



REPUBLIC OF KENYA



**Republic v Nyamai & 11 others (Criminal Case E040 of 2022)  
[2022] KEHC 16396 (KLR) (Crim) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16396 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E040 OF 2022  
K KIMONDO, J  
DECEMBER 19, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ANTHONY MBINDYO NYAMAI ..... 1<sup>ST</sup> ACCUSED  
FREDRICK MUNYUNZU MUSYOKI ..... 2<sup>ND</sup> ACCUSED  
WILFRED MUTISYA MUNYAO ..... 3<sup>RD</sup> ACCUSED  
FREDRICK MUASYA MUNYAO ..... 4<sup>TH</sup> ACCUSED  
ANTHONY MUTUA MUTISO ..... 5<sup>TH</sup> ACCUSED  
PAUL MUVENGEI ZACHARIA ..... 6<sup>TH</sup> ACCUSED  
FREDRICK MUTISO MUTUA ..... 7<sup>TH</sup> ACCUSED  
BENSON MWANZA MUNYAO ..... 8<sup>TH</sup> ACCUSED  
NOAH MUTISO MUVENGEI ..... 9<sup>TH</sup> ACCUSED  
SHADRACK MUTIO MUVENGEI ..... 10<sup>TH</sup> ACCUSED  
JACKSON MUTINDA JOHN ..... 11<sup>TH</sup> ACCUSED  
FELIX MUSEMBI MUVENGEI ..... 12<sup>TH</sup> ACCUSED**

**RULING**

1. The 5<sup>th</sup> accused person, Anthony Mutua Mutiso, prays for review of the order cancelling his bail made at Machakos High court on June 23, 2022 (Muigai J).



2. His notice of motion is dated June 30, 2022 and buttressed by the deposition sworn on even date and a supplementary affidavit dated September 15, 2022. His learned counsel, Mr Uvyu, also relied on written submissions filed on the latter date.
3. The application is strenuously opposed by the republic. Reliance was made on a replying affidavit sworn by chief inspector Wanjohi on August 1, 2022 and written submissions dated November 25, 2022.
4. The motion is also fervently contested by counsel representing the family of the victim *vide* submissions dated November 22, 2022.
5. On November 29, 2022, I heard further arguments from all the three learned counsel for the applicant, the republic and the family of the victim.
6. A brief background is necessary. The 12 accused persons were jointly charged at the Machakos High Court with murder. The particulars were that on August 1, 2020 at Kathuma Village, Misakwani sub-location, Mumbuni location in Machakos sub-county within Machakos county they jointly murdered Juliana Mwikali Ngui.
7. On December 8, 2020, the High Court (Kemei J) declined bail on two main grounds: That there was “some tension in the village and that the situation is exacerbated by the fact that the witnesses and the accused persons are members of one family”. Secondly, that it was prudent to first take the evidence of the vulnerable witnesses; or, to secure them under the witness protection programme.
8. On January 21, 2021, the 10<sup>th</sup> accused was released on bail. Subsequently, and on February 4, 2021, officers from the witness protection agency informed the learned judge that all vulnerable witnesses had been placed under the programme. The court thus granted bail to all the other accused persons.
9. The trial opened before Muigai J on December 1, 2021 when Jackson Makau Ngui (PW1) testified. Matters then took a bad turn. Counsel for the victims claimed that the 5<sup>th</sup> accused was interfering with witnesses; and, that Nelson Ngui, a potential witness had deserted the programme and made contact with the 5<sup>th</sup> accused. PW1 died in his house following his testimony. The cause of death was inconclusive and under investigation.
10. A formal application dated December 9, 2021 to cancel the bond for the accused was finally heard on May 5, 2022 and June 15, 2022. It is partly explained by the fact that the court conducted inquiry; ordered for certain investigation reports; and, some proceedings were held in camera.
11. By a considered ruling dated June 23, 2022, the court cancelled bail for the 5<sup>th</sup> accused. The principal reasons are found at paragraphs 50, 63-65 of the learned judge’s decision-

[50] Of importance to note is that the 12 accused persons and victims and/or vulnerable witnesses are relatives and are 1 family, they consist of fathers, sons, cousins, step-brothers, in-laws etc. It is curious that each allegation by different and various parties is levelled at 5<sup>th</sup> accused person only and not the other accused persons by people of same family who know each other well.

[63] The bail/bond terms were granted by the trial court after officers from the witness protection program confirmed to the trial court that the vulnerable witnesses were safely housed in the witness protection program. Since, then 1 witness, Nelson Ngui sneaked out of the program contrary to MOU and compromised safety and security of other witnesses. After PW1 refused to withdraw the matter from court and he testified in 2 criminal cases while in the witness protection program, he died in unclear and yet to be determined circumstances as investigations are ongoing to determine the cause of death.



