



**Republic v Njau & 2 others (Criminal Case E001 of 2024)
[2024] KEHC 4959 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL CASE E001 OF 2024**

DR KAVEDZA, J

MAY 8, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

MICHAEL MBUGUA NJAU 1ST ACCUSED

CHRISTOPHER NJAU MBUGUA 2ND ACCUSED

CHARLES KINYANJUI MWANGI 3RD ACCUSED

RULING

1. The accused persons have been charged with the offence of murder contrary to section 203 as read with 204 (Cap 63) Laws of Kenya. The particulars of the offence are that on the 23rd day of December 2023, at Uthiru Centre in Dagoretti Sub-County, within Nairobi County, George Njui Mwaura. Vide an application dated 9th February 2024, they sought bail pending trial.
2. The application is supported by three affidavits sworn by each of the accused persons. The averments made are they will not interfere with prosecution witnesses. They have a fixed abode and are not a flight risk. They will avail themselves to court when required. Their security is not at risk and they undertake to abide by the conditions for bail set by the court.
3. In response, PC Dennis Were filed an affidavit to oppose bond. The averments made were that after the offence was committed in the house of the 1st accused who is the father of the 2nd accused and a foster parent 3rd accused. One of the victims of the attack survived, is an eye witness, and is a prosecution witness. Since the arrest of the accused persons, some prosecution witnesses have developed cold feet owing to the 1st accused's influence in society. In addition, after the offence was committed, members of the public stormed into the 1st accused premises and tried to lynch him. The accused persons are therefore in danger from members of the public. He urged the court to dismiss the application for bail/ bond pending the hearing and determination of the case.



4. In their written submissions, the accused persons submitted that the right to bail should only be restricted in the presence of compelling reasons. They further contended that the prosecution, in their affidavit, failed to furnish compelling reasons for denying bail or bond. They insisted that the allegations made by the prosecution were baseless and unsupported by evidence. They implored the court to grant him reasonable terms for bail or bond.
5. The prosecution argued that there was a likelihood of the accused interfering with prosecution witnesses. In addition, the accused persons safety was at risk and there was a need for their detention pending the hearing and determination of their case. Ultimately, they asserted that detaining the accused pending the hearing and determination of his trial is necessary for his safety.
6. Having considered the application, the response thereto, the pre-bail reports on record and the applicable law, the issue for determination is whether there are compelling reasons to deny the accused reasonable bail/bond terms.
7. Article 49(1) (h) of *the Constitution* guarantees the right of an arrested person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released. The onus of proof in bail applications in respect of compelling reasons is borne by the state under section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The right for an accused person to be released on bail is not absolute.
8. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of *the Constitution*, the courts are to be guided by the provisions of section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

 - (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;
 - (d) The strength of the evidence of his having committed the offence:
 - (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;
 - (a) Has previously been granted bail and has failed to surrender to custody if released on bail, it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own good.
9. *The constitution* specifically requires under Article 49 (h) of *the Constitution* of Kenya that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the *Criminal Procedure Code*, Article 49 (h) of *the Constitution* places the burden of proof on the state to demonstrate compelling reasons. It is therefore upon the prosecution to prove that there are compelling reasons why the accused should not be released on bail.



10. The investigating officer, PC Were, opposed the application for bail/bond by claiming that the accused persons were likely to interfere with witnesses. He stated that one of the prosecution witnesses, who had witnessed the alleged offense, was well acquainted with the accused persons. Additionally, he noted that other prosecution witnesses seemed hesitant, possibly due to intimidation, which he attributed to the influence of the first accused in society. This created a reasonable fear of coercion, intimidation, and interference.
11. Moreover, following an attack on the first accused's premises by members of the public, there remained a reasonable fear of ongoing anger and danger to their lives. Therefore, the officer argued that the accused persons should be kept in custody for their own safety. The defence has brushed off the allegations as mere perceptions.
12. In any case, it is the duty of the state to ensure the safety and security of its citizens including the accused persons. The police should take appropriate measures to ensure the security of the accused persons. I therefore find the argument that the accused be detained for their own safety and security to be without any legal or factual basis and I reject the same.
13. The prosecution alleges a likelihood of interference with prosecution witnesses. On this ground, the court in *R. vs. Jaktan Mayende & 3 others*, stated that:

“ - In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general, as envisioned by the people of Kenya in the Preamble to *the Constitution* of Kenya, 2010.....Threats or improper approaches to witnesses, although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

14. Proven interference with witnesses is an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of *the Constitution*. Accordingly, 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. More jurisprudence on the point is found in *R. V. Dwight Sagaray & 4 others, [2013] eKLR*, where the court stated that: -

“For the prosecution to succeed in persuading the court on these criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others.”

15. The arguments presented on interference with witnesses remind me of two pertinent matters. One is the protection of witnesses and victims of crime. And, protection of the integrity of the trial and criminal justice process. Under the law, the court has a duty to give effect to the rights of victims expressed in Section 10 of the *Victim Protection Act* No. 17 of 2014, as follows: -

10 (1) a victim has a right to: -



- (a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
 - (b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and
 - (c) Have their property protected.
16. Interference with witnesses undermines the criminal justice system and dents the integrity of the criminal process; in turn interference with the administration of justice, and prejudice to the trial. Thus, it is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in [R. V. Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 \(2016\)](#) eKLR where she succinctly stated that: -
- “Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger an individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.”
17. In the present case, the prosecution stated in the affidavit opposing bond that the accused individuals are likely to interfere with prosecution witnesses, especially one who is also a victim. Additionally, some witnesses have become hesitant and do not want to testify. These witnesses reside in the same area where the first accused holds considerable influence. It is more likely that the vulnerable witnesses may be greatly intimidated by the presence of the first accused among them.
18. The court must therefore, strike a perfect balance that ensures that the trial is not impeded by acts of interference with witnesses, but at the same time, upholding the rights of the accused to a fair trial ([K K v Republic \[2017\]](#) eKLR)
19. In conclusion, the court finds that a compelling reason has been established; likely interference and intimidation of witnesses owing to the circumstances under which the offence was committed. There is compelling reason to keep the accused persons in custody until the key prosecution witnesses have testified. Accordingly, the accused persons are denied bail. In the case of a future bail application, it will be considered on its merit and the circumstances of the case at the relevant time. The Court further directs that the hearing of this case be on a priority basis.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mulama for the State

Ms. Komagum Supeo for the 1st, 2nd and 3rd accused

Joy/Nelson Court Assistants.



