



**Republic v Omusi (Criminal Case 5 of 2019)
[2022] KEHC 16689 (KLR) (Crim) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16689 (KLR)

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

**CRIMINAL
CRIMINAL CASE 5 OF 2019**

CW GITHUA, J

DECEMBER 19, 2022

BETWEEN

REPUBLIC STATE

AND

NEHEMIAH OLANGI OMUSI ACCUSED

RULING

1. The accused, Nehemiah Olangi Omusi faces a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on December 6, 2018 at about 6.00 pm at Kibera Lindi Slums in Nairobi County, he murdered Kelvin Etemesi Musula.
2. Upon being arraigned before the court, the accused denied the charges. His trial commenced on July 19, 2022 when one prosecution witness testified.
3. On March 16, 2022, through his advocates Messrs Omenke Andeje & Company Advocates, the accused presented a notice of motion in which he sought to be admitted to bond with an alternative of a cash bail pending hearing and determination of his trial.
4. In the grounds premising the motion and in his supporting affidavit, the applicant averred that he has a qualified constitutional right to be released on bond pending trial and the right to be presumed innocent until the contrary was proved. He pledged not to interfere with witnesses or to abscond if his application was allowed. He deposed that his continued detention and deprivation of his liberty amounted to punishment before he was found guilty by a competent court.
5. The application is opposed. The state through a replying affidavit sworn by PC Joseph Nderitu urged the court to find that there is a compelling reason to justify denial of bail/bond to the accused person in that if released, he was likely to interfere or intimidate the prosecution's key witness one Leah Buliro



who is his former wife and was the deceased's wife at the time of his murder; that the accused's brothers have been tracking the witness on phone threatening her with dire consequences if she testified against the accused.

6. The application was prosecuted by way of oral submissions.

Learned counsel for the accused, Mr Omenke reiterated in his submissions that the claim that the accused is likely to interfere with witnesses is a mere allegation as it had not been backed by any evidence. He relied on the persuasive decision by Mativo J in *R v Danford Kebage Mwangi* [2016]eKLR where the learned Judge held that bail cannot be refused simply because an accused person had been charged with a serious offence. Counsel also relied on the decision by Hon Olga Sewe J in *R v Dorcas Chelagat Ruto* [2019]eKLR in which the Hon Judge held that possible interference with witnesses by the accused person perse is not sufficient reason to deny an accused person bond or bail; that instead of denying bond, the court should impose conditions to mitigate that risk.

Counsel urged the court to find that no compelling reason had been advanced by the prosecution in this case and allow the application.

7. In opposing the application, learned prosecuting counsel Ms Ogwenko expounded on the depositions made in the replying affidavit and contended that although the main prosecution witness had since changed her telephone number and relocated from Kibera, if the accused was released, he would trace her and continue with the threats made to her by his brothers or interfere with other prosecution witnesses.

8. I have given due consideration to the application and the affidavits sworn in support and in opposition thereto. I have also considered the oral submissions made by learned counsel for the parties.

It is trite that the constitutional right to bond or bail pending trial enshrined in Article 49(i) (h) of the *constitution* is available to each arrested or accused person irrespective of the seriousness or gravity of the offence charged.

This right is limited only by the existence of compelling reasons which in the court's view justify denial of bond or bail pending trial.

9. The *constitution* does not however define what constitutes compelling reasons. This is left to the determination of the trial court depending on the circumstances of each case.

In my view, compelling reasons would refer to strong and convincing reasons that would lead to an irresistible conclusion that admission of an accused person to bond pending trial would adversely affect his trial and consequently undermine the course of justice.

This therefore means that bond should not be denied on spurious or flimsy grounds but on real and cogent reasons See: *Michael Juma Oyaró & Another v Republic* [2019] eKLR.

10. The duty to demonstrate existence of compelling reasons is placed squarely on the shoulders of the prosecution. This was buttressed by the Court of Appeal in *Patius Gichobi Njagi & 2 Others v Republic* [2013] eKLR when the court stated as follows:

“... Where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the state must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and



circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case of *Jaffer v Republic* 1973 EA 39, the court cannot be called upon to speculate.”

11. I must state at this juncture that the primary consideration in the exercise of the court’s discretion in deciding whether or not to grant bond or bail is whether an accused person will attend his trial if released or will abscond.

Other reasons are as stated in the *Kenya Judiciary’s Bail and Bond Policy Guidelines* of March 2015 and section 123 A of the *Criminal Procedure Code* which includes the reason being advanced by the prosecution in this case, that is, the likelihood of the accused interfering with prosecution witnesses if admitted to bond or bail.

12. As I stated in *Abmed Abdullabi Maalim v Republic* Nrb Criminal Case No E001 of 2022, the likelihood of interference with prosecution witnesses if proved is a serious matter since it has the potential of undermining the cause of justice. For this claim to form the basis of denying an accused person his or her right to bond or bail, it must be founded on credible evidence or material that demonstrates actual or perceived interference.

13. In this case, there is no evidence to show that the accused has since his arrest contacted or done anything whether directly or indirectly that would be perceived to be a threat to any of the prosecution witnesses including the said Leah Buliro.

I agree with Mr Omenke that the claim that accused’s brothers have threatened the aforesaid witness through her phone remains a mere allegation since the prosecution did not avail any evidence to demonstrate that such threats were actually made. If such threats were made, one would have expected that they would have been reported to the police and OB entries availed in court as evidence of that fact. This was not done and this makes the claim unworthy of belief.

14. I believe I have said enough to demonstrate that I am not persuaded that in this case, the prosecution has established compelling reasons to justify denial of the exercise of the accused person’s constitutional right to bond pending trial.

It is thus my finding that the accused’s application is merited and it is hereby allowed on the following terms;

- (i) The accused will be released upon executing a bond of Ksh 500, 000 together with one surety of like amount. The surety will be approved by the Hon Deputy Registrar of this court.
- (ii) Upon his release, the accused shall not, whether directly or indirectly contact or interfere in any way with Leah Buliro or any other prosecution witness in this matter.
- (iii) The accused shall attend the court whenever required without fail.
- (iv) Failure to comply with any of the above conditions may lead to cancellation of the bond granted herein.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF DECEMBER 2022

C.W. GITHUA

JUDGE

In the presence of:



The accused person

Mr. Omenke for the accused

Mr. Kimani for the State

Ms. Karwitha Court Assistant

