



**Republic v Ngari & another (Criminal Case E012 of 2023)
[2024] KEHC 5069 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE E012 OF 2023
AK NDUNG’U, J
MAY 8, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JENNIFER NYAMBURA NGARI 1ST ACCUSED

THOMAS NDIANGUI MUREITHI 2ND ACCUSED

RULING

1. The Accused persons in this case, Jennifer Nyambura Ngari and Thomas Ndiangui Mureithi are charged with murder contrary to Sections 203 and 204 of the *Penal Code*. It is alleged in the information dated 18/12/2023 that on 05/06/2023 at Githira area in Laikipia Central Sub-County within Laikipia County jointly with others not before court murdered David Maina Wachere.
2. On 04/01/2024 they both pleaded not guilty to the charge. The Republic has now opposed bail by an affidavit dated 04/01/2024 sworn by one of the Investigating Officer PC Meshack Biwot. The reasons advanced for opposing bail are;
 - i. That the 1st Accused is the one who organized a mob that attacked the deceased and it is well known that she has resources and connections to organize mob attacks.
 - ii. That the key prosecution witnesses are Accused neighbours and they are reasonably anxious that if the 1st Accused is released on bond, she will similarly organize mob to attack them.
 - iii. That one of the crucial witness, Shem Ndungu Mwangi house was burnt down one day after he recorded his statement and investigations revealed that it was arson and there is reasonable apprehension that it was in relation to this case. The witness is apprehensive that the Accused will make further attempts to harm his family.



- iv. There is a likelihood of interference and intimidation of prosecution witnesses who lives in Githira area and are well known to the Accused persons who are aware of their place of abode.
 - v. That six other suspects are still at large and there is apprehension that the Accused if released on bail will join their counterparts and go into hiding.
 - vi. That they are facing an offence that carries a death penalty hence there is a probability of them absconding if released on bond.
 - vii. That the prosecution has overwhelming evidence that points to the guilt of the Accused persons and there is a probability that the prosecution will secure a conviction hence, when released on bail they may flee in fear of being sentenced.
3. The application was canvassed by way of written submissions. The State maintained that the Accused are likely to interfere with witnesses who are known to the Accused persons; the Accused are flight risks; that the seriousness of the charge and sentence is an incentive enough for them to abscond, reliance is placed on the case of *Republic v Ahmed Mohammed Omar & 6 Others* (2010) eKLR where the court held that the severity of the sentence was a significant factor for consideration in an application for bail. Another reason advanced is the gruesome manner the deceased met his death and the strength of the prosecution's case in that the evidence against them is strong, compelling and overwhelming and there is a presumption that they might abscond on that ground.
 4. In response, the Accused counsel argued that the *Constitution* grants the Accused persons right to be released on bond or bail unless there are compelling reasons. That the nature of the offence and the strength or weakness of the prosecution's case can be factors that the court can consider but they cannot be anchor reason for denying bail. They cannot stand alone since they are not sufficient to deny bail.
 5. That the Accused persons have dutifully subjected themselves to bail term given by the investigating officer and have never failed to present themselves to the station since the investigation started. That the 1st Accused was released on police bail on two occasions and she never flouted the bail terms. That the 2nd Accused was the one who presented himself to the DCI when he was requested to and there is no evidence that has been advanced that they compromised the investigations prior to their arrest. That the allegation that they could go into hiding is not based on facts and fear of retaliation are unfounded.
 6. As to likelihood of interfering with witnesses, he argued that the 1st Accused is diabetic and spends a lot of time at her farm and also the witnesses are not known to the Accused persons. Further, the witnesses are subject to *Witness Protection Act*. That the Accused presumption of innocence is paramount, that they have fixed place of abode and they are not likely to escape if granted bond and there are no compelling reasons that has been shown that they would compromise peace and public order.
 7. I have considered the rival arguments by the parties. Bail pending trial is now a constitutional entitlement in all criminal offences. It will be denied only for compelling reasons; and any conditions that the court might impose, again by constitutional edict, must be reasonable. See Article 49(1) (h) of the *Constitution* of Kenya, 2010 which states that every accused person has a right-
 - “(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”



8. “Compelling reason” is not defined in the *Constitution* or in any law that this court is aware of. The term is also not defined in *Black’s Law Dictionary*, Tenth Edition. However, the term “Compelling need” is defined there as –

“A need so great that irreparable harm or injustice would result if not met.”

A note following that definition states –

“Generally, courts decide whether a compelling need is present based on the unique facts of each case.”

9. Compelling reason therefore, in this court’s view, is a reason that must militate against granting the accused bail, such as proven likelihood of him/her not attending court, interference with witnesses, harm to witnesses or to himself/herself, and the like. The important word here is proven. It is not just a matter for the discretion of the court. He who seeks to deny an Accused person his constitutional right to bail pending trial must therefore place evidence before the court as would establish, on balance, the compelling reason urged. It is not enough to merely allege without evidence.

10. The reasons advanced by the prosecution for denial of bail are;

- i. Interference and intimidation of witnesses.
- ii. The Accused persons are flight risk.
- iii. The nature of the charge and seriousness of the punishment.
- iv. The strength of the prosecution’s case.

