



REPUBLIC OF KENYA



**Gitonga v Republic (Criminal Case E097 of 2021)
[2022] KEHC 18135 (KLR) (Crim) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 18135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE E097 OF 2021**

DO CHEPKWONY, J

OCTOBER 21, 2022

BETWEEN

FRANCIS KINYUA GITONGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, Francis Kinyua Gitonga, has been charged with one count of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).

The particulars of the offence are that:-

“On the 5th August, 2019 at Kasarani Sub County, within Nairobi County jointly with another before court murdered Jeremiah Ndungu Njuguna”.

2. The Applicant pleaded “Not Guilty” to the charge. The applicant then filed a Notice of Motion dated 3rd January, 2022 seeking to be admitted to bail/bond on reasonable terms pending trial.
3. In the affidavit supporting the Motion, the Applicant has averred that he lived with his mother in Kasarani and she is willing to stand surety for him. He confirms that he is not a flight risk since he has a fixed abode and is not passport holder. He contends that he has worked as a boda boda operator, so that if he is admitted on bond he will deposit the motorcycle logbook as security. The Applicant confirms that he will comply with any and or all conditions that will be imposed by the court and attend court at all times without fail. He also contends that he will not interfere with or any prosecution witnesses. According to the Applicant, there are no compelling reasons to deny him release on bail and that he should be so released as he is to be presumed innocent until proven guilty pursuant to the provisions under Article 50 (2) (a) of the [Constitution](#).



4. However, the application was opposed by the Respondent vide an affidavit dated 3rd January, 2022 sworn by PC Donald Baraka of DCI Kasarani in which he deposed that the Applicant was a boda boda chairman within Garage area in Kasarani and was charged jointly with another in HCCR. No.53 of 19, *R –vs- Ali Hussein Ali*. He contends that the Applicant is a flight risk since has been on the run since August, 2019 after he relocated from Kasarani to an unknown place, shaved his dreadlocks and changed his numbers. PC Baraka goes on to state that although Article 49 (1)(h) of the *Constitution*, 2020 guarantees an accused the right to bail, the same is not absolute as it is limited by the existence of compelling reasons as adduced by the prosecution.
5. The application was disposed by way of written submissions. The Applicant’s advocate submitted that the applicant enjoys the presumption of innocence as provided for under Article 50(2)(a) of the *Constitution*, has a fixed abode in Kasarani where he was arrested and lacks a passport hence will not flee from the court’s jurisdiction. He has also refuted the claims that the Applicant shaved his dreadlocks and changed his telephone numbers to evade arrest. To support his submissions, the Applicant’s advocate has relied on the following cases; *Republic vs. Joseph Thiongo Waweru & 17 others* [2017] eKLR; *Republic vs. Nuseiba Mohammed Haji Osman* [2018] eKLR; *Republic vs. Danson Mgunya & another* [2010] eKLR; *R vs. Gerald Mwenda Kailemia* (2013)eKLR and *R vs. Evans Ochieng Rachar* [2019] eKLR.
6. In opposing the application, the Respondent submitted that the Applicant is a flight risk. It was the Respondent’s submission that the applicant’s behavior from the date of commission of the offence up until his arrest painted him as a flight risk. This is because he disappeared to an unknown place for a period of over 2 years and 4 months after changing his identity and that he was only arrested in commission of another offence. In support of this submission, the prosecution’s counsel has placed reliance on the case of *R v Joseph Kuria Irungu & Another* (2018) eKLR.
7. Secondly, the Respondent has submitted that the Applicant has no fixed abode and if released, he will likely abscond from the jurisdiction of the court. According to the prosecution’s counsel, during the period which the Applicant disappeared, he could not be traced at his last known residence which was Kasarani. She has thus urged the court to dismiss the application.

Analysis and Determination

8. This Court has considered the application in light of the grounds set out by either party and arguments advanced in support of each party’s position and finds, the only issue to be considered is whether the Applicant or should be released on bond and/or bail pending trial.
9. Article 49 (I)(h) of the *Constitution* of Kenya, 2010, provides that:-

“An accused person has a right 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. However, the *Constitution* has not defined the term “compelling reasons.” The ordinary meaning of the term “compelling” according to Thesaurus English Dictionary, is forceful, convincing, persuasive, undeniable and gripping.
11. The right to bail is not absolute and where there are compelling reasons the said right may be restricted. It is therefore upon the prosecution to demonstrate that there exist compelling reasons to deny an accused person bail. It is also within the Court’s discretion to decide whether or not to grant bail to an accused person. And in exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice.



11. 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. Additionally, the *Judiciary's Bail and Bond Policy Guidelines*, March, 2015 at P. 25 sets out Judicial Policy on 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.



14. In the case of *Kelly Kases Bunjika v Republic* [2017] eKLR, Muriithi, J. held that: -

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

15. The prosecution is opposed to the release of the accused on bail for various reasons. The first ground is that the Applicant is a flight risk. The prosecution submitted that the Applicant disappeared for a period of over two years after the commission of the offence and even changed his identity by shaving off his dreadlocks and changed his mobile phone numbers, which made tracking him impossible and had also relocated to an unknown place.
16. On his part, the Applicant’s advocate refuted the claims as unsubstantiated allegations and stated that the Applicant is not a flight risk.
17. This court agrees with the prosecution that the Applicant’s action of disappearing is evidence of a man who can easily take flight and vanish into thin air and be a fugitive to justice if he is released on bond/ bail pending trial. His disappearing actions and changing of his identity paints him as a flight risk.
18. The second ground relied upon by the prosecution in opposing the Applicant’s application for release on bond/bail is that he lacks a fixed abode. The respondent submitted that during the period the Applicant disappeared, the police were unable to find him at his last known address which was Kasarani. However, the Applicant’s advocate submitted that the Applicant has a known place of abode which is in Kasarani area where the offence was committed and he was arrested from.
19. It is trite that the purpose and intention of placing an accused person on bail is to secure his attendance in court for his trial as if he is out of prison custody. It is therefore imperative that before releasing an accused person on bail, the court must satisfy itself that he shall still attend court for his trial, and that should he abscond, it would still be possible to trace and bring back to court for his case. If the court cannot get this assurance, then it would be justified in denying such accused person bond.
20. The affidavit by the Investigating Officer shows that the Applicant relocated to an unknown place after the commission of the offence for which he is charged with. Therefore, the court is persuaded to conclude that the accused person is not a right candidate for being released on bond/bail pending trial as the likelihood of him taking flight are real.
21. In my view, this court finds that compelling reasons do exist for this court not to admit the accused to bond/bail pending trial. However, in view of the probability of the hearing taking long to be concluded, it is hereby directed that the Applicant:-
- a. Avails a contact person who should in turn;
 - b. File an affidavit detailing fill particulars being identity, occupation, place of residence for him/ herself and accused Person.

It is so ordered.



RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF OCTOBER , 2022.

D. O. CHEPKWONY

JUDGE

