



REPUBLIC OF KENYA



**Ngoso v Republic (Criminal Case E037 of 2024)
[2025] KEHC 6419 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E037 OF 2024
RM MWONGO, J
MAY 21, 2025**

BETWEEN

JENESIO FUNDI NGOSO APPLICANT

AND

REPUBLIC PROSECUTION

RULING

Background

1. The applicant faces the charge of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence are that on 12th November 2024 at Irabari village, Kithunthiri location in Mbeere south subcounty within Embu County, the accused murdered Gladys Thaara Nthiga. The accused pleaded not guilty and the plea was duly entered.

The Application

2. He filed a notice of motion dated 21st March 2025 seeking that the Honourable court be pleased to grant him bail/bond terms. The application is based on the provisions of Article 49(1)(h) of *the Constitution*. The applicant stated that he will be committed to the terms set by the court and avail himself to court for the trial. That there are no compelling reasons for the accused to be denied bail/bond.

Response

3. The application was opposed through an affidavit sworn by CI Janet Akelo, in which she deposed that the applicant is not only a local flight risk, but he is also a person known to have violent tendencies. He is the only surviving parent to his children, who are possible witnesses, thus, he has direct influence over them. He asked the deponent not to allow his children to testify in the case. She stated that if the



applicant is released on bond, the community is ready to lynch him and his mother. ggThus, it is in his best interest for bail to be denied.

Hearing of the Application

4. At the hearing of the application, counsel for the applicant submitted that the names of the minors (key witnesses) have not been revealed and that there is no proof that the applicant is violent or that he will interfere with witnesses. That several months have passed since the offence was committed, meaning that the applicant's security is not an issue if he is released on bail. He stated that there is not enough evidence to deny bail/bond. He urged the court to grant bail of Kshs.100,000/= plus bond of Kshs.1,000,000/= with 2 sureties.
5. The prosecution submitted that the names of the minors were not disclosed to protect their identities. That if the applicant is release on bail/bond, there is the risk of him interfering with the witnesses and he might be attacked by members of the public. It urged the court to consider this as a compelling reason to deny bail for the safety of the applicant. The prosecution stated that they will be amenable to release of the applicant on bail after key witnesses in the case have testified and once the probation officer's report is filed confirming that the community is more receptive of the applicant.

Pre-bail Probation Officer's Report

6. The Probation Officer's report is dated 02nd April 2025. In it, the applicant is portrayed as a husband and father to a young family. The local administration vouches for the applicant as a peaceful member of the community and was surprised to hear about the offence. The victim's family is reported to be ready to avenge the death of their kin by lynching the applicant if he is released on bail. Part of the community views the applicant as a drug dealer and peddler. The report recommends that the applicant may be released on strict bond terms.

Issue for Determination

7. The issue for determination is whether the applicant should be released on bail/bond.

Analysis

8. An accused person is presumed innocent until proven guilty and thus has a constitutional right to bail unless there are compelling reasons. This is the underlying basis for bail applications. Bail and Bond Policy Guidelines recommend that:

“The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.”

9. However, the right to bail is not without limits as provided under Article 49(1)(h) of *the Constitution* which provides for the right to bail pending trial as follows:

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



10. The court may deny bail under certain circumstances and where the court is satisfied that there are compelling reasons to deny bail. Section 123A of the Criminal Procedure Code provides instances where bail may not be granted, 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 fulfillment 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.”

11. The Bail and Bond Policy Guidelines provide guidance on factors the court may consider in assessing whether or not to grant bail. They are, inter alia;

- a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
- b. The strength of the prosecution case.
- c. The character and antecedents of the accused person.
- d. The failure of the accused person to observe bail or bond terms.
- e. The likelihood of interfering with witnesses.
- f. The need to protect the victim or victims of the crime.
- g. The relationship between the accused person and the potential witnesses.
- h. The best interest of child offenders.
- i. The accused person is a flight risk.
- j. Whether the accused person is gainfully employed.
- k. Public order, peace and security.
- l. Protection of the accused persons.

12. With this in mind, it is noted that the deceased is the accused's wife. The children of the deceased are likely to be witnesses in this case. This relationship between the accused and possible witnesses is a strong factor to consider given that he is their father. The investigating officer's apprehension that the



applicants will interfere with witnesses, cannot be ignored. In fact, it may well be a compelling reason to deny bail pending trial.

13. A compelling reason is not merely an allegation. In the case of Michael Juma Oyamo & another v Republic [2019] KECA 953 (KLR) the Court of Appeal adopted the meaning of the phrase “compelling reasons” as was stated in the case of R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 where the Learned Judge held as thus; -

“..... 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 standards set by *the Constitution*.”

14. Previous courts have addressed themselves on the issue of whether interference with witnesses is a compelling ground to deny bail. In the case of Republic v. Gerald Mutuku Nyalita & Another (2015) eKLR it held that; -

“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 relationship 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 as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant...” [Emphasis added]

15. Similarly, in the case of Republic v Patrick Ntarangwi [2020] KEHC 2140 (KLR), the court held that:

“In considering the question of bail or bond, the court should balance the right of an accused, pursuant to the presumption of innocence, to be released on bail pending his trial against the public interest of prevention of crime and the right of the victims to access to justice. The right of the victims to access justice no doubt will be gravely affected if the prosecution witnesses are interfered with.”

Conclusions and Disposition

16. In my view, this is one of the few cases where because of exceptional circumstances, the accused should not be granted bail at this time. In any event, bail can be granted after hearing of the evidence of family members who are vulnerable.

17. This is in line with the Bail and Bond Policy Guidelines, thus:

“4. 36 Courts shall inform accused persons of their rights to apply for review of bail decisions and conditions. Bail decisions and conditions should be reviewed on a regular basis, as the circumstances of the accused person and the case change.”



18. Accordingly, the application is dismissed. Bail shall be reviewed after key witnesses testify and it is ordered that their evidence is fast-tracked.

19. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21ST DAY OF MAY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Accused Present in Court.

Mr. Githinji holding brief for Kimanzi for Accused.

Ms. Nyika for the state.

Francis Munyao - Court Assistant

