



REPUBLIC OF KENYA



**Republic v Selote (Criminal Case E020 of 2023)  
[2024] KEHC 1314 (KLR) (22 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1314 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE E020 OF 2023  
DO CHEPKWONY, J  
JANUARY 22, 2024**

**BETWEEN**

**REPUBLIC ..... RESPONDENT**

**AND**

**NO.81135 CPL KIPKURUI SELOTE ..... ACCUSED**

**RULING**

1. The accused is charged with the offence of Murder contrary to Section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya.

The particulars of the offence are that:-

“On 20<sup>th</sup> November, 2028 at Thika Section II area Thika West Sub-county within Kiambu county murdered Cornelius Musili Kilee”.

2. An inquest was conducted to establish the cause and circumstances of the said death and on 26<sup>th</sup> July, 2021, the accused was culpable for the death of Cornelius Kilee which led to him being charged for the offence of Murder before this court.
3. The accused has, vide a Notice of Motion Application dated 25<sup>th</sup> September, 2023 filed under Article 49(1)(h) and 50 both of the Constitution and Section 123 of the Criminal Procedure Code sought for the following orders:-
  - a. Spent;
  - b. Spent;
  - c. That the Applicant herein be admitted to bail and or bond on reasonable terms pending trial.
  - d. That the cost of the application for provided for.



4. The Applicant is based on the grounds set out on its face and the Supporting Affidavit of Kipkurui Selote Soo sworn on 24<sup>th</sup> September, 2023, as follows:-
  - a. That on 19<sup>th</sup> September, 2023, the Honourable Court made an order remanding the Applicant/Accused person herein, after he voluntarily presented himself before it.
  - b. That, there are no compelling reasons to warrant the accused person herein being denied release on bond and/or bail.
  - c. That, the order detaining the Applicant/Accused person herein was complied with and the Applicant has been in custody since then, the liberty of the Applicant has been curtailed hence his constitutional right to bail under Article 49(1)(h) of the Constitution is at stake.
  - d. The Applicant herein is not a flight risk since he is a serving Police Officer and has been co-operating with the investigators.
  - e. The Applicant will not interfere with the witnesses and or evidence.
  - f. The Applicant has no previous records.
5. The family of the deceased filed a Replying Affidavit which was sworn by Margaret Mutiso Kilee on 3<sup>rd</sup> October, 2023, wherein she holds that although the right to bail is provided for under *the Constitution*, the same is not an absolute right as it can be denied where compelling reasons are demonstrated. According to the deponent, the Accused is a Police Officer stationed in Thika where the deceased's family reside and there is a likelihood that since he is familiar with the area and has access to facilities, he is likely to interfere or intimidate witnesses if he is released on bond.
6. She further argues that the accused was present during the inquest and he is aware of the all the witnesses who are expected to testify including the evidence that will be presented against him before court, hence the likelihood of him interfering with witnesses or the evidence.
7. She contends that in the inquest proceedings, the court held that there were various attempts to cover up the murder by manipulation of the investigation process since the ammunition and magazine which had been taken for ballistic examination went missing, and the original police investigations file with exhibits also disappeared.
8. She further holds that the accused is likely to be flight risk having absconded court since June, 2023 when he failed to honour court summons and even absconded from his work whereby he was declared a deserter of National Police Service. She argues that since the Accused has already delayed the case which had been mentioned several times pending his arrest and if he is released he will cause a further delay in the conclusion of the case.
9. She contends that if at all the court is inclined to grant bail/bond terms then the same should be in strict terms s as to prevent any delays or interference with witnesses or evidence. She urges that the Application should be dismissed.
10. The Respondent also filed Replying Affidavit which was sworn by Paul Njihia Karung'o, an Investigator under the Independent Policing Oversight Authority on 29<sup>th</sup> September, 2023. He opposed the application for bail while arguing that the right to bail is not an absolute right but in a matter of court's discretion.
11. He contends that in the instant case the Accused person is a Police Officer charged with the offence of Murder and who was summoned to appear in court 21<sup>st</sup> June, 2023 but failed to appear and a warrant of arrest was issued. He holds that the accused also failed on report to duty on numerous occasions which



was marked under OB No. 13/10/07/2023, 46/12/07/2023, 13/21/07/2023 and was consequently declared a deserter under the National Police Service, which makes him a flight risk.

12. Also, the Respondent argues that the post-mortem report of the deceased showed that the deceased died from a gunshot from a gun which belonged to the accused, an indication of a premeditated intent of murder which is one of the elements required in proving the offence of Murder. Further, it is the Respondent's argument that owing to the serious nature of offence and grave consequence thereof, the Accused is likely to abscond if he is released on bail/bond terms. He thus urges the court not to release the accused until key prosecution witnesses have testified.
13. The court called for a social inquiry to be conducted on the accused and a pre-bail report was filed on 19<sup>th</sup> December, 2023 for its consideration. According to the information in this report, it is stated that the accused is 46 years old, a husband and father to four school going children. It is also stated that the accused is from a cohesive family which is concerned with his welfare and has a fixed abode at Tabaino in Bomet where he will reside during trial process if granted release on bail/bond terms. From the report, it is stated that the accused understands the seriousness of the offence and seeks lenient bail and bond terms with the assurance that the wife and his brother are willing to stand as his sureties.
14. With respect to the family of the victim, it is stated that they are traumatized by the loss of their kin who died in the hands of a Police Officer, a person expected to protect lives. The family is opposed to the accused being granted bail and bond terms citing possible interference with the trial process. According to the family of the deceased, the accused is a flight risk as he failed to honour court summons before, the same sentiments expressed by the Investigating Officer.
15. In her recommendations, the Probation Officer has stated that the court may admit the accused person to bail/bond after key witnesses have testified.

