



**Republic v Khamati & another (Criminal Case E038 of 2023)
[2025] KEHC 1355 (KLR) (Crim) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E038 OF 2023
AM MUTETI, J
FEBRUARY 5, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAUL AHUNO KHAMATI ALIAS MUKUNA ALIAS MUKUSH 1ST ACCUSED

MAUREEN NANJALA NEKELO ALIAS GRACE 2ND ACCUSED

RULING

1. The two accused persons have applied to be released on Bail pending trial.
2. The accused jointly face the charge of murder contrary to Section 203 as read with 204 of the [Penal Code](#).
3. It is alleged that on the 28/5/2023 at around 1900hrs at Matopeni Area in Kayole Njiru Subcounty Nairobi County they jointly murdered Newton Volegwa Kamara alias Ogutu alias Ogush.
4. The prosecution through No 71504 CPL Timothy Wanyama of DCI Kenya have opposed their release on Bail citing two reasons.

Compelling Reasons

5. In his affidavit on 11/7/23 CPL Timothy Wanyama has stated that the security of the two accused persons as a major concern considering that at the time of arrest the 1st were accused was severely beaten by the public and only survived the attack because the police officers who rescued him from the public arrived just in time.



6. According to the police officer the 2nd accused managed to flee from the scene immediately after the incident and that was how she managed to evade the irate members of the public.
7. The deponent has further deposed that the two accused persons are also likely to interfere with witnesses if released on bail thus the court should not release them on bail to avoid prejudicing the trial.
8. The two accused persons have not filed any affidavits in answer to the affidavit sworn by CPL Wanyama. Counsel for the accused chose to file written submissions for the court to consider.

Pre-bail Reports

9. The court received pre bail reports dated the 2/10/2023 and 27th October 2023 in respect of the 1st and 2nd accused persons respectively.
10. Mr. Albert Jaoko probation officer in his report regarding the 1st accused states that the accused person is not suitable for release on bail because the accused person is well known in the society and according to informants his family is known to have criminal tendencies.
11. The officer went further to state that there is fear that should the accused person be released on Bail there is the potential of interference with witnesses.
12. The officer who prepared the report further indicated that the investigating officer is apprehensive that the 1st accused might take flight to avoid trial. However, in the affidavit of CPL Wanyama there is no such indication thus the court will disregard that aspect of the report.
13. The probated officer has also stated that the 1st accused has no fixed abode in Nairobi and lacks a strong family bond at home.
14. In respect of the 2nd Accused the probation officer in her report indicates that she is not well known to the local administrator thus she could not get any useful information about her from the administration.
15. The officer has also highlighted that the deceased's family is still hurting from the loss of their kin and are opposed to the release on Bail of both accused.
16. The officer has also indicated that there is real fear of interference with witnesses since they are known to the accused persons.
17. The probation officer however recommends the 2nd Accused person be considered for release on Bail.
18. In respect of the 1st Accused the report recommends that he should not be released on Bail.

Analysis and Determination

19. The two accused persons through the respective counsel have argued that Bail is a Constitutional right under Article 49 of the [Constitution](#) thus the court should be pleased to grant both accused persons bail.
20. Counsel for the first accused has urged the court to disregard the claim by the prosecution that the accused person is likely to interfere with witness.
21. According to counsel for the 1st Accused the fact that the accused persons and the witness have within the same neighborhood should not influence the mind of this court in absence of tangible evidence actual interference. In support of the argument, the counsel has cited the case of [Republic v Dwight Sagaray & 4 others](#) [2013] eKLR in which the court held that the prosecutor should provide material



evidence in support of allegations touching on witness interference. The 1st Accused counsel went further to submit that the threat of interference must be real not just speculative.

