



Republic v Kimwaki alias Ephantus Kimotho alias Noso (Criminal Case E022 of 2023) [2024] KEHC 1162 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL CASE E022 OF 2023
F GIKONYO, J
FEBRUARY 13, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

**PAUL NJUGUNA KIMWAKI ALIAS EPHANTUS KIMOTHO ALIAS
NOSO ACCUSED**

RULING

Bond/Bail Application

1. Mr. Tanyasis counsel for the accused person orally applied for the accused person to be released on bail. He argued that the accused has a fixed abode. He comes from Ngodi location, Nakuru. He comes from a family of 6 siblings. He is a second-born. He was raised by a single mother. He has limited income as he is doing manual jobs. He urged this court to take into consideration his circumstances.
2. Mr. Tanyasis added that the accused person is ready and willing to attend court at all times required by the court.
3. Ms.Rakama prosecution counsel opposed the application for reasons that there are compelling reasons in the investigating officer's affidavit filed. She argued that the accused is a flight risk as he tried to escape after the commission of the crime. He was arrested while escaping. She argued also that the accused will interfere with witnesses as one of the witnesses was in a relationship with the accused.
4. Mr. Kamwaro counsel for the victim's family associated himself with the reasons given in the investigating officer's affidavit. He argued that the right to bail is not absolute. It may be limited if there are compelling reasons. The witness interference is real. The grandmother with whom the accused was residing is a witness so is his girlfriend. He relied on the cases of *r v Dwight Zagaray* on witness interference. And the case of *R v William Mwangi* [2014] eKLR on absconding. Counsel for the victim's family further argued that the accused person is a flight risk as he was arrested near Naivasha



while fleeing. He was also saved from being lynched. It is also not true that he has a fixed abode. He has so many names which suggests his identity is crowded. He relied on the case by Lesiit J as she then was on the interference of witnesses. On that basis, she urged this court to find that there are compelling reasons to deny the accused person bail to avoid hearing a trial without the accused person. Two other suspects are still at large. The accused will abscond.

5. In a rejoinder, Mr. Tanyasis submitted that bond is granted on terms and should not be denied on flimsy grounds. It must not be based on mere statements in an affidavit. These statements do not constitute any solid grounds to deny any accused bail. He argued that paragraph 6 of the affidavit does not have details of the officer who arrested the accused while he was fleeing.
6. Merely stating that the accused has no fixed abode does not constitute a compelling ground. He argued the accused has a fixed abode.
7. No evidence that the accused will interfere with witnesses. These are statements without factual basis and expressions from the bar that the accused cannot be trusted are not supported by any evidence. Due to the witness being his girlfriend is not stated in the affidavit. He relied on *R vs Duncan Nganga* [2010] eKLR emphasized that DPP must demonstrate why the accused should not be released on bond.
8. The affidavit filed does not reveal any compelling reason. His identity is not a matter for consideration when giving a bond. The accused not having an identity card should not deprive him of his right to bail as sureties may cure that element.

Analysis and Determination

Right to bail

9. All persons charged with a criminal offence are entitled to be released on bond on reasonable conditions except where there is a compelling reason not to be so released (art. 49(1)(h) of *the Constitution* of Kenya, 2010). This is based on the right to be presumed innocent until the contrary is proven (*R. vs. Richard David Alden* (2016) eKLR.)

Compelling reason and burden of proof

10. The prosecution bears the onus of proving compelling reasons under Article 49(1)(h) of *the Constitution*- these are reasons that justify the limitation of the right to liberty in the context of Article 24 of *the Constitution*.

Objective of bail

11. The overarching objective of bail is to ensure the accused gets his liberty but also attends his trial. However, in granting bond the court should ensure that the accused does not prejudice the trial (*Muraguri v Republic*).

Grounds for objecting bond

12. The prosecution cited three grounds on which they opposed bail;
 - i) witness interference,
 - ii) flight risk, and
 - iii) safety and security of the accused person.



Interference with witnesses

13. The prosecution alleged the likelihood of interference with prosecution witnesses. Interference with witnesses is an affront to and impeaches the integrity of the trial. Thus, justifiable reason to limit the right to liberty (R. vs. Patius Gichobi, article 24 of *the Constitution*)
14. See also a work of the court in R. vs. Jaktan Mayende & 3 others, that:

