Republic v Rotich & 2 others (Criminal Case E022 of 2024)
[2025] KEHC 2368 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2368 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE E022 OF 2024

RN NYAKUNDI, J

FEBRUARY 17, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

ROSE CHEPKEMBOI ROTICH ..... 1ST ACCUSED

JAMLICK KIPTOON MOROGIT ..... 2ND ACCUSED

VINCENT NGOSOSEI KIPRONO ..... 3RD ACCUSED

RULING

1. Rose Chepkemboi Rotich, Jamlick Kiptoon Morogit And Vincent Ngososei Kiprono (accused persons herein) are charged with murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that on the 3rd day of October, 2024 at Elgon View Estate in Kesses Sub-County within Uasin Gishu County in the Republic of Kenya jointly murdered Samson K. Kandie.

2. The accused persons took plea on 12th November, 2024 and they denied the allegations against them; whereupon they made oral applications, seeking that they be admitted to bail pending the hearing and final determination of this case.

3. In response to the application by the accused persons to be accorded bond, the State through the investigating officer, P.C. No. 78788 John Kulecho filed an Affidavit dated 12th November, 2024 expressing the reasons why the accused persons should be denied bond. In a nutshell, the reasons elucidated were with regard to; the interference with witnesses, the safety and security of the accused persons and public interest of the case.

4. On 10th January, 2025, Mr. C.F Otieno watching brief for the victim's family also filed a Victims Report dated 9th January, 2025 wherein he stated that the victims in this case are the biological children of the

deceased and his biological children. Counsel outline them as follows; Rodgers Lagar (son), Collins Kibet Kandie (son), Kelvin Kipchumba Kigen (son), Viena Jepchirchir (daughter), Graig Kimurgor (son), Johnstone Kigen (brother), Nicholas Kimitei Kigen (brother) and Richard Kigen (brother).

5. Counsel stated that the vulnerable victims in this situation are Viena Jepchirchir (daughter) and Graig Kimurgor (son) who are the youngest children of the deceased and the 1st accused person and that they are also the ones who will be found at the deceased's home since they do not have an income of their own /and or property of their own.

6. The application was canvassed vide written submissions. The accused persons filed their respective submissions on 5th February, 2025 while the State filed on 4th February, 2025,

The 1st accused person's submissions

7. Learned counsel Mr. Momanyi for the 1st accused person cited Article 49 (1) (h) of *the Constitution* and Section 123 A of the *Criminal Procedure Code*.

8. Regarding the seriousness of the charge, learned counsel argued that although the accused person faces a charge of murder, which is a serious offence under our laws. All charges are bailable under our current constitutional dispensation. Counsel maintained that the charge is yet to be proved and the accused is deemed innocent till the contrary is established.

9. On the weight of the evidence so far adduced if the case is part heard, learned Counsel submitted that the said criteria is in applicable as the hearing of the matter is yet to commence.

10. Regarding the possibility of the witnesses being interfered with by the 1st accused, learned counsel submitted that the daughter of the accused has attempted to suggest that the 1st accused is likely to interfere with her as a witness if she resides in the matrimonial home with her. Counsel further submitted that it has been alleged that the accused made a phone call to her yet the phone number to which the call was made the time, month and year have not been disclosed either. Counsel submitted that the accused has denied through Affidavit ever making a call to her daughter and challenged her to state the time, month and telephone number to no avail. Counsel urged that the allegation is therefore unsubstantiated and that the witness statement of Viena Jepchirchir which has been attached to the accused's Affidavit does not in any way link the accused to the crime. According to Counsel, the said statement absolves the accused of any commission of a crime and there will be absolutely no basis for the 1st accused to tray and prevent her form testifying as her statement is not in anyway incriminating to her or any of the accused persons for that matter. Counsel added that the 1st accused has made a commitment to keep away from her daughter and the matrimonial home and that she opts to secure accommodation elsewhere since she is a civil servant and is on a salary and house allowance. Counsel submitted that she works at Kabarnet which is a reasonable distance away from Eldoret.

11. With regard to safety and protection of the accused if released on bail, Counsel submitted that none of the family members has threatened to harm the 1st accused if released on bail and her safety is therefore guaranteed and or is not in anyway threatened. Counsel reiterated that the accused will keep off the matrimonial home, the home in Flax and Elgon View. Counsel contended that the only reason why the brothers of the deceased oppose her release, is so as to enable them continue managing the deceased's estate and collect rent from the plots in Elgon View, Pioneer and Langas.

12. On whether the accused will attend trial, learned Counsel submitted that the accused will faithfully attend Court for the trial in the event she is released on bail and there is therefore no reason to fear that she may abscond.

13. In the end, learned counsel urged that no compelling reasons exist to militate against her release on bail pending hearing, Counsel relied on the holding in Republic V Sifuna, Criminal Case No. E0114 of 2023. Counsel further submitted that the accused ought to be released on bail so as to secure her job in Civil service and ensure that social justice and the preserve of her dignity. Counsel cited the case of Republic V Oonde & Another, Criminal Case No. E018 of 2024 in support of the case for grant of bail under Article 49(1) (h) of *the constitution*.

