



State v Migosi (Criminal Case E059 of 2023) [2024] KEHC 2847 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E059 OF 2023
TA ODERA, J
MARCH 7, 2024**

BETWEEN

STATE PROSECUTOR

AND

ALEX AYATA MIGOSI ACCUSED

RULING

1. The Accused Person has been charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code.
2. The accused was arraigned in court on 19.12.23 when he pleaded guilty but later changed his plea to that on not guilty on both counts on 30.1.24.
3. Prosecution objected to bond on grounds that accused is closely related to the victims and their security would be at risk if accused was released on bond. They sought for a pre-bail report before making a decision on bond.
4. This court ordered that a pre-bail report be availed and the same was filed on 29.2.24. the community and local administration opposed his release on bail citing his own security and the security of witnesses and that his house was torched down by boda boda rider who upon interview told the officer that they had reservations for release of accused. as his house was burnt down by his in-laws and the boda boda riders. The victim also said that the memories were still very fresh in his mind, he did not want to see accused. Even accused’s own family opposed his release on bond for security. The officer found him unsuitable for bond
5. I have considered the application for bond and the pre-bail report. Article 49(1)(h) of the Constitution provides that an Arrested Person has 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.



6. Paragraph 3 of the *Bail and Bond Policy Guidelines* sets out the general principles that shall guide the process of bail and bond decision-making. They are as follows;
- a. The right of accused person to be presumed innocent.
 - b. Accused Person's right to liberty.
 - c. Accused's obligation to attend trial.
 - d. Right to reasonable bail and bond terms.
 - e. Bail determination must balance the rights of the accused persons and the interest of justice.
 - f. Consideration for the rights of victims.

7. Indeed, the primary consideration is whether the accused person will appear for trial if granted bail. (Section 4.9 of the Bail and Bond Policy Guidelines)

Also see *Republic v Danford Kabage Mwangi* (2016) eKLR;

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 is 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 is a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security.
 - l. Protection of the accused person.
8. 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.



9. These conditions were restated in the cases of *Republic v Daniel Ndegwa Wachira* [2015] where Justice Mativo (as he then was) referred to the case of the Supreme Court in Nigeria in *Albaji Mujabid Dukubo-Asari v Federal Republic of Nigeria* SC 20A/2006; the Court of Appeal case of *Michael Juma Oyamo & another v Republic* [2019] eKLR pronounced itself as such; and the case of *Mkirani v Republic* (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) (3 December 2021) (Ruling) where Justice Mativo (as he then was) referred to the case of the Supreme Court of India in *Krishnan v The People* {SCZ 19 of 2011}, {2011} ZMSC 17 which Court laid out similar conditions to be considered in an application for bail pending the hearing of an appeal.
10. In all these, the common denominator is that it is for the prosecution to establish the existence of these compelling reasons. See Paragraphs 23 and 28 of the Court of Appeal case of *Michael Juma Oyamo & another v Republic* [2019] eKLR.
11. The Pre-bail report raised two issues:
 - a. Safety of accused.
 - b. Security of witnesses

The probation officer found that the situation at home was not conducive to the return of accused as the victims were still bitter with him and have issued threats of intent to revenge incase his is released on bond. Also that the witnesses fear for their security
18. Section 123 A(2)(b) of the *Criminal Procedure Code* provides;
 - (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
 - (b) should be kept in custody for his own protection.
12. Threat to life is a serious issue which cannot be ignored. The fact that the memories of the death of deceased were still fresh what not the only reason raised in the report. Right to life is fundamental and this court this the custodian of the rights of citizens and thus it has a duty to protect the rights of accused persons, complainants, witnesses or the community at large. I find that since the life of accused I will be endangered if he is released on bond at this juncture and thus this is a compelling reason to deny him bond.
13. Security of witnesses is also another factor to be considered in determining whether to grant and accused person bond or not. The report indicates that the witnesses who are family members of accused have expressed threats to their lives and that he is also likely to interfere with them. This court also has a duty to protect witnesses and satisfied that accused may interfere with witnesses if released on bond since they are his close family members. This is also a compelling reason to deny accused bond.
14. In the upshot I proceed to deny accused bond for the foregoing reasons.
15. Hearing on 20.6.24

T.A ODERA

JUDGE

7.3.24

DELIVERED IN OPEN COURT AT KISII IN THE PRESENCE OF;

