



**Republic v Chepkwony (Criminal Case E029 of 2022)
[2024] KEHC 9765 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE E029 OF 2022**

**RL KORIR, J
JULY 24, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

VICTOR KIPKURUI CHEPKWONY ACCUSED

RULING

1. The Accused person, Victor Kipkurui Chepkwony has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the charge were that on 19th December 2022 at around 7.10am, at Ekaterra (K) plc, Kapkwen Estate, Chemosit Location in Konoin Sub-County within Bomet County, the Accused murdered James Kipkemoi Kipketer.
2. The Accused pleaded not guilty to the charge and his Counsel applied to have him admitted to bail/ bond on reasonable terms as the Court would deem fit, pending the hearing and determination of the case. On the same day, this Court directed that the Probation Officer’s Report be filed for its consideration.
3. On their part, the Prosecution requested the Court to consider the concerns of the victim’s family as contained in the Probation Officer’s Report. I have reviewed the Probation Officer’s Report dated 7th March 2023.
4. Article 49 of the Constitution of Kenya provides for the right to bail as follows: -
An arrested 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.



5. Ibrahim, J (as he then was) in *Republic vs. John Kabindi Karisa & 2 others* (2010) eKLR stated clearly that:

“This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the Criminal Procedure Code which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these cases, the mandatory sentences provided by law is death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any offence under the Penal Code including those that attract the death sentence e.g. murder, the same is bailable. A murder suspect has a Constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.”

6. It follows then that, bail is a fundamental right available to an accused person facing trial. This right is however not absolute. Section 123A of the *Criminal Procedure Code* Cap 75 outlines the parameters for the grant of the right to bail as follows:-

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.

7. Bail is dependent on judicial discretion. However, such discretion is not to be exercised whimsically but must take into consideration the law and circumstances of a case. The court is further guided by the *Judiciary Bail and Bond policy Guidelines* of March 2015 which set out the considerations to be made in an application for bail pending hearing. The Guidelines outline specific considerations to be made by courts at page 25 as follows:-

- 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.
8. In the present case, the Accused was charged with the offence of murder of James Kipkemoi Kipketer whom he discovered was having an ongoing affair with his wife. The offence of murder is considered a capital offence and attracts capital punishment if circumstances warrant so. The gravity of this offence was espoused in the case of *Watoro vs. Republic* (1991)KLR 220 where the court held thus:-

“The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody.....the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases.....the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction....”

9. Mr. Barusei, defence Counsel submitted that the Probation Officer’s Report was favourable to the Accused and that the Accused understood that he would be required to attend Court without fail. He further submitted that the Accused was ready to abide by any bond terms issued by the Court and that he was not a flight risk because he had a fixed abode.
10. I have noted that the Accused’s family members are willing to accept him back into the family if he should be granted bond and that they were making arrangements to visit the deceased’s family in Laikipia to seek reconciliation and commence traditional cleansing rituals, if the deceased’s family would be willing to engage them. At the same time, his wife expressed her desire to have the Accused released on bond during the pendency of the trial because she was struggling to raise their four children singlehandedly. The Accused’s ailing father also relied on him for medicine and upkeep in his old age.
11. In terms of the community outlook, the Accused was reported to be a humble person with a good relationship with other community members and that the entire community was shocked at what transpired between him and the deceased. The local authorities also knew the Accused to be obedient and likeable. Finally, the Report indicated that the Accused’s family was ready and capable of raising bond should the Court deem it fit to grant him his prayer.
12. On the other hand, I have considered the plight of the victims. They objected to the release of the Accused on bond on the grounds that it would be an injustice for the Accused to enjoy freedom during the hearing yet one of their own had died. They were opposed to the Accused’s family’s request for reconciliation and traditional rights.
13. It is the duty of this Court to balance the above conflicting interests being an accused’s right to bail and the victims’ interests and right to justice and arrive at a decision whether or not to grant bail.
14. The primary purpose of bail is to secure the attendance of an accused to Court so that he or she may face trial. This was held in the case of *Kelly Kases Bunjika vs. Republic* (2017)eKLR thus:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is



demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms”.

15. As earlier stated, the only tether to the grant of bail under Article 49 of the *Constitution* is the existence of compelling reasons. In Republic vs Joktan Mayende & 4 Others Bungoma, High Court Criminal Case No. 55 of 2009, the court defined the terms “compelling reasons” as follows: -

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the *Constitution*”.

16. This Court has taken into consideration all the relevant factors and arrived at the finding that there are no compelling reasons to deny the Accused bail.

17. I have given due consideration to the concern of the victims. It is the view of this court that the release of the Accused on bail will not prejudice the victims in any manner as the accused shall be tried and convicted if found culpable or acquitted if found innocent.

18. In the end, though the Accused has been charged with a serious offence whose punishment upon conviction may be capital punishment, it is my finding that there are no compelling reasons for me to refuse to grant him bail. The Accused in this case is not a flight risk and his family and community are willing to welcome him back home. Further, it has been demonstrated that his family is capable of standing surety for him.

19. I am therefore inclined to grant him bail in the following terms:-

- I. He shall execute a personal bond of kshs. 300,000/- and one surety of similar amount.
- II. He shall attend court whenever required and shall not impede the trial in any way.
- III. He shall not interfere with prosecution witnesses.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 24TH DAY OF JULY, 2024.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in open court in the presence of Accused Mr. Barusei for the Accused, Mr. Njeru for Prosecution and Siele (Court Assistant).