22. On the issue of the security of the Accused person upon release on Bail the 1st accused's counsel has urged that the 1st accused is prepared to relocate from the current location to Kangemi or Kawangware once released on Bail.
23. Counsel urged that it is the duty of the state to protect life and as such the state cannot be heard to argue that the security of an individual is likely to be prejudiced knowing too well that it is its responsibility to secure all persons and their property.
24. Counsel for the 1st Accused cited the case of *Republic v Benson Waweru* (2021) eKLR to emphasize the duty of the state in ensuring the safety of all.
25. The 2nd Accused on her part has indicated that the sister is prepared to accommodate and take care of her. That features prominently in her prebail report. She is also said to be ailing thus in need of care outside prisons. Her condition has been indicated to be one that requires a special diet for management.
26. The two accused persons are man and wife.
27. It is submitted that following their incarceration, their only child has had to be placed in a children's home at Ruai.
28. The 2nd Accused's counsel has further submitted that the safety of the Accused persons through important should not be casually raised as a ground for denying an accused person bail. Counsel cited the decision of Justice Gikonyo in *Republic v Gibson Kiplangat Bett* (2022) eKLR in which he stated:-

“I have lamented before; this ground is disturbing as it depicts a society of the ruffians or Mahocks whose talent was to use all manner of cruel and torturous methods to inflict as much pain as possible and to kill anyone found in their way. Such was a society without law and order. But, the community herein is within the territorial jurisdiction of the Republic of Kenya- a nation governed by the rule of law and order under the *Constitution* of Kenya, 2010. I wonder where the said community derives its authority to harm or kill a suspect under trial. No one is above the law or should take the law in their hands. All are bound by the *Constitution* which reigns. See article 2 of the *Constitution* which declares the Supremacy of this Constitution thus: -

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.”

29. The 2nd Accused urges the court to consider that she is entitled to protection by the state and that there is no evidence of threats to her life and the fact that her husband was assaulted at the time of arrest should not be a reason to have her denied bail.
30. Counsel for the 2nd Accused has further submitted that the reasons advanced by the prosecution for denial of Bail do not meet the test set under Article 49 (1) (h) of the *Constitution* of Kenya and this court should consider releasing the accused persons on bail.
31. The court has keenly perused the affidavits the investigator CPL Timothy Wanyama. In his affidavit the said investigator does not address himself to the cardinal question of flight risk which in my view ranks first in considering applications for Bail under our present constitutional architecture.
32. The duty of the state in opposing bail is that it must be demonstrated to the court that in all probability, if an accused person is released on bail, they are most likely not to turn up for trial.



33. If the state establishes the risk of flight the court need not even focus on other grounds since the predominant purpose of bail is to ensure that the accused person continues to enjoy his right to liberty but return to court for trial as and when required to do so. See Republic v Danson Mgunya & another [2010] eKLR in which Ibrahim J (as he then was) held:-

“In our Constitution it is stated expressly, positively and unequivocally that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial. This means an accused must be released on bail or bail on reasonable conditions. The only exception or fetter to this right is that there must be “compelling reasons not to be released” . The court must therefore exercise its discretion with this in mind – “existence of compelling reasons.” I do hold that if the prosecutor objects to the release of the Accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused person to prove or at least demonstrate the existence of the “compelling reasons”. This is the correct procedure as stated by Justice J. Katsala in the Malawi case when he stated:

“..... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to release from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order.” I am persuaded by the aforesaid interpretation and principles of law.

34. The state therefore bears the onerous duty of establishing that if the accused person is released on Bail the person may not turn up for trial.
35. In the instant case the state has not addressed the issue of flight at all in the affidavit and the mention of that possibility in the probation officers’ report is not convincing at all.
36. The court perfectly understands the victims’ family could still be hurting as a result of the loss of their kin. However, that is not one of the grounds for consideration by a court in determining applications for Bail.
37. Death is not a light matter and people are deeply hurt by the demise of their kin. To expect otherwise would be an unreasonable expectation on the part of the court or any other reasonable right thinking member of the society.
38. A court should never allow emotions of parties to cloud its mind in making its decision whether or not to grant bail. Objectively must reign supreme. It should thus not be taken that a court is insensitive to the family of a deceased person whenever it releases an accused person on Bail.
39. At all times the presumption of innocence under Article 50 of the Constitution must be borne in mind in determining bail applications pending trial and a delicate balance must be struck by the trial court to ensure that the presumption of innocence does not remain a mere aspirational concept in our criminal justice system. It must be apparent in all decisions taken by the court during the hearing. It is through upholding that principle that the right to a fair hearing will attain its full meaning and effect.



