Republic v Kamotho (Criminal Case E001 of 2025)
[2025] KEHC 2113 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL CASE E001 OF 2025

DR KAVEDZA, J

FEBRUARY 18, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

SARAH WAIRIMU KAMOTHO ..... ACCUSED

RULING

1. The Accused was charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*. The particulars of the offence are that on the night of 19th and 20th July 2019 at the Lower Kabete area within Nairobi County, in the Republic of Kenya the accused jointly with others not before this court, murdered Tob Chichou Cohen. On 29th January 2025, the accused pleaded not guilty to the charge.

2. The accused through her counsel made an application for bail which was opposed by the prosecution. The application was fixed for oral hearing on the 3rd February 2025.

3. Mr. Monda, for the State, opposed the bail application on two grounds: That there was risk of witness interference, as two witnesses are under the Witness Protection Programme, and that the accused is a flight risk. He relied on an affidavit by ASP Maxwell Otieno, dated 29th January 2025. ASP Otieno stated that the accused informed the Dutch Embassy the deceased had travelled to Thailand, but Kenyan Immigration confirmed no such travel occurred (annexed as MO1). The accused also allegedly instructed workers, now prosecution witnesses, to lie about material facts, seen as witness intimidation (witness statements annexed as MO2 and MO3). Some witnesses are close friends of both the deceased and the accused.

4. Other witnesses include former employees from the residence where the deceased's body was found. ASP Otieno further stated that some witnesses were intimidated, coerced, or threatened by the accused

or her proxies, with incidents reported to Spring Valley Police Station (OB report annexed as MO6). Due to this, some witnesses were placed under the Witness Protection Programme.

5. During Inquest No. E009 of 2023, the accused allegedly attempted to interfere with former employees, now prosecution witnesses, to dissuade them from testifying (OB report annexed as MO8). ASP Otieno also noted that releasing the accused on bail could jeopardise efforts to apprehend other suspects still at large.

6. Mr. Monda and Ms. Ogweno urged the Court to deny bail, citing these sworn averments. They stated the State is ready to produce the protected witnesses promptly, after which the accused could renew her bail application. They relied on *Republic v Galgalo & 3 Others* (2019) eKLR.

7. Counsel for the Victims, Ms. Omamo associated herself with the state's submissions in opposing the bail application. Ms. Omamo submitted that the accused person has been actively interfering with potential evidence, i.e. the scene of crime by occupying the house in which the body of the deceased was discovered. Ms. Omamo further reiterated the victim's grounds of objection dated 30th January 2025.

8. In response, the Accused filed a Replying Affidavit on 31st January 2025, contesting ASP Maxwell's affidavit as general and irrelevant to the bail application. She denied instructing her workers to lie about material facts in the case. The Accused noted that similar objections to her bail application were previously dismissed by the court, which suggested placing witnesses under the Witness Protection Programme, a measure already confirmed by ASP Maxwell's affidavit.

9. She further stated that the witnesses' identities were disclosed to her earlier, and the prosecution has not provided evidence of her attempting to contact them. She argued that opposing her bail now invites the court to revisit a matter conclusively determined by Lady Justice S.N Mutuku in a ruling dated 11th October 2019.

10. Mr. Ndeda, supporting Mr. Maloba's submissions, reiterated that the right to bail is fundamental and guaranteed, though not absolute. He emphasised that the prosecution bears the burden of proving compelling reasons to deny bail, a burden he argued the State had failed to discharge.

11. In rejoinder, Mr. Monda maintained that the State's objections to bail were valid, and aimed at ensuring the protected witnesses testify first. He urged the court to expedite the hearing of the protected witnesses before revisiting the bail application.

Issue for Determination

12. The issue for determination is whether there are compelling reasons to deny the accused bail.

13. A preliminary issue arises from the defence's submission that the court is being asked to revisit a decision by Lady Justice SN Mutuku in *Republic v Sarah Wairimu Kamotho* [2019] eKLR, where the issue of bail was conclusively determined on 11th October 2019. It is trite law that a court cannot sit on appeal over its own decision, and if proven, this would warrant dismissing the objection.

