



**Mitheko v Republic (Criminal Case 21 of 2016)
[2024] KEHC 4259 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL CASE 21 OF 2016
CW GITHUA, J
APRIL 17, 2024**

BETWEEN

STEPHEN MAINA MITHEKO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The accused, Stephen Maina Mitheko, is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 15th day September, 2016, at Rwathia location, Kihoya sub-location within Murang'a County, he murdered Hannah Njeri Mitheko.
2. The accused took his plea on 12th October 2016 and denied the charges. The court record shows that trial commenced on 29th February 2022 and three witnesses testified before Hon. Kimondo J after which hearing was adjourned at the instance of the prosecution. The court record further shows that on 9th March 2022, the accused made an oral application to be admitted to bail on reasonable terms pending determination of his case. The application was not prosecuted because the trial judge was transferred to another station.
3. According to the record, I took over hearing of the case on 19th September 2023 and the application was argued orally before me on 13th December, 2023. Ms. Waititu, who represented the accused submitted that the application ought to be allowed as the accused was not a flight risk as he had a fixed abode and he had been in custody since his arrest on 15th September 2016. She urged the court to note that despite the age of the case, only three witnesses had testified.
4. Ms. Gakumu, learned prosecution counsel on her part relied on the averments made in the replying affidavit sworn by IP Michael Kariuki in opposition to the application. In the affidavit, Ip Kariuki deposed that the accused was the deceased's son and his immediate family as well as members of his



community at large were very bitter and hostile towards him following the deceased's death; that the accused should continue to be detained for his own protection till conclusion of the trial since members of the community he hailed from had threatened to kill him if he was spotted in their village. Relying on this averment, Ms. Gakumu emphasized that since the accused had not indicated that he had an alternative place of abode where he could reside if admitted to bail, his application should be dismissed for his own safety.

5. This being an application for bail, it is trite that under Article 49 (1) (h) of *the Constitution*, an arrested or accused person has a right to be released on bail or bond on reasonable conditions pending a charge or trial unless there were compelling reasons not to be released.
6. A reading of the above constitutional provision makes it clear that the right to bond is not absolute and can be curtailed if the prosecution was able to demonstrate to the satisfaction of the court existence of compelling reasons to warrant denial of that right.
7. There's no standard measure or scientific method that has so far been devised to determine what would constitute compelling reasons that would apply to all cases since no two cases can have exactly the same facts and circumstances. Each case therefore must be decided on its own merit. That said, compelling reasons in my view would refer to reasons which are strong, forceful, captivating and credible and which convinces the court that it would be in the best interest of justice to deny an accused person the exercise of his right to bond pending trial.
8. Section 123 A of the *Criminal Procedure Code* and The Judiciary Bail and Bond Policy guidelines 2015 enumerates factors that, if proved, would constitute compelling reasons to justify denial of bail. These includes, inter alia, the nature and seriousness of the offence; the possibility of the accused interfering with investigations or witnesses; whether the accused was likely to abscond if released; the safety of the victims and the accused person as well as the public interest.
9. Although all the factors indicated above are important considerations in deciding applications for bond, it is trite that the all-encompassing consideration which should weigh heavily on the court's mind when deciding whether or not to grant bail is whether or not the accused will turn up for his trial and for the court to make that determination, substantial grounds must be adduced to establish a basis for believing that if released, the accused was likely to abscond.
10. In this case, the main reason advanced by the prosecution for its opposition to the application is that the victim's family who double up as the accused's immediate family as well as their community at large were still bitter and hostile towards the accused and his safety would be prejudiced if released since it could not be guaranteed.
11. After hearing arguments from both parties, I called for filing of a pre-bail report to get an independent view of the current position on the ground regarding the alleged hostility against the accused to guide me in making a just decision on the application. And despite the fact that the incident which led to death of the deceased occurred about seven years ago, the pre- bail report filed on 23rd June 2024 was still unfavourable to the accused.
12. The report indicated that there was bad blood between the accused and his siblings which was exacerbated by the death of their mother which was blamed on the accused; that the accused to date maintained a negative attitude towards his siblings who in his view continue to occupy land which rightfully belongs to him which he hopes to reclaim if released. It also shows that his villagemates are apprehensive that if released, the accused was likely to harm his siblings and his presence in their midst was unwelcome since it was bound to disrupt their harmonious co-existence.



13. I must point out at this juncture that although the court is obligated by the Victims Protection Act 2014 to take into account views of the victim's family at this stage and although I sympathise with their situation, it must always be remembered that all accused persons, including the accused in this case, have a constitutional right to be presumed innocent until proved guilty. However in this case, despite being cognizant of this right, it is apparent that there is deep hostility between the accused and his siblings and other members of his community that persists to date and since the accused has not indicated that he has an alternative place of abode away from the locus in quo where he could reside if released, I find that allowing the application may have the undesired effect of putting the accused's life and safety in jeopardy.
14. I must point out at this juncture that the right to life for all persons including that of an accused person besides being a constitutional right is also sacrosanct and must be protected at all times. Having taken all relevant factors into account, I find that even if the accused has a right to enjoy his liberty pending conclusion of his trial, compelling reasons have been offered in this case to justify denial of the exercise of that in order to safeguard his protection and safety.
15. For the above reasons, I decline to allow the application but the same can be revisited in future if the accused secured an alternative place of residence other than his home in Kihoya Sub-location in Murang'a County.
16. Given the outcome of the instant application and considering the age of this case, its only fair and just that conclusion of the accused's trial be expedited. I therefore direct that hearing dates in this case be taken on a priority basis.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 17th day of April, 2024.

C.W GITHUA

JUDGE

In the Presence of:

The accused

Ms. Susan Waiganjo, Court Assistant

No Appearance for the ODPP

No Appearance for Ms. Waititu for the Accused.

