



REPUBLIC OF KENYA



**Republic v Ong'era (Criminal Case E033 of 2023)
[2024] KEHC 1393 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E033 OF 2023**

TA ODERA, J

FEBRUARY 7, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

ALFAYO OBWOCHA ONG'ERA ACCUSED

RULING

1. The Accused Person in this matter is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. He was arraigned in Court on 23.8.2023 and he pleaded not guilty to the charge.
2. On 24.8.2023, this Court admitted him to bond on the following terms-Accused may be released on bond of Kshs 500,000/=, with one surety of the same amount.
3. On 31.10.2023, the accused made an oral application for review of the bond terms.
4. The Prosecutor opposed the application and stated that the bond terms were fair in the circumstances.
5. It is that application for review of bond terms that is the subject of this Ruling.

Determination

6. I have considered the Application and the Prosecution's opposition thereto.
7. I have also considered the Probation Officer's Bail Assessment Report with regard to the Accused Person.
8. The *Black's Law Dictionary* 9th Ed. defines review as consideration, inspection, or reexamination of a subject of thing. Bail review means a process of re-examination of bond terms to an accused person who has been unable to post bail before the same court.



9. The right to be released on bail or bond is entrenched in the Constitution under Article 49(1)(h) and Section 123 of the Criminal Procedure Code. Section 3 of the Bail and Bond Policy Guidelines provides for the general principles as relates to the process of bail and bond decision-making which principles were derived from international best practices.
10. Indeed, Section 123A of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, provides for the considerations that a Court should have in mind when considering an application for bail or bond. They are:
 - a. The nature and 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 fulfillment of obligations under previous grants of bail; and
 - d. The strength of the evidence of his having committed the offence.
11. Section 4.9 of the Bail and Bond Policy Guideline provides that the primary factor to be considered by the courts in bail decision-making is whether the accused will appear for trial. The following factors, which are by no means exhaustive, should be considered:
 - a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person if 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(s) of the crime.
 - g. The relationship between the accused person and potential witnesses.
 - h. Child offenders.
 - i. The accused person if a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security.
 - l. Protection of the accused person.
12. In the case of Harish Mawjee & another v Republic [2020] eKLR Criminal Revision Case No 545 of 2020, Lessit J. (as she then was) held as follows:

“There are certain overreaching principles that govern the administration of bail and bond by Courts. First of all, courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused's ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court



or appeal....an accused can apply for review of bond terms given by the trial court. The application should be made before the trial court which granted the bond. If, however the accused is still aggrieved by the decision of the trial court, he can still approach the higher court for relief.”

13. While certain factors have been put in place to govern the grant and/or refusal of bail or bond, there is no known formula of how one would arrive at a given set of conditions. The operative word though is “reasonable” bail and bond terms.

14. Paragraph 3.1(d) of the [Bail and Bond Policy Guidelines](#) underpins the right to reasonable bail and bond terms as follows:

d) Right to Reasonable Bail and Bond Terms:

Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more that is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.

15. I am persuaded by the case of [Mohamood Chute Wote & 2 others v Republic](#) [2021] eKLR, where the Court held thus:

“ 10. The key word is; “reasonable”. Thus, the question that arises is: what criteria should be used in determining what is reasonable? In my considered opinion, the starting point is the recognition of the fact, under Article 50(2) of the [Constitution](#) of Kenya, 2010 every accused person is presumed innocent until proven guilty. The purpose of bail and bond terms is to ensure therefore that the accused attends the trial. Further, the provisions of section 123A of the [Criminal Procedure Code](#) provides the relevant circumstances to be considered, including, nature and seriousness of the offence, character of the accused, record of compliance with previous bail and bond terms and strength of the evidence to be adduced.

11. In the same vein, the provisions of; bail and bond policy guidelines, states first and foremost, bail or bond amount should not be excessive, that is, it should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case. (see [Republic v Taiko Kitende Muinya](#) (2010) eKLR)



12. Further, bail determination must balance the rights of the accused person and the interest of justice. Consequently, bail or bond will only be denied where the prosecution presents convincing evidence to justify such denial and demonstrate, with convincing evidence that, his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions. As a result of the aforesaid, bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial.”
16. I am also persuaded by the decision of the Court in the case of *Victor Kiprono Ngeni v Office of the Director of Public Prosecutions* [2021] eKLR, where the Court held thus:
- “20. In granting bail, the court must ensure that bail or bond terms must not be excessive or unreasonable and should not be far greater than what is necessary to ensure or guarantee the accused person’s appearance before court. Where this is the case, it would be tantamount to a denial of bail, a right which is enshrined in the *Constitution* and the *Criminal Procedure Code* as outlined above. This position was expounded in the case *Taiko Kitende Muinya* (2010) eKLR.”
17. I have considered the Probation Report and the same is, unfortunately, unfavourable to the accused person. His family and the area chief consider him a flight risk. The deceased’s father is said to be emotional and could do anything.
18. In addition, the accused person has been charged with the offence a murder, which is a capital and serious offence.
19. I, therefore, find and hold that the bond terms as earlier issued are fair and reasonable in the circumstances.
20. Hearing on 29.2.24.

DATED, DELIVERED AND SIGNED AT KISII THIS 7TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Mr Koima for the State

N/A for the Accused Persons/Applicant

Oigo -Court Assistant

