



**Nyansera & another v Republic (Criminal Case E014 of 2024)
[2024] KEHC 9480 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E014 OF 2024
TA ODERA, J
JULY 15, 2024**

BETWEEN

JOHN MOSOTA NYANSERA 1ST ACCUSED

DADIUS NCHORE NYAKUNDI 2ND ACCUSED

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The accused persons herein are charged with the offense of murder contrary to section 203 as read with section 204 of the *Penal code*. The Particulars of the offense were that between 22nd and 23rd April, 2024 at an unknown place within Kisii County and unknown time within the republic of Kenya, the accused persons jointly with others not before court murder Linet Mosiara Nyabuto.
2. The Accused persons pleaded not guilty to the offence. They thereafter through their Advocates, Mr. Marita and Mr. Okemwa both made oral Applications to be released on favorable bond terms. The Prosecutor, Mr. Koima opposed the Application and indicated that investigating officer had filed an Affidavit wherein he had indicated that accused persons are a flight risk and are likely to interfere with witnesses. He sought for time in order to serve the same upon the parties so that they could respond to the same. He equally made an Application for a pre-bail probation report.
3. This court ordered the prosecution to serve the said affidavit to enable the accused persons reply to it. The court also ordered for a pre-bail report to be filed and served upon counsel for the accused persons.
4. In his affidavit sworn on 6th June, 2024 the investigating officer, Chief Inspector Nicholas Oluoch averred the accused person murdered Linet Mosiara Nyabuto and dumped her body at Nyangweta Forest in Etago in the morning of 23rd April, 2023. He averred that the crime was well organized and



- therefore it was apparent that there are other accomplices and witnesses who the accused persons are likely to interfere with if they are released on Bond.
5. He averred too that from the information he had gathered from the ground, members of the public are planning revenge if the accused persons are released on bond.
 6. He disposed that the 1st accused person took advantage of the bond by the Magistrate at Etago Law Courts and on two occasions visited the parents of the deceased and her children who now feel threatened. He disclosed that parents and children had reported the two incidents at the Itumbe Police station vide OB 37/20/05/2024 and OB No. 21/16/05/2024. He disposed to that the 1st accused person is man of erratic behavior given that he had occasionally meted physical violence on the deceased as well as the victims who are his children. He contended that denial of bond to accused persons would be nearly commensurate with punishment for the offence and thus the family will have satisfied and would easily heal from the painful loss.
 7. Regarding the 2nd accused person he indicated that he has no gainful employment and therefore he is likely to flee to unknown destination where cannot be easily located during trial.
 8. He disposed also that some of the witness feel threatened as they hail from the same locality.
 9. In conclusion he contended that it was in the interest of justice that the accused person be denied bond and be detained until the case is heard and determined.
 10. In response to the averments by the investigating officer the Accused persons filed replying affidavit which was sworn by the 1st accused person. In his Affidavit the 1st accused person averred that the affidavit by the investigating officer was anchored on mere allegations that they are not based any tangible evidence with a sole intention of hoodwinking the court to deny the accused persons bond.
 11. He contended that an accused person has a constitutional right to be presumed innocent until a determination guilty is made by the court and that it is a constitutional right for an accused person to be released on bond pending the hearing and determination of the case against him. He contended too that release on bond can only be denied by a court of law if only there are compelling reasons have been established by the accused person.
 12. It was also his contention that a causal perusal of the investigating officer affidavit reveals that there are no compelling reasons outlined to deny the accused persons their constitutional right to bond. Regarding the issue of the likelihood of the Accused persons interfering with witnesses, he averred that the Investigating officer did not provide any particulars of such interference nor any such evidence to demonstrate the nature of interference if any. He contended that the assertion that there was a likelihood of witness interference was based on mere suspicions devoid of any material backup.
 13. On the issue of their security being threatened in case they are released on bond and/or bail, he averred that their security was guaranteed that they have never received any threat from any member of public.
 14. He averred too that the main aim and objective when considering an Application for bond is to secure the attendance of an accused person attendance to court as and when required. He contended that here apprehensions cannot for the basis to denial of bond that is firmly guaranteed by the constitution.
 15. Regarding witnesses reporting that he had threatened them, he averred that such claims were baseless given that the investigating officer did not attach the said OB extracts to his affidavit. He equally stated the said issue of threats was inconceivable because he together with his co-accused person have been in custody since 2nd May, 2024.



