



REPUBLIC OF KENYA



**Republic v Wainaina (Criminal Case 17 of 2019)  
[2024] KEHC 1634 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1634 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 17 OF 2019  
GL NZIOKA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**PETER KINYANJUI WAINAINA ..... ACCUSED**

**RULING**

the ARGUMENTS

1. On 2<sup>nd</sup> December 2022, the investigating officer in the matter herein filed an affidavit in support of cancellation of the accused's bond. He deposes that, the key witness in the matter one Rufus Mutuma who witnessed the murder, hence an eye witness, was picked up by the accused and led to Maili Sita allegedly to transport sheep bought by their boss, but upon arrival at Maili Saba, the accused led him into the thicket of the forest, strangled and left for dead.
2. That Rufus gained consciousness on the morning of 18<sup>th</sup> October 2019, managed to walk to Maili Sita Police Station and reported the matter.
3. That, the accused was then arrested and charged with the offence of attempted murder vide Naivasha CMCC No. 1537 of 2019 and released on bond.
4. The investigating officer, avers that immediately after his release, two witnesses, Rufus and Grace Mumbi, started receiving threats and on 17<sup>th</sup> August 2021, Rufus made a report at Mbaruk Police Post alleging that on 15<sup>th</sup> February 2021, the accused traced him at his new place of work and threatened him. The report recorded in the OB No. 3/17/08/2021.
5. Similarly, Grace Mumbi received a threatening call believed to have been from the accused. The matter was also reported vide OB No. 27/5/11/2021.



6. That a day to the hearing date, Rufus was reported missing and a report to that effect made *vide* OB No. 02/07/11/2021. Later his decomposed body was discovered at Githiora Area along Nakuru-Nyahururu Road on 6<sup>th</sup> November 2021, and taken to Nyahururu Sub-County Referral Hospital. it was positively identified by the relatives.
7. That the post mortem report revealed the cause of death was neck compression by strangulation (homicidal) and run over by a motor vehicle. The investigation officer avers that; the series of events herein point to the accused as a suspect.
8. Furthermore, the other witnesses have developed cold feet in fear of their lives and have refused to come to court hence the prayer that the accused's bond be cancelled.
9. However, the application was opposed vide a replying affidavit dated 14<sup>th</sup> December 2022, sworn by the accused. He deposes that, seeking for cancellation of bond without a substantive application is not only incompetent but also an abuse of the court process.
10. That the prosecution was directed to file a formal application to invoke the court's jurisdiction but have failed to do so. Further pursuant to Article 49(h) of the *Constitution* of Kenya, he is entitled to bond unless there are compelling reasons and that he was granted bond vide an application dated 25<sup>th</sup> November 2019.
11. He avers that the matter deposed to at paragraphs 1-10 of the affidavit of investigating officer are matters of evidence which can only be adduced at the trial. That, an accused person is presumed innocent until proved guilty.
12. He avers in the absence of an affidavit by the witnesses that they are threatened, the averments by the investigation officer is hearsay.
13. That the entry of OB 31/7/08/2021 refers to one Peter and not him, as Rufus knows him very well. Further the people who threatened Grace are unknown people and that, there is no evidence to prove he was involved in the murder of Rufus. That there is no evidence from Safaricom, or DNA extractions. To the contrary he was run over by a motor vehicle.
14. The application was disposed of through oral submissions. Mr. Ndiema, learned counsel for the State reiterated the averments in the affidavit of the investigating officer that the witnesses, Rufus and Grace, started receiving threatening calls after the accused was released on bond.
15. Further, barely two months after the accused was released on bond, Rufus was reported missing and subsequently was founded dead the cause of death being strangulation and being ran over by a motor vehicle. As a result, other witnesses are now in fear for their lives. In the circumstances, the accused's bond terms should be cancelled for witness intimidation.
16. However, Mr. Mongeri, learned counsel for the accused, reiterated the averments in the accused's replying affidavit and argued that, investigations into the death of Rufus did not point to the accused and that he has never been summoned to the police station on the same.
17. Additionally, since the matter came to court in 2019, the issue of witness intimidation has never been raised before. That in any event the prosecution can use the witness protection facility.
18. Mr. Mongeri submitted that the prosecution wants to subject the accused to pre-trial detention and urged the court to exercise discretion under Article 49 and 50 of the *Constitution* of Kenya on the accused's right to bail and presumption of innocence.



19. I have considered the pleadings and the arguments advanced by the respective parties and find that, it is not in dispute that a key witness in this matter was killed in suspicious circumstances. In that case, prosecution has good reason to be apprehensive that by the time the matter will be heard, the other witnesses may not be available.
20. It is also in the investigating officer's affidavit that; the other witnesses have developed cold feet following the death of the key witness. Their fears are well founded.
21. The investigating officer has produced copies of OB extracts and post mortem report in respect of the witness who was killed and in my considered opinion the subject documents raise reasonable grounds to revisit the terms of accused's bond and/or call for enhanced protection of the witnesses.
22. As none of the witnesses who have been threatened have sworn an affidavit to corroborate the investigating officer's averments. I direct the terms of bond imposed upon the accused be and are varied as follows: -
  - a. The accused is reminded and is required to adhere to all bond terms set by the court a ruling delivered on 30<sup>th</sup> April 2020.
  - b. That the accused will relocate from the area where the witnesses are staying until the hearing and determination of this matter.
  - c. He shall be reporting to the investigating officer once every week until the court orders otherwise.
  - d. The case will be heard on priority basis with the vulnerable witnesses being heard on priority.
  - e. Finally, if any of the witnesses herein dies in suspicious circumstances, the accused shall be held as a prime suspect unless the death arise out of natural cause.
23. The upshot is the bond is not cancelled but the matter will be heard on 14<sup>th</sup> March 2024.
24. In the meantime, the OCS within the location of the witnesses and the investigating officer must accord the witnesses the security required to keep them safe.
25. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of: -

The accused present virtually

Mr. Abwajo for the State

Mr. Mongeri for the accused

Ms. Ogutu: Court Assistant

