



**Republic v Mwachizi & another (Criminal Case E007 of 2024)
[2024] KEHC 7060 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CRIMINAL CASE E007 OF 2024**

OA SEWE, J

JUNE 5, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

OMAR MAGETA MWACHIZI 1ST ACCUSED

CHIWALA MWERO TSUMA 2ND ACCUSED

RULING

1. This is a matter in which the accused persons, Omar Mageta Mwachizi (the 1st accused) and Chiwala Mwero Tsuma (the 2nd accused) were arraigned in court on 13th May 2024 on Information that they had committed the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#), Chapter 63 of the Laws of Kenya. They denied the charge and have been in custody since. On the 28th May 2024 when the matter came up for plea, their counsel, Mr. Mbwiza, applied for their release on bond; which application was opposed by the Prosecuting Counsel, Ms. Mwaura. This ruling is therefore in respect of that bail application.
2. There is no gainsaying that bail is a constitutional right. The right is founded on Article 50(2) of the [Constitution](#), which stipulates that every accused person is entitled to the presumption of innocence. Consequently, Article 49(1)(h) of the [Constitution](#) is explicit that, unless there is a compelling reason, an accused person, ought to be released on bail, as a matter of right, pending the hearing and determination of his case. It provides that:

“An arrested person has the right ... to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.”
3. Accordingly, Section 123A of the [Criminal Procedure Code](#), Chapter 75 of the Laws of Kenya, stipulates that:



- (1) Subject to Article 49(1)(h) of the *Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
 - (a) the nature or seriousness of the offence;
 - (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
 - (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 and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection.
4. And, in the *Bail and Bond Policy Guidelines*, it is restated as a general guideline in Paragraph 4.9 that:
- “In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail...”
5. The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:
- (a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
 - (b) The strength of the prosecution case.
 - (c) The character and antecedents of the accused person.
 - (d) The failure of the accused person to observe bail or bond terms.
 - (e) The likelihood of interfering with witnesses.
 - (f) The need to protect the victim or victims of the crime.
 - (g) The relationship between the accused person and the potential witnesses.
 - (h) The best interest of child offenders.
 - (i) The accused person is a flight risk.
 - (j) Whether the accused person is gainfully employed.
 - (k) Public order, peace and security.
 - (l) Protection of the accused persons.
6. The Prosecution based their objection on the apprehension that the life of the accused persons may be imperiled by their release. Reliance was placed on the affidavit sworn by the investigating officer, Willy Partati of DCI Lunga Lunga. The investigating officer averred that the accused persons are flight risks since their place of residence is close to the Kenya-Tanzania Border; that they are predisposed to



violence and might interfere with the Prosecution witnesses most of whom are related to them; that there is bad blood between them and the family of the deceased, and that the community is hostile and therefore their lives might be at risk if released.

7. The Court also called for Pre Bail Reports in respect of the accused persons and they show that, while the family of the deceased have no problem with the release of the accused persons, the community is still hostile and may harm the accused persons in retaliation if released on bond at this time. Similar concerns were also expressed by the family of the 1st accused. The report further shows that the local administrators plan to convene meetings to manage the situation involving both the families of the deceased and the families of the accused persons.
8. Thus, having perused and considered the application in the light of the averments set out by the investigating officer in the aforementioned affidavit, and the findings set out in the Pre Bail Report, I am satisfied that compelling reasons have been given by the Prosecution to warrant the denial of bail for now. I accordingly direct that the accused persons remain in custody till 24th June 2024 when their application will be reconsidered by the visiting judge.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF JUNE 2024

OLGA SEWE

JUDGE

