



**Musau v Republic (Criminal Case 002 of 2024)
[2024] KEHC 122 (KLR) (10 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 002 OF 2024
SM MOHOCHI, J
JANUARY 10, 2024
RULING ON BAIL**

BETWEEN

NICHOLAS MUSYOKA MUSAU APPLICANT

AND

REPUBLIC ACCUSED

RULING

1. The Applicant, Nicholas Musyoka Musau is charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Upon taking today, her counsel Mr. Mongeri applied that he be admitted to bail pending trial. The Respondent through the Office of the Director of Public Prosecutions (DPP) Mr. Okachi sought for time to conclude the investigations having obtained 21 days from the 14th December 2022 and that the investigations are incomplete and that they require a further 14 days to conclude investigations with regards to “grievous harm” offences for witnesses still in hospital. And that it will not be possible to obtain the witness statements while they are still recuperating file an affidavit in opposition to the bail application.
2. Consequently, the Respondent filed an affidavit sworn on 10th January, 2024 by Ms. Judith Kawira Kinyua of IPOA Nakuru office who introduces herself as the investigating officer in the matter.
3. Ms. Judith Kawira Kinyua depones that when the offence took place on the 13th December 2023 two victims were fatally injured while two (2) other victims survived gunshot injuries and are undergoing treatment at the Nakuru Level V Hospital.
4. That if the Accused is admitted to bail/bond “there is a high likelihood that he shall interfere with witnesses bearing in mind he the accused is a police officer.



5. That immediately upon the commission of the offence the accused was attacked and assaulted by members of the public and that for this reason he should be denied bail for his own personal security.
6. That the Accused is a flight risk and he is likely to desert duty and abscond owing to the gravity of the offence.
7. Mr Okachi for the Respondent further submitted that , the Applicant has a history of being vicious and wild and if released on bond might thus interfere with witnesses and that the mental assessment report dated 19th December 2023 fortifies his assertion
8. In making the application for the release of the Applicant on bail, his advocate submitted that he has a right to bail. According to counsel, the claim that the Applicant is likely to interference with witnesses is a mere allegation as no evidence of threatening the witnesses or any conduct the accused has undertaken in this regard. Counsel for the Applicant further submitted that the Applicant is not a flight risk and he is a police officer currently transferred to Naivasha and her has a known place of abode. The Court was therefore urged to admit the Applicant to bail on reasonable terms.
9. Through its affidavit, the Respondent advanced two grounds in opposition to the application for bail; that the Applicant is a flight risk and that he is likely to interfere with witnesses, there has been no expounding and the evasions remain merely as such.
10. The question to be answered in this ruling is whether the Respondent has established compelling reasons warranting denial of bail to the Applicant.
11. Article 49(h) of *the Constitution* entitles every accused person 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.”
12. Section 123A (1) of the *Criminal Procedure Code* provides, the factors to be taken into consideration in determining an application for bail as: the nature or seriousness of the offence; the character, antecedents, associations and community ties of the accused person; the defendant’s record in respect of the fulfillment of obligations under previous grants of bail; and, the strength of the evidence. According to Sub-section (2) of the same Section, an accused person can only be denied bail if he has previously been granted bail and failed to surrender to custody or where it is necessary for him to be kept in custody for his own protection.
13. Similarly, the Bail and Bond Policy Guidelines provides for considerations that ought to be taken into account when determining an application for bail, by an accused person. Those factors are:the nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty;the strength of the prosecution case;the character and antecedents of the accused person;the failure of the accused person to observe bail or bond terms; the likelihood of interfering with witnesses;the need to protect the victim or victims of the crime;the relationship between the accused person and the potential witnesses; the best interest of child offenders;whether the accused person is a flight risk;whether the accused person is gainfully employed;public order, peace and security; and,protection of the accused person.
14. In *Nganga v Republic* [1985] KLR 451, Chesoni, J (as he then was) observed that:

“ Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions (section



72(5)) generally in principle, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that;

- (a) the accused will fail to turn up at his trial or to surrender to custody; or
- (b) the accused may commit further offences; or
- (c) he will obstruct the course of justice.

The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether or not the accused will attend his trial."

15. The scenario painted before this Court is one of a hostile environment where the life of the Applicant will be at risk if she is allowed back to the community. The right to bail of the Applicant must be viewed alongside his right to life.
16. No cogent evidence has been presented in support of the averment that, the deprivation of the Applicant's liberty shall be in his best interest and for his personal security
17. The Respondent has also alluded to the possibility of the Respondent interfering with witnesses in this case. In the affidavit of the investigating officer, the Applicant is alleged to have sent threatening messages to the one of the witnesses. In response, counsel for the Applicant denied the allegation and submitted that no evidence was placed before this Court in support of the allegation.
18. I note that, the affidavit filed by the Respondent in opposition to the Applicant's bail application was not rebutted through cross-examination or a replying affidavit. The Respondent has made its case under oath, this Court is inclined to consider the assertions made by the investigating officer in his affidavit. The averments have not established the likelihood of the Applicant interfering with the witnesses and remain hollow assertions.
19. The conclusion I arrive at is that the Respondent has not established compelling reason(s) as to why the Applicant should not be admitted to bail, the Respondent's objection of the Applicant to be admitted to bail claims it is for time to conclude investigations in 14 days without providing any specificity on the actual investigations to be conducted.
20. In the circumstances, the Applicant's application for bail is of merit, however this court shall order and direct the Probation department to undertake requisite interviews and prepare a "re-bail Report within 7 days from today.
21. In the upshot this court finds this Application for bail to be of merit and the same is accordingly allowed upon the following terms and conditions;
 - i) A Pre-Bail Report be prepared and filed within the next 7days from today.
 - ii) The Accused shall be held in police custody at the Lanet Police Station to await the setting of bail/bond terms.
 - iii) Mention for setting Bail/Bond Terms shall be on the 17th January 2023.

It is so Ordered.



**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 10TH JANUARY
2024**

MOHOCHI S.M

JUDGE