- [64] Clearly, these circumstances depict that the reason advanced to allow the trial court grant bail/ bond to accused persons, that the vulnerable witnesses were/are safe in the witness protection program is not borne out by the recent developments and is no longer viable. More so, there has been interference with witnesses and possibly evidence by dissuading witnesses not to testify and/or withdraw the matter from court.
- [65] From the totality of evidence adduced and submissions made by respective counsel, this court is satisfied that 5<sup>th</sup> accused person interfered with Nelson Ngui and Timothy Ngui both witnesses in this case waiting to testify in court. The action by 5<sup>th</sup> accused person was contrary to terms of bond/bail granted and orders of this court. The 5<sup>th</sup> accused person failed to observe bail /bond terms by interfering with witnesses and victims of crime especially as they are family members. [underlining added].
12. I find the following contextual framework material. Firstly, it is a truism that the applicant and his co-accused are presumed innocent. Under article 49 (1) (h) of the *Constitution*, as read together with section 123A (1) of the *Criminal Procedure Code*, the applicant is entitled to bail unless there be compelling circumstances. See generally, *Michael Juma Oyamo & another v Republic* [supra]; *Muraguri v Republic* [1989] KLR 181; *R v Fredrick Ole Leliman & 4 others*.
13. Regarding the phrase, compelling reasons, I am well guided by the decision of Gikonyo J in *Republic v Joktan Mayende & 3 others*, High Court, Bungoma Criminal Case 55 of 2009 [2012] eKLR where the learned judge stated-
- But more light is shed by the Black's Law Dictionary 7<sup>th</sup> Edition. And accordingly, 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 standard set by the Constitution.
14. In the matter before me, the 5<sup>th</sup> accused was granted bail. But it was cancelled for interfering with protected witnesses and for the considered ruling I have set out above. The loss of liberty was to remain until all the vulnerable witnesses testify.
15. The second context is that the homicide occurred within a close family setting. As observed by the trial court, the “accused persons and victims and/or vulnerable witnesses are relatives and are [one] family, they consist of fathers, sons, cousins, step-brothers, in-laws”.
16. Thirdly, the *Victims Protection Act* 2014 now requires that the views of the victim’s family be considered at any stage of release of the accused on bail. They are also protected by section 10 of the *Act* from intimidation or harassment by the accused. The application by the counsel for the victims dated December 9, 2021 was thus properly before the court. For similar reasons, I will entertain the submissions dated November 22, 2022 on behalf of the victims’ family.
17. Fourthly, and as stated earlier, vulnerable witnesses were placed under the witness protection programme. It is upon that foundation that Kemei J reviewed his earlier order and granted bail to all the other accused persons. I have kept in mind that the bail for the 5<sup>th</sup> accused was subsequently cancelled by Muigai J precisely for interfering with such two witnesses.
18. The fifth important context is that the *Witness Protection Act* was enacted to safeguard such witnesses and ring-fence the course of criminal justice. Section 30F of the *Act* provides as follows-



- (1) A person shall not intimidate, harass, obstruct, threaten, hinder or prevent a witness with intention to subvert the course of justice.
  - (2) A person who contravenes the provisions of subsection (1) commits an offence and is liable, on conviction, to a term of imprisonment not exceeding five years.
19. The seventh important consideration is that one of the protected witnesses (PW1) died after his testimony in unclear circumstances. Following that death and the impugned ruling, the High Court at Machakos transferred the matter to the criminal division at Nairobi “for hearing out of jurisdiction for purposes of ensuring safety and security of vulnerable witnesses”.
  20. For various reasons including transfer of judicial officers, none of the remaining witnesses has taken to the stand at Nairobi. So much so that the framework protecting the witnesses under the programme has been breached through the death of a witness. The court thus needs to reinforce the arrangements under the programme.
  21. So are there grounds to review the above order? To start with, I have no right to sit on appeal against a decision of a court of concurrent jurisdiction. There is no doubt that I may to review it. See *R v Diana Suleiman Said & another*, Mombasa High Court Misc Appl 55 of 2014 [2014] eKLR. But I find that the entire application is a challenge on the findings of fact and opinion by the learned judge and points strongly in the direction of an appeal.
  22. For instance, paragraph 5 of the applicant’s affidavit states that the allegations by Timothy Mutiso Ngui that he (5<sup>th</sup> accused) met Nelson Ngui “were never proved”. That is also the argument in paragraphs 6 to 13 of the supporting affidavit. At paragraph 65 of the impugned ruling, the learned judge found as a fact “that 5<sup>th</sup> accused person interfered with Nelson Ngui and Timothy Ngui both witnesses in this case waiting to testify in court”.
  23. The applicant in paragraphs 14 to 16 and 17 of the supporting affidavit challenges the findings of the learned judge at paragraphs 48 and 50 of her ruling. I agree with the applicant that the investigations as to the cause of death of the witness (PW1) is ongoing. But as the learned judge observed at paragraph 48 of her decision, the circumstances remain unclear.
  24. While not blaming the 5<sup>th</sup> accused, the court observed at paragraph 63 that “since then 1 witness, Nelson Ngui sneaked out of the program contrary to MOU and compromised safety and security of other witnesses. After PW1 refused to withdraw the matter from court and he testified in 2 criminal cases while in the witness protection program, he died in unclear and yet to be determined circumstances as investigations are ongoing to determine the cause of death”.
  25. The totality of all the averments by the applicant in both the supporting affidavit and further affidavit have raised the same arguments made before Muigai J Learned counsel for the applicant argues that based on the materials before the court, the learned judge arrived at an erroneous conclusion. I am not so persuaded. I agree with the republic and counsel for the victim’s family that no new ground has been broken and no set of fresh facts have been advanced to attract review.
  26. The upshot is that the trial court properly found that there were compelling reasons for denial of bail; and, rightly recalled the bond for the 5<sup>th</sup> accused. It follows as a corollary that the notice of motion dated June 30, 2022 is dismissed. In the interests of justice however, this trial shall be fast-tracked.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2022.**

**KANYI KIMONDO**



## **JUDGE**

Ruling read virtually on *Microsoft Teams* in the presence of-

5<sup>th</sup> accused.

Mr Uvyu and Mr Maanzo for the 5<sup>th</sup> accused (applicant) instructed by M. M. Uvyu & Company Advocates.

Ms. Kigira for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr E. Ombuna, Court Assistant.

