



REPUBLIC OF KENYA



**Chege & another v Republic (Criminal Case 21 of 2015)
[2024] KEHC 4258 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL CASE 21 OF 2015
CW GITHUA, J
APRIL 17, 2024**

BETWEEN

LABAN MUNGAI CHEGE 1ST APPLICANT

MARTIN CHEGE NYANJORA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The two applicants, Laban Mungai Chege and Martin Chege Nyanjora (hereinafter the accused persons) are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It is alleged that on 8th day of June 2014, at Kiawaihiga village at Gatanga Sub-County within Murang'a County, jointly with others not before court, they murdered Anthony Njuguna Chege.
2. They were arraigned before this court on 11th November 2015 and they both denied the charge.
3. Subsequently, their then learned counsel Mr. Kirubi filed separate applications to have them admitted to bail or bond on reasonable conditions pending their trial. The applications were argued together before Hon. Waweru J (as he then was) who in a ruling delivered on 10th June 2016 dismissed the applications and declined to admit the accused persons to bond on grounds that they were flight risks.
4. The court record shows that thereafter, the 2nd accused individually approached this court through an undated Notice of Motion filed on 31st October 2023 seeking a review of the earlier decision by this court to deny him bail. The application was adopted by learned Counsel Ms. Kimani who came on record for the two accused persons after the application was filed replacing the accused persons former counsel the late Mr. Gacheru who had passed on. Ms. Kimani argued the application before me on 19th December 2023 and made a similar oral application on behalf of the 1st accused. Counsel urged me to review the orders made by Hon, Waweru J on 10th June 2016 and admit the accused persons to



bail under Article 49 (h) of *the Constitution*. She also prayed for filing of current pre bail reports which prayer was allowed.

5. The application was opposed through a replying affidavit sworn on 6th March 2024 by the investigating officer Cpl Ashford Gikundi. Cpl Gikundi deposed that the deceased and the accused persons were step brothers and the prosecution witnesses being their neighbours were known to them and if released, the accused persons were likely to intimidate and interfere with the witnesses; that there were three suspects who were still at large and efforts to trace them were still ongoing; that given the gravity of the offence, the accused persons if admitted to bond were likely to abscond.
6. The above depositions were wholly adopted by learned prosecution counsel, Ms. Muriu in her oral submissions in opposition to the accused persons application. In addition, Ms Muriu invited the court to note that according to the pre-bail reports, the victims family was opposed to admission of the accused persons to bond for fear that their release will prejudice the prosecution case.
7. In rejoinder, Ms. Kimani submitted that the prosecution had failed to demonstrate existence of compelling reasons to warrant denial of bail to the accused persons; that given the fact that the victim's family and that of the accused persons were not on talking terms as indicated in the pre- bail reports, there was no likelihood that if released, the accused persons will interfere with members of the victim's family.
8. Having considered the applications made on behalf of the accused persons; the submissions made in support and in opposition thereof and the pre bail reports filed on 23rd January 2024, I find that the only issue arising for my determination is whether the prosecution has made out a case to convince the court that compelling reasons still existed in this case to justify continued denial of bond to the two accused persons.
9. The right to bail or bond pending trial is a constitutional right enshrined in Article 49 (1) (h) of *the Constitution* of Kenya which states as follows;

“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.”
10. From the wording of the aforementioned constitutional provision, it is clear that the right to bail is not absolute and the same can be limited if the prosecution demonstrated to the satisfaction of the court existence of compelling reasons militating against exercise of that right.
11. The phrase compelling reasons was defined by the Court of Appeal in the case of *Michael Juma Oyamo & another V Republic* (2019) eKLR in which the court adopted the definition crafted by the High Court in the case of *Republic v Joktan Malende and 3 Others* Criminal Case No. 55 of 2009 and stated as follows:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by *the Constitution*.”
12. In this case, the main reasons proffered by the prosecution in its objection to the admission of the accused persons to bail is that if released, they were likely to interfere and intimidate potential witnesses who were their relatives and or neighbours and they were also likely to abscond given the gravity of the offence they face.