40. The prosecution has indicated that the accused persons are likely to interfere with witnesses. However, the witnesses likely to be interfered with have not been indicated thus the statement is bare.
41. The contention of witness interference must not be based on pure speculation. It should be founded on tangible evidence. It would greatly have assisted this court if the prosecution identified those witnesses and disclosed the basis of their fear.
42. The prosecution must go beyond mere allegation and present evidence that puts the accused person and the witnesses in a clear position of interference of a likelihood of interference.
43. For instance, the court would have understood the prosecutions concern if there was evidence that the accused persons either by themselves or proxy have attempted to reach out to the witnesses to dissuade them from appearing to give evidence. None of that has been shown.
44. I find and hold that in the absence of such evidence this court is not persuaded that the ground has any merit. I find the allegation by the prosecution unsubstantiated and thus lacking in substance and merit.
45. It is the position of this court that the fear by the prosecution is unfounded and this court will nevertheless issue conditions to the accused to alleviate the same.
46. As regards the safety of the accused persons this court is not prepared to accept a proposition that the public is likely to set upon the accused once released on Bail and harm them.
47. The state by suggesting so would basically be telling this court that the citizens of this country have the unchecked authority to inflict punishment upon those that they suspect of being involved in crime. It would be a very dangerous proposition in my view. The public must know that those that the state puts on trial on whatever charges remain innocent throughout their trial until the court pronounces itself in their guilt.
48. It is not open to members of the public to usurp the role of the law enforcement agencies and seek to administer instant injustice in the name of “mob justice”. To countenance this would be to encourage lawless and courts would be accepting an invitation to embolden the public into wrong doing.
49. The state must honor its obligation to protect its citizens at all times. The accused persons also must also upon release on bail avoid conduct that may provoke public anger from the victims of crime.
50. Civility should be the guiding pillar to the accused persons and they must allow the criminal process to take its course. The victims must equally be reminded of their duty to respect and uphold the law at all times. It is the system of justice that we gave unto ourselves on that 28th day of August 2010 through the promulgation of the *Constitution* of Kenya 2010.
51. We must all accept that the current constitutional dispensation is the best gift Kenyans gave themselves making all offences bailable in Kenya.
52. The many years persons would spend in pre-trial detention only for them to be acquitted at the end of the day must remain a constant reminder of the importance of upholding the provisions of Article 49 (1) (h) and release those that must be released on bail pending trial.
53. In the end this court finds that there are no compelling reasons presented by the state to warrant a denial of bail. The two accused persons are hereby admitted to bail in the following terms:-
 - a. Each accused person shall be released on a bond of Kshs 500,000 plus 1 surety of similar amount.



- b. The accused persons shall not during the subsistence of these proceedings contact any of the prosecution witness or any manner seek to interfere with them.
- c. The accused person shall only engage the victims' family through counsel should they desire to pursue any alternative form of justice mechanism.
- d. The accused persons shall reside within Nairobi at an identifiable location by the Investigating officer. The accused persons to provide the details of residence during the approval for bond and surety.
- e. The accused persons should provide contact of persons that the investigators can reach out to in the event they require the attendance of the accused persons.
- f. The accused persons shall provide their telephone contacts and those numbers must remain active throughout the trial and in case of any change the accused persons shall notify the court and the investigating officers.

54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the Presence of:-

Kiptoo: Court Assistant

Ms Njoroge for the state

Ms Mbuvi absent for the 1st Accused

Ongangi holding brief Nyabira for 2nd Accused

1st & 2nd Accused present

