



**Kadenge v Republic (Criminal Case E080 of 2021)
[2022] KEHC 13592 (KLR) (Crim) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CRIMINAL
CRIMINAL CASE E080 OF 2021
JM BWONWONG'A, J
SEPTEMBER 28, 2022**

BETWEEN

SIMON LEVY KADENGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The accused was charged with the offence of murder contrary to section 203 as read with section 204 (Cap 63) Laws of Kenya. The particulars of the offence are that between the night of 11th and 12th October, 2021 at Wapewape area, in Embakasi sub-county, within Nairobi County murdered Lawrencious Mumo Kithuku.
The accused pleaded not guilty to the charge.
2. He has now approached this court by way of notice of motion dated 10th December 2021 seeking to be released on reasonable bail/bond terms pending his trial. His application is supported by an affidavit of a similar date. It is grounded on the averments that he will abide by the bond terms set by the court. Secondly, he is the sole breadwinner of his family after separating with his wife. That he has a fixed abode within the jurisdiction of Kenya and he is not a flight risk. He also undertakes not to interfere with the prosecution witnesses.
3. No. 80316 PC John Weru, the investigating officer has sworn an affidavit dated 9th February 2022 in opposition to the application. He has averred as follows. He avers that the accused and the deceased were living as husband and wife prior to her death. Further, the accused is likely to interfere with prosecution witnesses who, are his immediate neighbours and a sister-in-law, who are well known to him. In addition, the relationships create a legitimate anxiety about the influence the accused may have on them if released on bail/bond. He maintains that the accused has no fixed permanent abode having



lived in a residential house prior to his arrest. The investigating officer contends that he has adduced compelling reasons for the court to deny the accused bail/bond.

The applicant's written submissions

4. Messrs Keengwe and company advocates filed written submissions on behalf of the accused. Counsel submitted that the accused should be admitted to bail/bond on reasonable terms as of right. Further, that the accused is not a flight risk, has a fixed abode and is ready to abide by the terms and conditions to be set by the court.
5. Learned counsel further submitted that the respondent has not tendered any evidence that is compelling to warrant the denial of bail/bond. Counsel has therefore urged the court to admit the accused to bail on reasonable terms.

The respondent's written submissions

6. Ms. Peris Maina, learned prosecution counsel has submitted that the accused person has been provided with witness statements and therefore knows the identities of prosecution witnesses, and the nature of the evidence they will adduce which increases the likelihood that he will interfere with the witnesses. She cited the case of *Republic vs Fredrick Ole Leliman & 4 others* [2019] eKLR, in which the court set out instances and mode of interference with witnesses.
7. Counsel further argues that the accused is a flight risk having lived in a residential house in Wapewape area in Embakasi area, and has no other known permanent place of abode. In addition, the accused's supporting affidavit is vague on the specific geographical area wherein he resides. She maintains that this will make it difficult to trace him in the event he absconds. She therefore urges the court to deny the accused bail/bond pending the hearing and determination of the case.

The written submissions of the victims

8. Mr. Francis Mutua, learned counsel for the victim's family reiterated the contents of the submissions by the prosecution. Counsel maintained that the application for bail/bond had been made prematurely owing to the fact that the victim's family were still grieving. He urged the court to deny the application for bail/bond.

Issues for determination

9. I have considered the rival affidavits and the submissions of the parties. As a result, I find that the following are the issues for determination.
10. Whether there are compelling reasons to deny the accused reasonable bail/bond.

Analysis and determination

11. Article 49 (1) (h) of the *Constitution* of Kenya guarantees the right of an arrested person to be released on bail/bond, on reasonable conditions, pending trial, unless there are compelling reasons for the person not to be released. The onus of proof in bail applications in respect of compelling reasons is borne by the state under section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The right for an accused person to be released on bail is not absolute.



12. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (1) (h) of the Constitution of Kenya, the court is to be guided by the provisions of section 123A of the Criminal Procedure Code (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

- (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;
 - (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 if released on bail, it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own good.

13. Under Article 49 (1) (h) of the Constitution of Kenya the terms of bail/bond to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the Criminal Procedure Code and article 49 (h) of the Constitution places the burden of proof on the state to demonstrate compelling reasons.

14. In the instant application, the investigating officer claimed that the accused was likely to interfere with prosecution witnesses. This is because the witness statements have been supplied to him and he knows their identities. Further, the witnesses are his immediate neighbours and a sister-in-law. However, no evidence has been placed before the court on the alleged interference with prosecution witnesses, who will allegedly be interfered with by the accused. In the absence of such evidence, his averment that there is a likelihood that the accused is likely to interfere with the prosecution witnesses is speculative and inadmissible. I therefore reject his averment for that very reason.

15. It was further claimed for the respondent that the accused is a flight risk, because he lacks a known permanent residence, since he has been living in a rental house. However, lacks of a permanent house does not constitute a sufficient reason. As long as the accused is able to provide a fixed place of abode, the same suffices as a residence. Consequently, this averment is dismissed for lacking in merit.

16. After taking all the foregoing matters into account, I find on the evidence and the applicable law that there are no compelling reasons to deny bail/bond to the accused. In the premises, the application of the accused succeeds and he is hereby granted a bond in the sum of Kshs. 200,000/- with a surety of a similar amount to be approved by the Deputy Registrar of this court.

17. In the alternative to the foregoing, the accused may be released on a cash bail of one hundred thousand shillings (Shs 100,000/-) to be deposited with the court.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022.



J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Ms Nyatichi for the accused/applicant

Mr Mutua for the victims

Ms Maina for the Respondent

