused attending trial. That the accused willingly submitted themselves to court, therefore, they will attend trial. She cited cases including that of Felicity Sichangi Nyongesa vs Republic (2014)eKLR in that regard and urged that any averment as to denial of bail is speculative which should not be a consideration to warrant denial of bail.
 10. The State through Mr. Okeyo learned counsel argued that there was a likelihood of the accused interfering with witnesses or raising fear to the said witnesses, but, added a qualification to the averments that in event that the court be inclined to grant bail, strict conditions be set including an order barring the accused from setting foot at Kayole Police Station or getting in touch with the witnesses, a condition that the defence were agreeable to. I have considered the application, affidavits in support and opposition, and, rival arguments by counsels for the accused and respondent/ state.
 11. 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.



12. The Constitution does not define what entails “Compelling reasons”. But, looking at the definition per the *Collins English Dictionary*, it amounts to an argument or reason that convince one that something is true and should accordingly be done.
13. This means that the right to bail/ bond is not absolute.
The prosecution is therefore duty bound to establish existence of compelling reasons requiring incarceration of the accused.
14. Factors to be considered when determining whether or not to grant bail/bond are provided by Statute. Section 123A of the Criminal Procedure Code provides thus:
 - (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.
15. In the case of *Alhaji Mujahid Dukubo-Asari v Federal Republic of Nigeria* S.C. 20A/2006, the Supreme Court stated as follows:

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

 - (i) The nature of the charges;
 - (ii) The strength of the evidence which supports the charge;
 - (iii) The gravity of the punishment in the event of conviction;
 - (iv) The previous criminal record of the accused if any;
 - (v) The probability that the accused may not



surrender himself for trial;

- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- (vii) The likelihood of further charges being brought against the accused;
- (viii) The probability of guilty;
- (ix) Detention for the protection of the accused;
- (x) The necessity to procure medical or social report pending final disposal of the case.”

16. The Kenya Judiciary Bail and Bond Policy Guidelines provide directions for granting bail. At Page25, it states as follows:

- “(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. Murder is considered an extremely serious offence which should call for a serious punishment, including death, hence fear of those charged being tempted to abscond. However, the most important consideration that attaches to release of an accused person on bail is whether he will turn up for trial.

18. In the instant case the argument advanced by the prosecution is the likelihood of the accused interfering with witnesses who will testify. As a result of the contention by the State, this court sought Pre-Bail reports. Following the social inquiry carried out in respect of all accused, the community where the offence is alleged to have been committed were of the view that the accused had an impeccable record of curbing crime within the area. This, ensured business in the community thrived. It is their view that they don't pose a security threat to them except the criminal gangs who went into a frenzy celebration following their arrest.

19. The family of the victim is however opposed to the accused being granted bail. In particular, the mother and wife of the victim expressed fear of the accused being released on bail/ bond following allegations that they were threatened and forced to leave Nairobi. And, due to paranoia, they moved away from Kayole. Per the allegations, the mother relocated to their rural home while the wife moved to Thika.



They argue that the accused who were the victim's friends know her rural home, and if released they may follow her in order to eliminate her.

20. In the case of *Republic vs Dwight Sagaray & others*, HCCR No 61 of 2012, that is persuasive, it was stated 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.”

21. The question of intimidating witnesses who will testify may definitely instill fear in witnesses. But, it should not be a mere allegation. Other than the averment on the affidavit sworn by the Investigation Officer, the alleged witnesses did not depose any averment against the accused to prove the allegations. Even if there's a belief that the accused being police officers though currently intimidated, may have means of intimidating witnesses, this must be proved and balanced with the presumption of innocence. (See article 25(c) of the *Constitution*.)

22. It is trite that personal liberty is a fundamental right, it should not be curtailed unless there is cogent reason. It is alleged that the wife and mother of the victim fled their place of residence following threats, but, it is a mere allegation. This, hence, is a case that calls for imposing of conditions that will deter the accused from attempting to intimidate the witnesses as opposed to denying them bail.

23. From the foregoing, I admit each accused person on bond of Kenya Shillings One Million (Ksh.1000,000/-) with a surety of a similar amount on condition that if released:

- a) They will not reside at Kayole.
- b) They shall not interfere with the witnesses herein in whatever manner.

24. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
NAIROBI, THIS 12TH DAY OF AUGUST, 2022.**

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Accused 1- 6

Ms. Kimani holding brief for Mr. Okeyo for the State.

Ms. Martinas Swigas holding brief for Mr. Omari for the accused.

Ng'ang'a - Court Assistant

