



**Mwangi v Republic (Criminal Case E007 of 2023)
[2024] KEHC 739 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE E007 OF 2023
GL NZIOKA, J
JANUARY 17, 2024**

BETWEEN

FREDRICK NGARUIYA MWANGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, (Cap 63) of the Laws of Kenya. The particulars thereof are that, on the 12th day of April 2023 at an unknown time at Kamathatha within Gilgil Sub County, murdered Peris Murugi Wairiuko.
2. He pleaded not guilty and the case is partly heard. By a notice of motion application dated 2nd May 2023, he seeks for the following prayers:
 - a. That this Honourable court be pleased to release the applicant/accused on reasonable cash bail pending the hearing and determination of this matter.
 - b. That in the alternative to prayer a, that this Honourable court be pleased to release the accused on reasonable bond terms pending the hearing and determination of this matter.
 - c. That this Honourable court do make any other order it deems fit in the circumstances.
3. The application is based on the grounds thereto and the affidavit of even date sworn by the applicant wherein he avers that, he was arrested on 1st May, 2023 and remanded in police custody up to 26th May, 2023 when the police completed their investigations and he was arraigned in court.
4. That, under Article 49(1)(h) of the *Constitution*, he has an automatic right to bail and bond unless there are compelling reasons to deny him the same, and further he has a right to be presumed innocent until proven guilty. That, the prosecution has not adduced any cogent and/or compelling reasons for the court to deny him reasonable bail and bond terms.



5. He averred that, he is not a flight risk as he has a fixed abode at Karagita Area where he resides with his two children. Further, he is their sole breadwinner as they depend on him for their needs and education, and in the circumstances being in custody shall leave them destitute and desperate.
6. Furthermore, he will not abscond the jurisdiction of the court but will attend court at all times when required to. Additionally, he shall not interfere, intimidate or threaten any witness, and in any case, he has cooperated with investigations. That the prosecution case will not be prejudiced if the application is granted.
7. Further still he is not in a position to continue pursuing his career as a businessman due to the nature of the charges against him. He urged the court to grant him reasonable cash bail or in the alternative bond term.
8. However, the application is opposed by the respondent vide a replying affidavit sworn by; No. xxxx PC(W) Mutinda the investigating officer who avers that the deceased, who was the accused's wife, went missing on the 12th April 2023 while travelling with the accused. That, on 14th April, 2023 an unidentified body was recovered at Kamathatha area, Gilgil Sub County and preserved at Gilgil Sub County Hospital mortuary.
9. On the 22nd April 2023, at around 2200Hrs, the accused together with family members identified body as that of this wife and agreed to meet again the next day, 23rd April 2023 to confirm the identification. However, the following day the accused did not turn up at the mortuary and failed to respond to the family members calls.
10. That, a post mortem was carried out and the pathologist was of the opinion that the deceased died as a result of bleeding from injuries to the body using a knife and blunt object.
11. That the accused resurfaced at his home on the 27th April 2023, and claimed that he had travelled to Emali for prayer. On the same day, the accused together with his relatives travelled to Wanyororo in Nakuru for burial arrangements. Once again, the accused disappeared and only resurfaced on 30th April 2023 at his residence in Naivasha Karagita.
12. It was urged that the behaviour and conduct of the accused after the identification of the body, the outcome of the autopsy and refusal to participate in the burial arrangements raises suspicion and made him a suspect leading to his arrest on 1st May 2023.
13. Further, there are crucial witnesses among them a tenant and a neighbour of the accused and its highly likely that, the accused might interfere with them. Furthermore, the accused being a businessman who operates in Taveta at the boundary of Kenya and Tanzania, is a flight risk likely to abscond and/or disappear completely.
14. Upon considering the arguments by the parties, the court ordered for a pre-trial report. The report was availed and states that both the accused parents are deceased. He is 53 years old and the fifth born out of eight siblings. He was born in Nakuru, Ndunduri village. That he completed his O levels examinations and engaged in casual jobs for three (3) years before starting his own business of selling clothes along Mombasa Road, Emali and Loitoktok towns which he was doing prior to his arrest
15. That the accused moved to Naivasha, Mirera village where he built his home and lived with his family prior to his arrest. That he was married to the deceased and have two children age 22 and 18 years old. That, one is in University while the other child is in form four.



16. It states that the accused family is able to raise bail and bond however, they cannot guarantee that the accused will present himself to court, in that he has a habit of disappearing and being out of reach on his phone.
17. The victim's mother and brother stated that the family held discussions and they are opposed to the accused being granted bail as he is a flight risk especially taking into account that he carries out business in some of the country's border towns.
18. The area chief, Hells Gates stated that he does not know the accused but has never received any reports of misconduct by him. That, he only learnt of the offence from members of the community. Further, that there is no threat or hostility expressed to the accused's life.
19. The Probation Officer, Ms. Njeri Kahumba, was of the opinion that there is minimal likelihood of the accused interfering with witnesses as the offence was reported in Gilgil whereas the accused resides in Mirera. She concluded that while the accused has a positive home report he was a flight risk and recommended that the accused be granted stringent bail and/or bond terms
20. I have considered the application, and find that Article 49 (1) (h) of the [Constitution](#) states that: -
 - “ An arrested 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”.
21. Similarly, Article 50 (2) (a) of the [Constitution](#) states as follows: -
 - “(2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved.”
22. In the same vein, section 123 of the [Criminal Procedure Code](#) empowers the court to admit an accused person to bond or bail on reasonable terms and states as follows: -
 - “(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
 - (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
 - (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced”.



23. Pursuant to the aforesaid, section 123A provides that: -

- “(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”.

24. Finally, Paragraph 4.9 of the *Kenya Bail and Bond Policy Judiciary Guidelines*, stipulates factors to be considered by the court when deciding with whether to grant or deny bail/bond and includes:

- 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. Character and antecedents of the accused person.
- d. The failure of the accused person to observe bail or bond terms.
- e. Likelihood of interfering with witnesses.
- f. The need to protect the victim or victims of the crime from the accused person.
- g. The relationship between the accused person and potential witnesses.
- h. Child offenders where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
- i. The accused person is a flight risk.
- j. Whether accused person is gainfully employed.
- k. Public order, peace or security, whether the release of an accused person will disturb public order or undermine public peace or security.
- l. Protection of the accused person. Whether pre-trial detention is necessary to protect the accused person.

25. To revert back to this matter I find that although accused avers that he is not a flight risk, the investigating officer has deposed to the contrary and her averments are supported by the accused's own



family members who have categorically stated that he should not be released on bond for the reasons stated in the pre-bail report and referred to herein, that he is a flight risk.

26. Similarly, the victim's family has opposed the release of the accused on bail on the grounds inter alia that he is a flight risk. The Area Chief does not know him well
27. As such it is unsafe to release the accused on bail without guarantee that he will turn up for the trial, which is one of the key issues to consider in a bail/bond application. Further without the support of the family members, supervision to ensure he attends court will be difficult.
28. The upshot of the aforesaid is that the application for release of the accused on bail/bond pending hearing and determination of the case is declined and dismissed accordingly.

DATED, DELIVERED AND SIGNED ON THIS 17TH JANUARY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Ndiema for the State

Wesonga holding brief for Bogongo for the accused

Accused present virtually

Ms Ogutu: Court Assistant

