



REPUBLIC OF KENYA



**Republic v Chairman & 6 others (Miscellaneous Criminal Application E471 of 2023) [2024] KEHC 5085 (KLR) (Crim) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E471 OF 2023  
K KIMONDO, J  
MAY 7, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ERIC MUNGERA ISABWA ALIAS CHAIRMAN ..... 1<sup>ST</sup> APPLICANT**

**RAPHAEL KIMANI GACHII ALIAS KIM BUTCHER ..... 2<sup>ND</sup> APPLICANT**

**MUSTAFA KIMANI ANYONI ALIAS MUSTO ..... 3<sup>RD</sup> APPLICANT**

**STEPHEN ASTIVA LIPOPO ALIAS CHOKORE ..... 4<sup>TH</sup> APPLICANT**

**JANE WANJIRU KAMAU ALIAS SHIRO ..... 5<sup>TH</sup> APPLICANT**

**MARGARET NJERI WACHIURI ..... 6<sup>TH</sup> APPLICANT**

**SIMON WAMBUGU GICHAMBASIMON WAMBUGU GICHAMBA .... 7<sup>TH</sup>  
APPLICANT**

**RULING**

1. In the notice of motion dated 14<sup>th</sup> December 2023, the 1<sup>st</sup> to 7<sup>th</sup> applicants seek two principal reliefs: Firstly, for an order to “set aside the decisions” by the Chief Magistrates Court denying them bail; and, secondly, that the High Court do release them on bail on favourable terms.
2. The application is supported by the deposition of the 1<sup>st</sup> applicant of even date. He avers that he has the authority of the 2<sup>nd</sup> to 7<sup>th</sup> applicants to present the motion.



3. The applicants were charged in Milimani Chief Magistrates Criminal Case Number 479 of 2015 (hereafter the lower court) with various counts of robbery with violence contrary to section 296 (2) of the Penal Code. Their application for bail was denied on different occasions by the trial court.
4. The applicants also face four counts of murder at the High Court in Nairobi HCCRC No. 29 of 2015 (hereafter the murder trial). In December 2023, the High Court (Bwonwonga J) granted the applicants bail on terms.
5. The applicants now contend that on at least three occasions, the lower court denied them bail only for the reason that the High Court had not granted them bail in the murder case. In view of the subsequent orders by the High Court, they argue that the decisions of the lower court should be set aside.
6. The applicants aver that since the charges in both courts arose out of related circumstances and have similar witnesses, the High Court had at some point called for the original lower court file. The net effect was that “it is not known when the proceedings will resume in the Chief Magistrates Court”. I should add that the lower court file has since been remitted back to the lower court.
7. The applicants stated that they have been in custody for nearly nine years. They claim they were the bread winners for their families and that their mothers passed away while in prison with no opportunity to mourn them.
8. Lastly, they contend that the prosecution has not shown any compelling reasons for denial of bail; and, that accordingly, articles 49 (1) (h) as read together with articles 20 (1) & (3) (b) of the Constitution entitle them to bail. In his oral submissions, the 1<sup>st</sup> applicant also contended that they require to get witnesses for their defence which is now hampered by their long incarceration.
9. The Republic opposed the motion but did not file a formal reply. On the date of the hearing on 15<sup>th</sup> March 2024, I allowed learned Prosecution Counsel to submit orally. In a nut shell, he argued that the applicants have since been placed on their defence in the lower court which heightens their propensity to abscond. He also argued that that the applicants can procure their witnesses through their relatives.
10. In further reply, the applicants denied that they were flight-risks and that no such evidence had been tabled by the prosecution.
11. I take the following view of the matter. Although the applicants describe themselves in the motion as “appellants”, there is no formal interlocutory appeal before me. Rather, this Miscellaneous Criminal Application is in the nature of a revision to set aside the orders of the lower court denying them bail.
12. Under Article 165 (6) of the Constitution as read together with sections 362 to 364 of the Criminal Procedure Code, the High Court is imbued with wide powers to revise the orders by the subordinate court.
13. The issue then is whether the learned trial magistrates, Hon D. Ogembo, CM (now a Judge of the High Court), Hon F. Andayi CM and Hon R. Oganyo CM in their respective rulings fell into error by denying the applicants bail.
14. The legal landscape is spelt out in Article 49 (1) (h) of the Constitution, which guarantees an accused persons bail unless there be compelling reasons. Further, by dint of Article 50 (2)(a), an accused person is deemed innocent until the contrary is proved.
15. The overarching objective of bail is to ensure the accused attend their trial. See *Muraguri v Republic* [1989] KLR 181, *Republic v Elias Kipkemoi*, Eldoret High Court Criminal Case 42 of 2014



(unreported), *R v Fredrick Ole Leliman & 4 others*, Nairobi High Court Criminal Case 57 of 2016 [2016] eKLR.

16. The applicants argued before me that the robbery with violence case in the lower court is “a pillion passenger” of the murder trial at the High Court. It would be prejudicial to comment on the connection, if any, of the charges as the trials are still ongoing. But I can safely state that the two sets of offences are alleged to have been perpetrated on the same date; and, that a large number of witnesses are common in both cases.
17. However, the murder charge and the robbery charge are separate and distinct offences. Logically, they are being tried in different courts. It is true that the High Court has freed the applicants on bond on the murder charge on terms. But it counts for little because they have not been successful in the lower court. I have thus interrogated the reasons for denial of bail there. For instance, on 28<sup>th</sup> May 2015, Hon D. Ogembo, CM (now a Judge of the High Court) advised the applicants to seek review of denial of bail once such bail was granted by the High Court in the murder trial. The same reasons were advanced on a different occasion by Hon F. Andayi, CM.
18. Furthermore, the two impugned rulings by Hon R. Oganyo, CM made on 7<sup>th</sup> June 2019 and 6<sup>th</sup> May 2020 denied the applicants bail largely based on the fact that the High Court had not granted bail in the murder case. However, I find that was not the only ground. In the ruling of 6<sup>th</sup> May 2020, the learned magistrate stated further as follows-

My considered view is that the evidence so far given is strong enough to be able (sic) to place the accused persons on their defence, if the prosecution side were to end their case here. I therefore would not grant bond at this stage.

19. I have also taken into account that on 26<sup>th</sup> January 2023, all the applicants were placed on their defence by the lower court. This fortifies the view taken by the learned trial magistrate above and I find no good ground to review it. Paraphrased, I cannot impeach the correctness, legality or propriety of the findings by the three trial magistrates at the point in time when their impugned decisions were rendered.
20. Furthermore, it remains open to the applicants to renew their application for bail in the lower court on the basis that the High Court has now granted them bail in the murder trial. I say that very carefully, because the two trials are distinct as explained earlier; and, the lower court would have to determine whether the prosecution has established any compelling reasons for denial of bail; or, whether the applicants are now entitled to bail at the defence stage of their robbery case. I remain alive however that the applicants stayed the proceedings in the lower court vide an order granted on 7<sup>th</sup> March 2024 in Nairobi Constitutional Petition Number E080 of 2024.
21. In the end, the notice of motion dated 14<sup>th</sup> December 2023 is hereby dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED this 7th day of May 2024.**

**KANYI KIMONDO**

**JUDGE**

Ruling read virtually on Microsoft Teams in the presence of: -

The applicants.

Mr. Mongare for the Republic instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