“...In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to *the Constitution* of Kenya 2010.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give skewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”
15. However, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence as to persuade the court to deny the accused bond (R. v Dwight Sagaray & 4 others, 2013 eKLR)
16. PC Martin Mutwiri averred that during the investigation two other suspects were later released by the court with the condition that they report to DCI Narok central offices once a month for three consecutive months. The accused may interfere with the two other suspects released by the court.
17. The prosecution submitted that the accused will interfere with two key witnesses; his girlfriend and his grandmother.
18. These are victims of the crime whose rights the court is obligated to uphold and protect. These rights are stated in Section 10 of the *Victim Protection Act* No. 17 of 2014 that: -
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 - (1) a victim has a right to: -
 - (a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
 - (b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and
 - (c) Have their property protected.
19. It is not far-fetched or unfounded that, the presence of the accused person amid such relatives and friends who are witnesses against him, makes such witnesses vulnerable to harm, intimidation, harassment, fear, tampering, blackmail, and abuse by the accused person. It is highly possible that such witnesses may resign to fear and may not give evidence or give skewed evidence to avert unpleasant repercussions.
20. It is therefore, appropriate that these victims should be free from harm, intimidation, harassment, fear, tampering, blackmail, and abuse by the accused persons; a right under section 10 of the Victims



Protection Act. It is also not lost to the court that the safety of victims is to be considered in determining bond issues.

21. Consequently, the prosecution has proved that the accused are likely to interfere with witnesses herein.
22. In light thereof, emphasis is on the court's duty to ensure that the integrity of the trial is not prejudiced by unlawful acts of the accused such as interference with witnesses. The integrity of the trial guarantees fair trial (*R. vs. Fredrick Ole Leliman & 4 Others*, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR and *K K K vs. Republic* [2017] eKLR).

Flight risk.

23. In his affidavit, PC Martin Mutwiri avers that the accused person was arrested by members of the public while he was trying to escape. He added that the accused risks absconding when given bail or bond as his place of abode has not been established. The accused also does not have an identity card which makes it hard to know his origin. This argument is neither here nor there, for no evidence has been tabled before this court which gives the argument the power and grace, say, that the accused went into hiding to avoid the hand of the law. Merely that they left the crime scene is not sufficient as a suspect would ordinarily not be expected to remain at the scene of crime until arrest. To lay the contrary as a legal proposition is dangerous. Real evidence is required to show that the accused went into hiding to avoid arrest and is likely to abscond trial. No such evidence upon which an inference may be drawn that he will abscond. For these reasons, the ground is not sustainable. This court rejects it.

Security and safety of the accused person

24. The investigating officer in his affidavit stated that the accused was arrested by members of the public and was rescued by a police officer from the Ngodi police post as he was about to be lynched. He averred that the release of the accused person is likely to cause further public disturbance and public outcry. He argued that due to the nature of his arrest and a near public lynching, it is unsafe for the accused to be released as his life may be in danger.
25. The defence has not responded to this issue.
26. Be that as it may, claims that, if granted bond, the safety and security of the accused might be in jeopardy, is disturbing, especially in light of the fact that Kenya is governed by the rule of law; and prides of a robust Bill of Rights which includes right to be presumed innocent until proven guilty.
27. Anger on the part of members of the family of the deceased or public due to the heinous killing of their kin or member comes naturally, and should be soothed by among other things, bringing the accused to book through, and participating in the due process.
28. It is possible, amidst sorrow, to be moved by a sense of duty and an abhorrence of the outrageous conduct of the culprits without necessarily craving for revenge. This is apt healing and solace to the family members of the victim in order to regain their dignified mood and cool in dealing with their loss of kin.
29. This may seem something of the humorist or incongruence, but solace does not come through revenge or further letting of blood. Such craving is criminal and only breeds harm and death; and more pain. It is never a basis for denying an accused person his natural right to life arbitrarily or his constitutional right to liberty through bond or bail pending trial. We must be careful not to elevate the ground of threat to the security of the accused by the members of the public or the victim's family as to inadvertently encourage, promote or condone violence, disorder, and usurping of law by individuals or group of people.



30. In any case, the state has to ensure the safety and security of its citizens including the accused person. The police should take appropriate measures to ensure the security of the accused persons.
31. This court's view is that the ground that the security of the accused is threatened by the members of the public or family of the deceased, should never be encouraged as a ground for denial of bail; unless there is real evidence of actual threat; lest we should inadvertently promote or condone violence, disorder, and usurping of law by individuals or group of people.
32. Therefore, this court finds the argument on security and safety of the accused to be without any factual basis and is rejected.

Conclusion and Orders

33. In conclusion, this court finds there is a compelling reason not to release the accused person on bail. They will remain in custody during the hearing of the case. Meanwhile, the vulnerable witnesses to testify after which bond issues may be revisited. In light thereof, this court directs the hearing of the case to be fast-tracked.
34. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 13TH DAY OF FEBRUARY, 2024.

Hon. F. Gikonyo M.

Judge

In the Presence of: -

Court Assistant - Otoro

Mr. Kamwaro for victims – Present

Mr. Tanyasis for accused – Present

M/s Rakama for ODPP – Present