14. The facts are undisputed. The accused was first arrested in 2019, pleaded on 3rd October 2019, and was discharged after a *nolle prosequi* in *HCCRC 60/2019*. The matter later became Inquest No. E009/2023, which terminated on 2nd October 2024 after new evidence prompted a review by the DPP. The accused was later arrested and charged in this file.

15. In the previous ruling, I discussed the nature and consequences of a *nolle prosequi*. I expressed myself as follows:

19. My understanding of these provisions is that a *nolle prosequi* can either lead to an acquittal or discharge depending on the stage of a trial. Section 82 of the *CPC* is expressive that a discharge is not a bar to subsequent proceedings against an accused person on the same facts. The provision says subsequent proceedings for a reason. This means that the Prosecution can institute fresh proceedings. There is no provision requiring the prosecution to reopen the same file. Further, once a *nolle prosequi* is entered, the file is closed.

20. Additionally, the power to enter a *nolle prosequi* is meant to give the prosecution a chance to put its house in order. If new evidence emerges, the prosecution can have a second bite. I am not convinced and I have not been pointed to any law or jurisprudence requiring the prosecution to reopen the same previously closed file.

16. Once the ODPP enters a *nolle prosequi*, it may reopen the case if new evidence emerges. Otherwise, the file is closed and effectively dead, relegated to the archives. This is particularly relevant here, as the ODPP has initiated fresh proceedings.

17. Is this court sitting on appeal over its own decision? No. Lady Justice SN Mutuku presided over *HCCRC 60/2019*, allowing a *nolle prosequi* and terminating the matter. These are new proceedings, unrelated to her decision. The accused has taken a fresh plea, and the trial has restarted. Lady Justice Mutuku's ruling is not under challenge or consideration herein.

Analysis and Determination

18. At the onset, I would like to state that there is no gainsaying that bail is a Constitutional right under Article 49(1)(h) and section 123A of the *Criminal Procedure Code*. However, this right is not absolute. It is for this reason that article 49(1)(h) decrees that the accused shall be released on bond unless there are compelling reasons. It provides thus:

> " An arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released."

19. The test for denial of bail is therefore the compelling reasons test. The high court has defined the term compelling reasons in *R v Joktan Mayende & 3 others* (2012) eKLR to mean:

> " The phrase compelling reasons 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 standards set by the *Constitution*".

20. Flowing from the above, this court is also enjoined to take into consideration the *Bail and Bond Policy Guidelines*, 2015. As much as the guidelines are not law, it is not in dispute that they have acquired the status of binding rules due to their wide practice by criminal courts. The compelling reasons provided in the guidelines are *inter alia*:

    i. the nature of the charge;

    ii. the seriousness of the punishment;

    iii. the strength of the prosecution case;

    iv. the character and antecedents of the accused;

    v. the failure of the accused to honour bail terms previously granted;

vi. the likelihood that the Accused will fail to attend court during trial;

vii. the likelihood of interfering with witnesses;

viii. the need to protect the victim of crime and the accused person;

ix. the relationship between the accused and potential witnesses;

x. the age of the accused;

xi. the flight risk;

xii. whether the accused person is gainfully employed; and

xiii. public order, peace, and security imperatives.

21. The test of compelling reasons is higher. Compelling reasons must be convincing and not founded on mere suspicion. The reasons must be substantiated and reasonably disclosed to convince the court that the liberty of an accused should be limited to the extent of denial of bail. The justification for such a higher test is easy to see. The right to bail has to be read together with Article 50 (2) (a) which provides that an Accused person has the right to fair trial which includes

> " the right to be presumed innocent until the contrary is proved"

This is a non derogable right.

22. Be that as it may, this Court should not lose foresight on the purpose of bail in criminal cases which is, to secure the attendance of an accused person during trial. In *Republic v. Robert Zippor Nzilu* (2018) eKLR thus: -

> " While agreeing with Justice Ibrahim Tanko Muhammad's judgment, Justice Niki Tobi gave an illuminating and persuasive decision when he said:
>
> The main function of bail is to ensure the presence of the accused at the trial..... Accordingly, this criterion is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria."