### **Analysis and Determination**

16. Having read through the application, the grounds raised by the parties in their respective pleadings for and against the prayers being sought alongside their written submissions cited statute and case law and pre-bail reports filed in respect of the accused person. I find the issue for determination being whether or not the accused should be granted release on bail/bond. Article 49(1)(h) of *the Constitution* provides 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.’
17. From its provision, the release of the arrested person on bail/bond terms is a right guaranteed by *the Constitution* unless or until compelling reasons are demonstrated to warrant the denial of bond/bail.
18. Section 123 of the *Criminal Procedure Code* also provides for bail to be availed to suspects in all criminal cases at all times or any stage of the proceedings.
19. In every application for bail/bond terms, what a court should consider are whether the reasons tendered by the opposing party are compelling enough to warrant an accused be denied release on bond/bail. The court in the case of *Republic -vs- Joseph Thiongo Waweru & 17 Others* [2017]eKLR, defined ‘compelling reasons’ as follows:-

“The Constitutional standard for denying bail is “compelling reasons” test. The burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify



denial of bail. Our emerging jurisprudence on the question is clear as to the kind of evidence needed to establish the “compelling reasons”. The evidence presented must be “cogent, very strong and specific evidence” and that mere allegations, suspicions, bare objections and insinuations will not be sufficient.”

20. There is no denying that the liberty of an individual is precious, hence the need for the courts and constitution to jealously and zealously guard or protect the same. This is because an accused person is presumed innocent until proven guilty through a trial process. However, this precious right of liberty of an individual must be balanced against the public or societal or community interest.
21. The main expectation of a court in granting bail/bond is the assurance that an accused appears for his/her trial whenever he/she is required and not abscond and derail the legal process. Thus, in granting or denying an accused bail pending trial, the law has set out the criteria to be considered. Section 123A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, which 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.
22. And in several court decisions, the criteria has been well established to include, among others, the following:-
  - a. the nature of the charges,
  - b. the strength of evidence,
  - c. the gravity of the punishment in the event of conviction,
  - d. the possibility that accused may not surrender himself for trial,
  - e. the likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.
  - f. the likelihood of further charges, being brought against the accused,
  - g. detention for the protection of the accused.
23. All these factors are taken into consideration of circumstances or merits of each case, which culminates to the power of each court in granting or refusing bail being discretionary and exercised judicially.



24. In this case, the compelling reasons that have been advanced for the accused to be denied release on bail and bond terms are the nature of the offence, the likelihood of the accused interfering with the evidence and witnesses by threats and intimidation and the accused being a flight risk.
25. In considering these grounds, on the nature of the offence the accused is charged with, being a capital offence that attracts a death sentence depending on the circumstances of a case, the offence of murder is bailable under *the Constitution* of Kenya.
26. On the issue of the likelihood of the accused interfering, threatening or intimidating the witnesses, the Respondent has argued, what has not been denied by the accused, that the matter was subjected to an inquests hearing and therefore the accused was aware of the evidence likely to be adduced in court and by which prosecution witnesses.
27. Further, on the issue of the accused being a flight risk, there is evidence which has not been satisfactorily dislodged that the accused failed to honour court summons until a warrant of arrest was issued against him. He attributed his failure to honour court summons on the complications he claims are a result of a road traffic accident he was involved in in the year 2013.
28. A perusal of the medical records show that the accused visited Cheptalal Level IV Hospital complaining of loss of consciousness and headaches but was not admitted. He was treated as an Out-patient No.3258 of 2023. On 18<sup>th</sup> June, 2023, around the same time the case was instituted. It was not until 19<sup>th</sup> September, 2023 that he presented himself to court, and which was after he had been declared a deserter of the National Police Service. There is no explanation of his whereabouts between June, 2023 and September, 2023.
29. I have also read through the pre-bail information report by Jacinta Gichiri, a Probation Officer at Kiambu Station dated 18<sup>th</sup> December, 2023 and find the same recommends that the accused be released on bond/bail terms only after the key witnesses have testified.
30. In view of the analysis of the arguments by both the prosecution and defence alongside the recommendations in the pre-trial report, this court finds that the prosecution has presented sufficient reasons which are compelling and overwhelming to warrant the accused being denied release on bond/bail terms. However, the application may be revisited by the accused after key prosecution witnesses have testified so as to protect and or guard their evidence form likely interference, threats or intimidation and or upon demonstration of change in circumstances.
31. In the resultant, the Notice of Motion application dated 25<sup>th</sup> September, 2023 be and is hereby dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 22<sup>ND</sup> DAY OF JANUARY, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kelwon counsel for the State

Mr. Keaton counsel for the accused

Applicant/accused – present



M/S Muchemi counsel for the Victims

Court Assistant - Kinyua

