



**Republic v Kamatu (Criminal Case E004 of 2024)
[2024] KEHC 4662 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL CASE E004 OF 2024
FN MUCHEMI, J
MAY 2, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL KAMAU KAMATU ACCUSED

RULING

1. The accused faces a charge of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence are that on the 1st day of May 2023 at Kirai village in Gatundu Sub County within Kiambu County murdered Mary Njeri Koigi. On 13th March 2024, the accused person entered a plea of not guilty.
2. In regard to bail, the prosecution filed an Affidavit of Compelling Reasons which they have labelled an Affidavit opposing the release of the accused on bond. The said affidavit was sworn on 29th February 2024 sworn by PC Erickson Gisore the investigating officer herein. He deposes that there is a strong likelihood that the accused person will interfere with the witnesses who are his family members personally known to him. Thus, the deponent argues that if the accused person is released on bond, he may compromise with the said witnesses who will not be in a position to testify freely.
3. The deponent further avers that tension and hostility is still high at Kirai village, where the incident occurred and if the accused person is released on bail, the locals and family members of the accused may harm him.
4. In opposition to the Affidavit in opposition of bail, the accused person filed a Replying Affidavit dated 26th March 2024 and states that bail/bond is a constitutional right guaranteed under Article 49(1)(h) of the *Constitution* of Kenya. Furthermore, the accused person contends that he has a right to a fair trial which includes the right to be presumed innocent until the contrary is proved pursuant to Article 50(2)(h) of the *Constitution* of Kenya.



5. The accused person further states that he has no intention of interfering with any witnesses in the matter if he is released on bail. On the allegations that the accused person is likely to face hostility from the locals and family members, the accused person argues that the allegations are not supported by any cogent evidence as there is no probation report or any other information placed before the court upon which the court can exercise its discretion upon.

The Prosecution's Submissions

6. The prosecution relies on Article 49(1)(h) of the *Constitution*, Section 123A of the *Criminal Procedure Code*, para 4.9 of the *Bail and Bond Policy Guidelines* and the case of *Michael Juma Oyamo & Another vs Republic* [2019] eKLR and submits that the accused should not be released on bail as there exists compelling reasons for the denial of bail. The prosecution contends that the accused person is likely to interfere with the witnesses as his own sisters witnessed the incident. Further, the key prosecution witnesses in the matter are the accused person's sisters, brother and other close relatives. The prosecution is therefore apprehensive that should the accused person be released on bail, he will go back to his home where he lived with his siblings and interfere with them and therefore the witnesses will not be able to freely give their testimony.
7. The prosecution submits that tension and hostility is still high at Kirai village where the incident occurred and locals of the village and family members of the accused person may retaliate if the accused person is released on bond. For the foregoing reasons, the accused person's life would be endangered in the event that he is released on bail or bond and. Although the accused person states that the state has a duty to ensure his safety, the prosecution argues that it cannot be denied that his safety is at risk.

The Accused's Submissions.

8. The accused relies on the case of *Panju vs Republic* [1972] EA 284 and submits that the prosecution has not provided any cogent evidence to show that if released on bond, he will interfere with the witnesses. The accused person further submits that the prosecution has not placed any material before the court to demonstrate that the proposed witnesses are in fact his relatives and how he is likely to interfere with them. He further argue that interference with prosecution witnesses would constitute a compelling reason not to grant bail or bond if it goes to the root of the trial and may lead to subversion of justice.
9. The accused further submits that although the prosecution has alleged that if he is released on bail, he may face hostility from the locals of his village and his family, it has not provided any proof in form of a probation report which may support such allegations. It is further argued that such allegations are only meant to pollute the mind of the court in considering bond terms.

The Law

Whether the reasons for opposing bail are merited in terms of Article 49(1)(h) of the *Constitution*.

10. Article 49(1)(h) of the *Constitution* provides that:-

An accused person has the 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.

11. It follows that the right to bail is not an absolute right and where there are compelling reasons, that right may be restricted. Nevertheless, since the *Constitution* expressly confers the said right, it is upon the prosecution to show that there exists compelling reasons to deny an accused person bail.



12. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's *Bail and Bond Policy Guidelines*, March 2015 at p. 25 which sets out judicial policy on bail thus:-

“the following procedures should apply to the bail hearing:

- a. The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:-
- b. That the accused person is likely to fail to attend court proceedings; or
- c. That the accused person is likely to commit, or abet the commission of, serious offence; or
- d. That the exception to the right to bail stipulated under Section 123A of the *Criminal Procedure Code* is applicable in the circumstances; or
- e. That the accused person is likely to endanger the safety of victims, individuals or the public; or
- f. That the accused person is likely to interfere with witnesses or evidence; or
- g. That the accused person is likely to endanger national security; or
- h. That it is in the public interest to detain the accused person in custody.”

13. *Republic vs Fredrick Ole Leliman & 4 Others* [2016]eKLR

the court held that:-

“The principles set out under the *Bail and Bond Policy Guidelines* I have been referred to are the same ones that were set out in the celebrated case of *Ng'ang'a vs Republic* 1985 KLR 451 where Chesoni J, as he then was thus:-

“The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the *Criminal Procedure Code* (Cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-

- a) The accused will fail to turn up at his trial or to surrender to custody;
- b) The accused may commit further offences; or
- c) He or she will obstruct the course of justice

The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- a. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
- b. The strength of the prosecution case;
- c. The character and antecedents of the accused;
- d. The likelihood of the accused interfering with prosecution witnesses.”



14. The issue that arises is whether the reasons adduced by the prosecution are compelling reasons such that the court should not grant bail pending trial.
15. The prosecution has argued that the accused is likely to interfere with the prosecution witnesses as the said witnesses are his sisters and brother. Further, the prosecution has stated that the accused person's safety is at risk as tensions are still high at his home village where the incident took place.
16. In regard to interference with the key witness, the prosecution did not demonstrate that such a thing was likely to happen. Further, the allegation that the accused's safety is at risk is not supported by any evidence by way of affidavits from the said witnesses or other people. The statements of the investigating officer remain mere allegations. In the case of *R vs Joktan Mayende & 3 Others* (2012) eKLR, the court in considering the scope of Article 49(1)(h) stated as follows:-

The phrase "compelling reasons" denote that the reasons are forceful and convincing as to make the court feel strongly that the accused should not be released on bond. Bail should therefore not be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.
17. The prosecution in my view, has failed to present any cogent evidence to support the allegations in the affidavit of compelling reasons. Having carefully considered the grounds relied on, it is my view that the reasons given do not pass the test set out under Article 49(1)(h) of the Constitution.

Conclusion

18. I am of the considered view that the prosecution has not proved on a balance of probabilities that there are compelling reasons to warrant the denial of bail. I therefore find that the accused person is entitled to be released on bail on reasonable terms. He is hereby released on the following terms:-
 - a. Bond of KShs.1,000,000 with one surety of a like amount.
 - b. That the accused shall not leave the jurisdiction of this court without the permission of the court.. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 2ND DAY OF MAY 2024 AT THIKA.

F. MUCHEMI

JUDGE