The 2nd accused persons' submissions.

14. As regards the 2nd Accused learned counsel Mr, Evans Oduor canvased the issues by way of written submissions dated 5.2.2025. Mr Oduor pointed out that the provisions of Article 49(1) (h) of *the constitution* and Section 123 of the criminal procedure Code should be interpreted purposefully by this court so as to not to limit the right to bail being sought by the Accused person. It was learned counsel contention that there are no compelling reasons in the cluster of interference with witnesses, the safety and security for the accused person and Public Interest in the case to warrant deny of bail. In buttressing the submissions to persuade this court to rule in favour of the accused he placed reliance in the following case law Edel Sum vs- Republic (2022)eKLR, Mohamood Chute Wote & 2Others vs Republic (2021)

The 3rd Accused submissions

15. My reading of the learned counsels submissions for the 3rd Accused prima-facie he took the queue and adopted the framework in greater detail with that of the learned counsel for the 2nd Accused. I find no reason to reiterate the same save to capture the torn for purposes of making a determination on the weighty issues surrounding Article 49(1) (h) of *the constitution* on whether the accused persons are eligible to bail at this stage of the proceedings.

Prosecution Submissions

16. Prosecution Counsel, G. Kirenge submitted that according to the Bail and Bond Policy Guidelines, in the consideration of granting bail or bond, a Judicial Officer must look into the Principle of the Rights of the Accused and the interests of justice:

> The State has a duty to prosecute those who commit crimes, which may entail safety between the time of arrest and trial of accused persons, and a duty to is convincing evidence that an accused person may undermine the integrity of interfering with the evidence, then a need arises to either deny such a person bail evidence that the accused person will endanger a particular individual (for crime, it also becomes necessary to subject an accused person to pretrial detention."

17. Counsel further submitted that the right of the victims also ought to be taken into consideration when making such a determination. The Policy gives victims of crime the right to have their safety and that of their family considered in determining the conditions of bail and release of the offender. Counsel urged the Court to be guided by the following cases; R. vs. Jaktan Mayende & 3 others, Republic v Sawe (Criminal Case E017 of 2023) [2024]KEHC 4256 (KLR) (16 April 2024) and Ndirangu V Republic (Criminal Case E014 of 2024) [2024] KEHC 15943 (KLR).

18. Counsel added that what the Court needs to determine in this particular case is whether the circumstances enumerated in the affidavit of the Investigating Officer as summarized above as well as the depositions made in the affidavits filed by the family of the victim as weighed against the depositions made by the accused and on his behalf have met this threshold.

19. According to Counsel, from the foregoing case Law as read together with the averments of Paragraph 7 of the Affidavit, the State has indeed proved that there are justifiable and sufficient grounds which have been adduced to deny the accused persons herein bond. Counsel urged that this Honourable Court disallows the application made by the Defence.

Determination

20. I have considered the application and the affidavit in opposition thereto as well as the submissions made.

21. The law on bail in our jurisdiction is well settled. The overriding objective in all bail application is that it is a right to entitle an accused person to right to liberty pending the hearing and determination of his or her trial. This right to bail underscores the presumption of innocence on accused person under Article 50(2) of *the constitution* until the contrary is proved by the prosecution adducing evidence to that effect. It is trite under Article 49(1) (h) of *the constitution* where there are no compelling reasons an accused person should be granted bail pending his or her trial. The seriousness of an offence though an important consideration in bail applications must be taken into consideration together with other relevant factors. In this respect, a trial court has to take into considerations our borders which have been held to be porous do provide alternative avenues of escape and tracking a suspect sometimes may prove a tall order for the security agencies. That is one condition presidents which cannot be ignored in appropriate cases where the interests of justice would be compromised if an accused persons is admitted to bail and given the seriousness of the offence he or she gets motivated to take flight from the jurisdiction of the court.

22. Article 49(1)(h) of *the Constitution* provides that:-

An accused person has the right... : -

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

23. *The Constitution* however has not identified what qualifies under the term "compelling reasons." The ordinary meaning according to Thesaurus English Dictionary of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping.

24. 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 therefore 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.

25. In S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), the Court held that:

> " The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will: -
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> i. endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
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> ii. not stand his or her trial or appear to receive sentence; or

iii. attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

iv. undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question... the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely: -

i. the period for which the accused has already been in custody since his or her arrest;

ii. the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

iii. the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

iv. any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

v. the state of health of the accused;

vi. any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be.

