



**Republic v Oonde & another (Criminal Case E018 of 2024)
[2024] KEHC 9000 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL CASE E018 OF 2024
FN MUCHEMI, J
JULY 25, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

KENNETH OMONDI OONDE 1ST ACCUSED

PAUL OOKO OTIEKO 2ND ACCUSED

RULING

1. The accused persons faces a charge of the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the night of 8th May 2024 at 2.00 a.m along Kenyatta Road at Orchard Estate in Juja Sub County within Kiambu County jointly murdered Patrick Gichia Mungai. On 24th June 2024, the accused persons pleaded not guilty to the charge.
2. The prosecution filed an Affidavit of Compelling Reasons sworn on 24th June 2024 by CPL Vickson Nyaga, the investigating officer herein. The deponent states that the accused persons should be denied bond as they are a flight risk because they do not have a fixed abode. The deponent states that the accused persons were arrested when they had taken the deceased to Impact Hospital at Maram Shopping Centre within Juja Subcounty. He further states that the accused persons were employees of Sacred Spy Security at the time of the incident. The deponent further states that he is apprehensive that if the accused are released on bond, they will continue with their employment at the security firm. If they decide not to continue working or are sacked, it is likely that they will abscond. The deponent states that he does not know where the accused persons live and if released on bond they may escape without a trace.
3. In opposition to the affidavit of compelling reasons, the accused persons filed individual replying affidavits both dated 3rd July 2024 and which stated that the investigating officer did not provide any compelling reasons pursuant Article 49(1)(h) of the Constitution and Section 123 (A) of the Criminal



Procedure Code. The 1st accused states that he is currently a resident of Kimunyu along Kenyatta Road where he stays with his wife and children and therefore he has a known place of abode. The 2nd accused states that he is a resident of Kimunyu Area along Kenyatta road where he works. Both accused persons further state that they do not own a passport and therefore they have no chances of leaving the country and are not a flight risk. Furthermore, the 1st accused states that the fact that the investigating officer did not know his place of abode is not a compelling reason to deny him bail/bond.

4. The 1st accused states that he is the sole breadwinner of his family. Both accused persons state that they have never been previously charged with any offence or appeared in a court of law in respect of any criminal offence. The 1st accused argues that the denial of bail/bond based on the apprehensiveness of the investigating officer is discriminatory especially to his young family which will continue to suffer following his incarceration. The accused persons further state that they understand the purpose of bail/bond and the consequences of absconding court and they assure the court that if granted bail/bond they will ensure their availability to court as and when required.
5. The Pre-Bail Assessment Reports dated 4th July 2024 indicate that the victim's family and the witnesses are objecting to both the accused persons being released on bond expressing that the accused persons are a flight risk for their homes are not yet known. The investigation officer is apprehensive that both accused persons are likely to interfere with the witnesses for some of them are their colleagues at work and are well known to them. The report however indicated that the accused person's employer informed the officer that the said witnesses already left the company which they were working for. The report provided that the 2nd accused person has a permanent place of abode at his parent's home in Migori County and is therefore not a flight risk as the 2nd accused person's parents are responsible family and community members who do farming as a means of sustenance.

The Law

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

6. 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.

7. It follows that the right to bail is not absolute 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.
8. 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.”

9. In *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.”

10. The issue that arises is whether the reasons adduced by the prosecution are compelling enough such that the court should not grant bail pending trial.

11. The prosecution argues that the accused persons are a flight risk for they have no fixed abode and that they were arrested when they took the deceased to Impact Hospital at Maram Shopping Centre within Juja Subcounty. The 1st accused person has stated that he is not a flight risk as he currently resides at Kimunyu along Kenyatta Road with his wife and children whereas the 2nd accused person states that he is also a resident of Kimunyu along Kenyatta Road where he works. The pre bail assessment report provides that the accused persons have a fixed place of abode. Furthermore, the fact that the investigating officer did not know where the 1st accused person lives is not a justification to deny the accused persons bond.



12. On the issue of interference of witnesses, it is evident that the investigating officer has not produced any evidence to support his claims. Furthermore, the employer of both accused persons, one Mr. Obala has stated that he is not against them being granted bail/bond and is willing to take them back or assign them to a new station from where the incident occurred to avoid any possible interference with the witnesses. That notwithstanding, Mr. Obala stated that the said witnesses already left the company which the accused persons were working. As such, the prosecution has not proved that the accused persons will interfere with the said witnesses.
13. The paramount consideration in granting bail pending trial is whether the accused will turn up for trial. The court in granting bail must ensure that the terms and conditions it imposes addresses the issue of turning up for trial.
14. The prosecution's allegation that the accused persons have no fixed abode has been controverted by the pre-bail report which states otherwise. The prosecution's fear that the accused persons may interfere with witnesses is not supported by any tangible evidence, for example, an affidavit of any of the witnesses. There is evidence on record that the witnesses left employment in the security firm immediately after the accused persons were charged. As such, I find that the allegations fronted by the prosecution are not supported by any evidence.
15. It is my considered view that the prosecution has not established any compelling reasons as to why the accused persons should not be released on bail.
16. Consequently, I hereby order that the accused persons be released on bond of Kshs.1,000,000/= with one surety of a like amount. The accused shall not leave the jurisdiction of this court without its permission.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JULY 2024.

F. MUCHEMI

JUDGE