23. On the Burden of proof, it is a trite point of law that the burden of establishing the compelling reasons is on the prosecution. That was the position in *Republic v William Mwangi Wa Mwangi* [2014] eKLR where Muriithi, J held that:

> " It is now settled that in the event that the State is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the constitutional right to bail... It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail."

24. Flowing from above, the burden solely lies on the prosecution's shoulders to demonstrate compelling reasons to warrant the denial of bail. It is on this basis that I proceed to consider the grounds of objection to bail advanced by the prosecution.

25. First, the State argued that the accused is a flight risk, citing paragraph 16 of ASP Maxwell's affidavit, which claims her release could hinder investigations into other suspects. It is undisputed that the

accused is Kenyan, has remained in Kenya since her initial arrest, and actively participated in both the first trial and the subsequent inquest without missing court appearances while on bail.

26. Notably, after the *nolle prosequi* in 2019, the accused had six years to flee, knowing very well that fresh charges could arise at any time, yet she did not. This therefore, undermines the claim that she is a flight risk.

27. The prosecution has failed to provide tangible evidence that the accused is likely to abscond. This aligns with established jurisprudence, reinforcing that mere assertions without proof are insufficient to deny bail. Lady Justice Mutende in *Republic v Abdulahi* (Criminal Case E074 of 2023) [2024] KEHC 8030 (KLR) (Crim) (2 July 2024) expressed the test to be:

> 34. The totality of the circumstances and further considering the serious nature of the offence and sentence, it is demonstrated that the accused is a flight risk and no amount of stringent bond terms or conditions would avert the chances of absconding trial.

28. The holding in *Republic v Abdulahi* (*supra*) indicates that reasons advanced by the state must be strong, convincing, and forceful to warrant the denial of bail. It was therefore incumbent upon the prosecution to convince this Court that the temptation for the accused to flee in this case, is so high that it amounts to a compelling reason.

29. From the foregoing jurisprudence, the argument advanced by the prosecution that the accused is a flight risk is based on mere fear, apprehension, and speculation. Every case must be considered on its own peculiar circumstances since every accused person has the right to dignity of the person. I have not been persuaded that the accused is a flight risk and I have no hesitation in dismissing this ground.

30. Secondly, the prosecution alleged the accused is likely to interfere with prosecution witnesses having already attempted to do that. Witnesses are crucial to criminal trials, prompting legislative and institutional frameworks like the *Witness Protection Act* to safeguard them. Section 6(1) of the *Act* outlines measures to protect witnesses, ensuring the integrity of the criminal justice process. Without witnesses, cases collapse hence, making their protection paramount for both public interest and administration of justice.

31. Witness interference undermines the criminal justice system, perverting trials into mockeries and prejudicing victims' rights. When bail objection cites witness interference, a courts must carefully assess the objection, since protecting witnesses safeguards the trial integrity. I agree with Lesiit J in *R. v. Fredrick Ole Leliman & 4 Others* [2016] eKLR, where she emphasized that witness protection is essential to maintaining the fairness and credibility of the judicial process.

> "Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that the accused may interfere with the evidence; or may endanger an individual or individuals or the public at large; the likelihood that the accused may commit other offences. In these instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."

32. The test on the interference of Witnesses was laid out by Justice R Korir in the case of *R v Dwight Sagery & 4 others* (2013) eKLR where the learned Judge stated thus:

> It must place material before the court which demonstrates actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses direct or indirect incriminating communication between the accused and witnesses; and a close familial relationship between the accused and witnesses among others.

33. I also concur with the holding in *Panju v R* (1973) EA 284, where the court in dismissing the prosecutor's fear of interference with witnesses stated that before anyone can say there would be interference with vital witnesses, at best some facts must be placed before the court otherwise it is asking the court to speculate.

34. The evidence on record establishes that the key prosecution witnesses are known to the accused. The prosecution, through ASP Maxwell's affidavit, has demonstrated that these witnesses were employees of both the accused and the deceased. The accused, in her affidavit and through her counsel's submissions, does not deny the employment relationship. It is also uncontested that the witnesses reported acts of intimidation to the police, supported by several OB records adduced as evidence.