26. In S v Nichas 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in S v Hudson 1980 (4) SA 145 (D) 146 in the following terms;

> " The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."
>
> In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also Aitken v AG 1992 (2) ZLR 249 and Norman Mapfumo vs. The State HH 63/2008... The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the

temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

27. The discretion to grant bail under Article 49(1) (h) of *the constitution* as read with Section 123 & 123(A) of the *Criminal Procedure Code*, in the more serious offences like homicide must be exercised with extreme caution and care by the trial courts as its breach is in violation of Article 26 of *the constitution* on the right to life. The requirements of bail in our constitutional imperatives and statute law are nearly to secure the attendance of an accused person at his trial and one of the key thresholds to me made is whether it is probable that he or she will commit to appear in court until the conclusion and determination of the case. The determination of these issues involves a consideration of other factors such as the character of an accused, his or her personal circumstances, the seriousness of the offence, the severity of the punishment in the event of conviction, whether he or she is in gainful employment, the family status, whether he or she has a permanent residence within the jurisdiction of the court where he or she can be located by the investigating officers or guardians in the event he or she defaults to attend court when so required.

28. It is also the duty of the trial court to take into account the issues of whether there are reasonable grounds for believing that the accused before court if released on bail he or she will temper with witnesses or interfere with the relevant evidence or otherwise obstruct the course of justice. Therefore, this exercise of discretion remains a balancing Act by the session judge to consider fully all other related issues such as whether the accused is aware of the identity of the witnesses lined up to give evidence on behalf of the prosecution to establish existence or non-existence of facts as part of the evidential material to secure judgement under Section 107 (i) of the *Evidence Act*. The other crucial aspect to meet the tenets of compelling evidence has to do with the issues whether the accused is related to the witnesses and whether is probable that they may be influenced or intimidated by him or her before they take the witness box. If the answer to all this concerns is in the affirmative it would not be in the interest of justice to grant bail on accused person.

29. 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.

30. In Kelly Kases Bunjika vs. Republic [2017] eKLR, Muriithi, J was of the view that:

> " The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'...Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of *the Constitution* to refuse bail in the particular case."

31. Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 sets out the judicial policy on bail and bond at page 25 thereof 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.

32. In Kelly Kases Bunjika vs. Republic (supra) 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."

33. The prosecution have opposed the release of the accused on bail for various reasons as stated earlier. In Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR it was held as follows;

> " Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in *Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010*; His Lordship expressed the view that;
>
> 'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'
>
> Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."

34. In Republic vs. Joktan Mayende & 4 Others Bungoma High Court Criminal Case No. 55 of 2009 court defined the term "compelling reasons" as follows:-

> " 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*."

35. I have also considered the Probation Officer's Report filed in regard to the 1st, 2nd and 3rd accused persons. According to the said reports, it clear that the family of the deceased is still bitter about the whole incident and there is still animosity between them and the accused persons and that the local administration has certainly raised concerns about the safety of the accused persons. The prosecution was also of the view that the accused persons may interfere with witnesses and will be endangered if granted bail.

36. Based on the analysis of the defence and prosecution's arguments as well as the pre-trial report's recommendations, victim impact statements this court concludes that the prosecution and other actors have supplied sufficient strong and convincing arguments to support denying the accused persons jointly and severally from being released on bail under Article 49 (1) (h) of *the constitution* as read with Section 123(A) of the *Criminal Procedure Code* on the basis of the high chances of any one of them interfering with star witnesses set to testify at the trial. In the 2nd limb the allegation against the accused persons involves a violation of Article 26 of *the constitution* on the right to life. It cannot be gainsaid that the death if any one member of the family whether in unlawful or excusable circumstances, is something taken lightly by the victims. If in the event there is a perception that the release of Accused persons is an affront to the fair administration of justice the likelihood of them taking the law into their own hands to administer justice upon the suspects is not a matter which can be underestimated. Therefore, the right to the security and safety of the Accused persons is something this court must

undertake to guarantee during dependency of this trial. Thirdly, taking cognisance of the facts before this court this is a serious offence circumstances around the offence of homicide, the assertion by the accused person is to the effect that they could surrender and submit themselves to the jurisdiction of this court. That alone is not sufficient and credible enough for this court to exercise discretion in their favour given the borders to the East, Southern, Norther and Western Kenya, being easy escape routes for anyone of them to take flight from the jurisdiction of this court. As against the strong submissions by the defence, the nature and gravity of this offence is a key motivating factor of the likelihood of the accused person conspiring to interfere with the course of justice.

37. Where a crime is of highest magnitude, the evidence in support of the charge, strong and the punishment the highest known to the law, the court will not interfere to admit to bail. Where either of these ingredients is wanting, the court has a discretion which it will exercise. (See Ayo Olubusi VS C.O.P (1970) 2 ALL NLR 1 AT 4)

38. Accordingly, considering the circumstances of this case, I am satisfied that the accused persons ought to be denied the right to bail for want of solid proof to controvert the existence of compelling reasons relied upon by the prosecution and the victims of the offence. As a consequence, a pre-trial conference shall be held on 5.3.2025 to take cognisance of the matter and have it heard and determined within a reasonable time. It is worth noting that the accused persons shall be eligible for review of their right to bail under Article 49(1) (h) of *the constitution* during the pendency of this trial.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY 2025

R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Momanyi Advocate

Mr Oduor Advocate