11. The fourth reason can be dismissed right away. The perceived strength of the prosecution case in my view is not a compelling reason to deny an accused person his constitutional right to bail. The Accused persons have a constitutional and legal right to the presumption of innocence until and unless proven guilty to the required standard. Furthermore, the court is not aware of the case facing the Accused persons. In *Oscar Edwin Okimaru v Republic* [2021] eKLR it was stated that;

“To my mind, for this court to base its decision on the weight of the evidence to be adduced against the accused persons at the stage of determination of an application for bail, may well be prejudicial. While the Court is not necessarily barred from taking a dim view of the evidence in in setting conditions for the grant of bail, that cannot be the basis for denial of a constitutional right to bail.”

12. The same applies to the third reason. The perceived seriousness of the offence and the sentence in my view can never be a compelling reason to deny an accused person the constitutional right to bail. Though the *Judiciary Bond and Bail Policy 2015* lists the seriousness of the offence as a tenet for consideration, court must not lose sight of the fact that Article 49(1)(h) grants an accused the right to bail irrespective of the seriousness and the nature of the offence. I also believe that this reason has to be considered alongside other factors. It cannot stand alone without other compelling reasons. See *R v Mwangi* [2016] eKLR where the court held that:-

“Bail cannot be refused simply because the accused has been charged with a very serious offence but the seriousness of the offence can be taken into consideration as a factor in determining if one of the ground for refusing bail exists.”



13. Being a flight risk and likelihood of interference with witnesses if proved on balance, are compelling reasons to deny an accused person bail, one because he/she will not turn up for the trial as and when required, two because interference with witnesses will be subversion of justice.
14. In the present case, have those allegations been proved on balance? The prosecution has stated that the Accused persons and the key witnesses hail from the same locality and they are well known to the Accused persons. That the 1st Accused person is the one who organised a mob that attacked the deceased and she is known to have connections in organising mobs. Therefore, there is apprehension that she might do the same to the witnesses. Further, one of the crucial witness' house was burnt down one day after he recorded his statement with the police and investigations revealed that it was arson. That the police believed that the same was in connection with this case.
15. The Accused person's counsel on the other hand denied that the Accused persons and the witnesses hail from the same locality.
16. It is trite that the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground. See R. v. Dwight Sagaray & 4 others, 2013 eKLR, where the court stated that: -

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.”
17. There are no instances of interference with witnesses that have been alluded by the prosecution's with precision. The prosecution did not state whether the arson case was investigated and it was found that the Accused persons were culpable. Attributing the same to the Accused persons is mere suspicion.
18. I have noted from paragraph 9 of the affidavit opposing bail that one Shem Ndung'u Mwangi who is a witness in this matter had his house burnt in a case of arson as confirmed in a Government Chemist report which showed that fire was started by petrol which is a fire accelerant.
19. The exhibit memo from forwarding samples to Government Chemist shows that the suspects in the alleged arson, were unknown.
20. I have anxiously considered this arson incident especially coming so shortly after he murder incident herein. It cannot merely be overlooked.
21. The court must however guard from rely on conjecture. It was the duty of the prosecution to go a little further and show by way of evidence a nexus between the accused person herein and the arson incident either through their proxy or otherwise.
22. Other than offering evidence that the fire was accelerated by petrol, there was no attempt to place before the court the nature, scope and stage at which investigations were with a view to establishing the connection between the arson and this case.
23. As it were the court is invited to draw an inference that the arson incident is related to this case and that the accused persons would interfere with witnesses yet there is no tangible evidence to support that proposition.



24. The other reason advanced by the State is that the Accused persons are flight risk in that six more suspects are still at large and there is a great apprehension that the Accused persons might as well join their counterparts and go into hiding. The Accused's counsel argued that the Accused persons have fixed place of abode, have never compromised the investigations but have also complied with the police bail that the 1st Accused was granted by the police. That the 2nd Accused took himself to the DCI office when he was summoned. If at all there were flight risk, it is my view that they would have left the jurisdiction of this court the moment the investigations commenced to join their counterparts. The State did not deny that the 1st Accused was given bail on two occasions during investigations and honoured the bail terms.
25. In so far as the 1st and 2nd Accused are concerned, the pre-bail report is favourable for their release on bond. The only objection emanates from the family of the victim whose view is that the Accused had no reason to kill the victim since the goats allegedly stolen had been recovered but that the 1st Accused was likely to interfere with witnesses.
26. The purpose of bail is to ensure that the accused persons attends his or her trial. It has nothing to do with culpability of the accused, a matter better left to the trial court.
27. Any allegation of possibility to interfere with witnesses must be backed by evidence. In our instant case, I see no such evidence against the Accused persons.
28. The prosecution has not satisfied the constitutional threshold to establish compelling reasons militating against granting bail to the Accused persons.
29. Overall, I find no compelling reasons to deny the accused bail. Am alive to the fact that should circumstances change, for instance, if investigations in the arson case were to bring out further revelations that may militate against the continued release on bail of the accused, the court retains residue power to revisit the question of bail and in extreme circumstances cancel the same.
30. With the result that I grant bail to the 1st Accused and 2nd Accused. Each of them is to be released on a personal bond of Kshs. 1000,000 with a surety of like sum.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 8TH DAY OF MAY 2024.

A.K. NDUNG'U

JUDGE