16. Regarding the issue of his co-accused not being in gainful employment, he averred that bond or cash bail is not only granted to persons in gainful employment and if that were to be case, such a move will be discriminatory to his co-accused.
17. He dismissed that the claim that witnesses will feel threatened if the two of them are released on bond. He contended that mere apprehension of threat cannot be the basis for denying them bond. He equally contended that there is an Act of parliament that clearly provides for steps the prosecution should take to ensure that the witnesses are protected. He contended too that this court has powers to issue conditions to ensure that the witnesses are protected and such the mere apprehensions of threat cannot be reasons to deny the accused person bond.
18. As I have stated herein above this court had ordered for a pre-bail report to be prepared and the same was prepared. The probation officer prepared the probation report for the two accused persons separately. In the report for the 1st accused the probation officer stated that from the social inquiry report the life of the victims and that of the 1st accused person is under threat. He reiterated the averment of the investigating officer that when the 1st accused person was released on bond by Etogo Law Courts, he attacked the parents of the deceased persons which attack was reported at the police station. He also stated that the 1st accused person had also attempted to abduct his children whom he sired with the deceased and the matter was also reported on occasion by the victims. He stated the community where the 1st accused person hailed from was not conducive for his return and thus his security is not guaranteed. He stated that the 1st accused person is a flight risk. He therefore concluded that the 1st accused was not suitable for bond.
19. Regarding the 2nd Accused person, the probation officer recorded that victim's family is opposed to the accused person's bond citing fear for their lives. He recorded that the area administration has cautioned against the release of the 2nd accused person as she doesn't know him properly. He concluded therefore that the 2nd accused person was not suitable to be released on bond.
20. During the hearing of the application the learned prosecution counsel relied on the Affidavit of the investigating officer and urged to consider the same in determining the Application. He argued that even though the defense had raised an issue in the replying affidavit that the issue of threats was a mere allegation, the affidavit of the Investigating Officer confirmed that OB 37.20.5.24 and 21 of 20/5/24 were booked regarding the threats at Itumbe police station.
21. Mr. Nyamweya, the learned counsel watching brief for the victims' submitted that investigations are still ongoing. He indicated that 3 witnesses have requested to be placed under witness protection and were to record statements in the Afternoon. He also argued that the identity of the 1st accused person was still unknown and the same will require clearance by Investigating Officer. He claimed too that the victims are young children of deceased whom the 1st Accused person had attempted to take away from deceased. He contended that the motive of the offense was not clear and thus realizing accused at this stage will put the lives of the children in danger. He contended that the pre-bail report is clear on security of the children.
22. Mr. Okemwa for the 2nd accused person submitted that the accused person wished to associate himself with the replying affidavit by Accused no. 1 which also addressed the issues of the 2nd accused person. Concerning paragraph 3 of the replying affidavit of the investigating officer linking the accused persons to the murder of the deceased person, the learned counsel submitted that this was matter of evidence.
23. The investigating officer indicated that Accused 1 and Accused 2 are accomplices and that they may interfere with witnesses, the learned counsel submitted that no illustration has been given of how the



two accused persons will interfere with the witnesses. He contended the Accused come from different regions wherein one of them comes from South Mugirango and the other is from Bomachoge sub county which are different geographical places and thus interference was not possible.

24. He submitted that Accused 2 has never left custody. He contended that even poor people are entitled to be released on bond. The fact that he does not work does not mean he should be denied bond. He argued that the issue of bad behaviors has not been established. He thus contended there are no reasons advanced to deny Accused 2 bond.
25. Mr. Marita for the 1st accused submitted that that according to paragraph 4 of the investigating officer's affidavit the murder incident occurred 2 months ago. He wondered why the Investigating officer was stating that there are accomplices who are yet to be apprehended and that accused may collaborate with them yet he had 2 months to carry investigation to apprehend them. He therefore contended that the said claim is no sufficient grounds to deny the accused persons bond.
26. On the test of security of accused he submitted that the 1st Accused is employed as enforcement officer in Kisii County Government and no one threatened his life before arrest. He submitted to that the Pre-bail report is just but a guideline and the court still retained discretion to admit the accused person on bail.
27. Mr. Nyamweya for the victims responded to the submissions by the learned counsel for the accused persons. Regarding the issue that the two accused persons coming from different regions he contended that it is in the evidence that the deceased's body was picked from Bobasi in south Mugirango.

Issues For Determination

28. I have carefully considered this application, preliminary objection filed by counsel watching brief for the victim and the grounds of opposition and I find that the main issue for determination is Whether this court should admit the two accused persons on bond.