13. Starting with the latter reason, it is important to note that the constitutional right to bail or bond pending trial is available to all accused persons irrespective of the seriousness of the offence charged. Unlike in the repealed constitution in which persons charged with capital offences including the offence of murder were expressly exempted from exercising the right to bail, *the Constitution* of Kenya 2010 does not distinguish between serious or minor offences when providing for the right to bond or bail. As the right to bond or bail is guaranteed to all arrested or accused persons regardless of the offence charged subject to the limitation stated earlier, the gravity of an offence by itself cannot in my view be used as a basis to seek denial of bond to an accused person on grounds that it would be a motivation to abscond.
14. It is however not lost on me that according to the court record, the accused persons apparently went into hiding after the offence was committed and were arrested separately several months later. The record also reveals that since they were arrested in the year 2015, they have been in lawful custody to date, meaning that they have been in custody for over nine years. During this period, for reasons that are on record, only two witnesses have testified.
15. The above notwithstanding, I have noted from the pre – bail reports that upon being interviewed by the Probation Officer in the course of her social inquiries, the accused persons promised to attend the court at all times and abide by all conditions the court may impose as a prerequisite to their admission to bond.
16. Given that it is not disputed that the accused persons have a fixed abode and having spent the last nine years or so in remand custody, I am persuaded to find that the accused persons are genuine in their promise not to abscond if released. I have also noted the views expressed by the victim’s family as stated in the pre bail report which I am enjoined by the *Victims Protection Act* to consider at this stage and though I sympathise with them, it is trite that all accused persons including the accused persons herein have a constitutional right to be presumed innocent until proven guilty.
17. In view of the foregoing, I find that although it is not disputed that the accused persons were arrested several months after the offence was committed, this does not automatically mean that they will abscond if released because this court has power to impose stringent bond terms which would mitigate the risk of the accused persons absconding if they were admitted to bond.
18. Regarding the claim that if released, the accused persons were likely to interfere with prospective prosecution witnesses, I hold the view that although this is a good reason, if proved, to justify denial of bond given that it goes to the core of the administration of justice, in order for this claim to constitute a compelling reason to justify denial of bail, it must be substantiated by cogent and credible evidence establishing that prior to the making of the application, the accused person either directly or indirectly through proxies made actual or perceived attempts to communicate or otherwise interfere or intimidate the witnesses through threats or other means. Mere assertions or unsubstantiated allegations cannot suffice.
19. In this case, no material has been placed before this court to authenticate or prove the above claim. The prosecution did not also identify the witnesses it had in mind in making the aforesaid allegation to rule out the possibility that it could have been referring to the two witnesses who have already testified since they fit the description of the witnesses alluded to by the prosecution given that they are the deceased’s father and uncle who are also close relatives of the accused persons.
20. In the absence of any evidence, the prosecution’s claim that if released the accused persons were likely to interfere with its remaining witnesses at best amounts to speculation or conjecture which cannot form the basis of any finding by this court.



21. Finally, I wish to briefly comment on the prosecution's averment that the accused persons should be denied bail because there were other suspects who were still at large. My brief response to this statement is that it is the duty of the investigative agencies to arrest persons suspected of having committed criminal offences. Accused persons cannot be faulted for failure of the police to arrest suspects or lack of diligence in execution of their duty unless the prosecution availed evidence establishing a clear link between actions of an accused person and inability or failure of the police to arrest the suspects in question.
22. I believe I have said enough to demonstrate that I am inclined to exercise my discretion in favour of admitting the accused persons to bond but on conditions which I believe will ensure that if released, they will not abscond and they will not prejudice the prosecution case.

The application is therefore allowed on the following terms:

- I) Each accused will be released upon executing a bond of Kshs. 500,000 together with one surety of a similar amount. The surety will be approved by the Deputy Registrar of this court.
- ii) Upon release, the accused persons will attend mentions before the Deputy Registrar once monthly on the first Monday of each month until further orders from this court.
- iii) The accused persons shall attend this court on all hearing dates or whenever required without fail.
- iv) They shall not contact the remaining prosecution witnesses whether directly or indirectly by any means whatsoever pending determination of this case.
- v) In default of compliance with any of the above conditions, the accused persons bond will be cancelled.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 17TH APRIL 2024.

C.W. GITHUA

JUDGE

In the Presence of:

Both accused

Ms. Susan Waiganjo, Court Assistant

No appearance by Ms Kimani for both accused.

No appearance by Ms. Muriu, Prosecution counsel.