35. In *Republic v Gerald Mutuku Nyalita & Another* (2015) eKLR E.M. Murithi J held that:

> " [5] In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of the *Constitution of Kenya*, the Prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial, or other relationships which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination of the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant..."

36. It is established that the accused and the two witnesses were engaged in an employer-employee relationship, characterized by a power imbalance inherent to superior-subordinate dynamics. The evidence on record indicates that attempts were made by the accused or her associates to intimidate the witnesses, thereby, deterring them from giving testimony against the accused.

37. The defence contends that six years have elapsed since the commission of the offence, hence diminishing the probability of witness interference. I do not agree with this thinking. Interference may manifest at various stages, including, during investigations, throughout the trial, or subsequent to the filing of charges, and may involve actions by the accused, witnesses, or other parties.

38. In *Republic v. Robert Kipkorir Tonui* (Criminal Case No. E001 of 2020), this court previously held that witness interference undermines trial integrity, regardless of timing, thus.

> " Judicial precedent has time and again held the view that interference with witnesses amounts to interference with the administration of criminal justice and is a compelling reason under Article 49 (i) (h) of the *Constitution*. In *R v Jackton Mayende & 3 Others* Bungoma HCCRC

No. 55 of 2009 (2012) eKLR Gikonyo J, while dealing with the question of interference with witnesses rendered himself thus:-

> "……
>
> (22) All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at the inception of the criminal charge in court, or during the trial; and can be committed by any person including the accused, witnesses, or other persons. The descriptors of the kind of acts which amount to interference with the witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused."

39. I do not agree with the defence counsel's argument that the passage of time does ipso facto mitigate against the threat to witnesses. The passage of time does not inherently reduce the risk of intimidation or interference. This trial being in its early stage, with no witness testimony yet presented, underscores the ongoing relevance of potential threats.

40. It is a factual misrepresentation to assert that threats against witnesses are necessarily most imminent around the time of the commission the offence. Threats can indeed occur at any point in the timeline of a case—prior to, during, or following the act, through the investigations, during the trial itself, and even post-trial.

41. Given the unpredictable nature of when and from where threats might arise, courts maintain the authority to implement protective measures for witnesses at any stage of the proceedings to ensure their safety and the integrity of the judicial process. This capability reflects the judiciary's recognition of the continuous and evolving nature of witness vulnerability.

42. From the analysis above, the likelihood to intimidate or interfere with the witnesses has been proved with sufficient evidence. Moreover, this is a case of public interest where a life was lost in the most heinous manner.

43. Article 24 of the *Constitution* appreciates that human rights can be limited. The provision sets out a limitation criteria that should be followed when limiting rights. The limitation is therefore a synonym for "justifiable infringement". The infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open democratic society based on human dignity, equality, and freedom. The right to bail and the right to liberty can therefore be limited when circumstances so demand. The Supreme Court of India echoed this position in *Masroor v state of Uttah Pradah* 2009(14) sec 286 where the Supreme Court of India stated;

> " There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the court. Nonetheless, such protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society, in general, have to be balanced. The liberty of an accused person would depend upon the exigencies of

the case. If possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned".

44. This case requires balancing the accused's right to liberty and bail against the administration of justice. It is my considered view therefore that he principles of justice and public interest outweigh the accused's right to liberty at this stage. The court must safeguard the trial's integrity by protecting witnesses and preventing potential interference.

45. In the circumstances, I decline the accused's application for bail. The accused shall remain in custody until after the two witnesses have testified. The accused is at liberty to revisit the issue of bail at that point.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF FEBRUARY 2025.

D. KAVEDZA

JUDGE

In the presence of:-

Mr. Monda, Ms. Gichui, Ms. Gachanja, Ms. Timoi for the state.

Mr. Maloba, Mr. Mingo, Ms. Obongo, Mr. Amalemba for the accused

Mr. Kimani Wakimaa, Ms. Perceline Omamo and Moses Tum for the victims

Accused – present

Achode – court assistant.