Analysis and Determination

29. 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.
30. While the Constitution does not identify what qualifies under the term "compelling reasons", Section 123A of the Criminal Procedure Code gives the parameters for the grant of the right to bail as follows:
 - (1) Subject to Article 49(1)(h) of the 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.
31. The factors for consideration 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 as follows:

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:
 - a. That the accused person is likely to fail to attend court proceedings; or
 - b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
 - c. That the exception to the right to bail stipulated under Section 123A of the [Criminal Procedure Code](#) is applicable in the circumstances; or
 - d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
 - e. That the accused person is likely to interfere with witnesses or evidence; or.
 - f. That the accused person is likely to endanger national security; or
 - g. That it is in the public interest to detain the accused person in custody.
32. In the instant case, the Prosecution and victims raised the issue of threats to witnesses as the main compelling reasons as to why the accused persons should not be admitted to bond. Relying on the Affidavit of the investigating officer and the Pre-Bail Report, they claim that the two accused persons if released are likely to pose a threat to the witnesses. In order to support their assertions, they relied on the revelation by the investigation officer that 1st accused person herein upon released on bond by Etago Law Courts on bond pending investigation, had on two occasions visited the parents of the deceased and also attempted to abduct her children who now feel threatened. The investigating officer and the probation officer stated that parents and children had reported the two incidents at the Itumbe Police station and were issued with OB 37/20/05/2024 and OB No. 21/16/05/2024. The extracts of the said Occurrence Books were not attached to the affidavit of the investigating officer. Though the OB extracts are not filed, Counsel watching brief told this court that they are working on witness protection and that they need time to complete the same. I note that there are children involved herein and the best interest of the children is always paramount in cases relating to children. The allegations relating to attempted abduction of the children are serious and need to be investigated thoroughly



- before I can make any orders as to bond relating to accused no.1. I find no connection of accused no. 2 to the threats to the family of deceased as there is no evidence that he has ever threatened any witness
33. On whether denial of bond serves justice to the victims, the investigating officer deponed that denying accused bonds will satisfy complainants. I do not agree with the said statement as accused are still presumed innocent unless proven guilty. This case has not been heard and so accused cannot be condemned or punished for the offence. In granting of bond, courts are guided by Article 49 (1) (h) of the Constitution, Section 123 A of the CPC together with the Bail bond guidelines 2015 only and not any other extraneous factors.
34. On the security of Accused no.1 it has emerged in the probation report and affidavit of the investigating officer that members of public are baying for his blood. The court has a duty to also ensure that the life of accused will be secure before his release. We are also told that he works with the County Government of Kisii as an enforcement officer. The 2nd wife to Accused no .1 indicated to the probation officer that he can be released on bond on condition that he moves away from home. Accused says he has not received any threats to his life from any person but I note that the pre-bail report and the investigating officer stressed the same. Threat to life is a serious issue which cannot be wished away. I have not seen any commitment from Accused no. 1 on steps he will take to ensure his own security given the prevailing situation at home. I find this to be a compelling reasons to deny him bond.
35. On Accused no.2, the investigating officer told this court that he has no job and thus he is a flight risk. Granting of bond does not depend of financial status of a person as rightly submitted by defence counsel. The purpose of bond is to ensure that an accused person comes back to court until the case is heard and determined. I find that joblessness is not a ground to deny bond to an accused person. I find no compelling reason to deny Accused no.2 bond.
36. From the forgoing therefore I hereby grant each of them bond/bail the following terms and conditions:
- i. Accused no. 1 is denied bond pending the processing of witness protection, investigations report of the alleged attempted abduction and filing of a children officers report.
 - ii. The investigating officer to avail a report on the investigations of the alleged attempted abduction.
 - iii. Witness protection agency to avail a progress report on protection of the witnesses herein.
 - iv. Kisii County Children Co-ordinator to provide a social inquiry report on the children of the deceased herein.
 - v. The 2nd accused person is admitted to bond of Kshs. 500,000/- WSLS.
 - vi. Accused no. 2 shall not contact any of the intended witnesses either directly or indirectly.
 - vii. Mention on 30.7.24 for the reports and further orders.

T.A ODERA

JUDGE

15.7.24

DELIVERED VIRTUALLY VIA TEAM'S PLATFORM IN THE PRESENCE OF:-

Mr. Koima for the state

Nyamweya watching brief for the victims



Both accused

T. Okemwa for accused no 2

Mariita for both accused (probono)

Court Assistant -Oigo

