



**Republic v Ndegwa alias Wagatare (Criminal Case E038 of 2023)
[2024] KEHC 8572 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE E038 OF 2023**

**HM NYAGA, J
JULY 11, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL NDEGWA ALIAS WAGATARE ACCUSED

RULING

1. The accused is charged with Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The particulars are that on 17th September, 2023 kwa Muhoroo Village of Jirani farm within Njoro Sub County in Nakuru County he murdered Andrew Wanyonyi Barasa.
3. On 24th October, 2023 he pleaded not guilty and he was granted bond of Ksh. 500,000/= with a surety of similar amount.
4. On 25th April, 2024, the defence counsel, Ms. Kamau, applied for an alternative cash bail on grounds that the accused's relatives could only raise Ksh. 200,000/= and accused was H.I.V (Human Immunodeficiency Virus) positive and was on medication.
5. After the Accused's Pre-Sentence Report was filed and shared with the parties, I directed them to submit on the Accused's Application.
6. The Accused submitted that the Victim's sentiments that the accused may interfere with witnesses if granted bond is shallow and mere suspicion as it is not backed by any evidence.
7. The accused posited that there was need for the prosecution to adduce evidence to substantiate the above position considering the victim and two other witnesses have testified and none of the prosecution witnesses have complained of the same. In support of this position, the accused relied on the cases of [Rep v Dwight Sagaray & others](#) High Court Criminal Case No. 61 of 2012, Milimani;



Republic v William Kipkorir Kipchirchir & Another [2018] eKLR; & *Panju v Republic* [1973] EA 282, page 283.

8. The prosecution counsel in her oral submissions opposed the application for reason that the pre-bail report noted the accused's family had a title deed and that the victim's family apprehension was documented. She thus prayed that the initial bond terms be maintained.
9. I have perused the filed pre-sentence report. It indicates the accused's parents are deceased and that his family owned six acres of land and they practiced mixed farming. The accused is a fifth born among six children and his family has no criminal record. The accused is 59 years old and married with four children all who are adults. The accused has no criminal record and is of low flight risk. The accused significant others are ready to place a title deed of three acres of land located at Laikipia County, Oldonyo Sub-County worth approximately two million and registered in the name of Zipporah Wanjiku Njihia.
10. The victim's wife one Diana Chepkemai expressed apprehension that if the accused was to be released on bond he may interfere with witnesses. The accused's brother one James Mureithi is agreeable to living with the accused upon his release on bond and to ensure he attends court as scheduled.

Analysis & Determination

11. The only issue for determination is whether this court should review the accused's bond terms of Ksh.500, 000/= and one surety of similar amount.
12. Article 49(1)(h) of the *Constitution of Kenya* provides;
 "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."
13. Section 123 of the *Criminal Procedure Code* provides that:
 "(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail: Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
 (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
 (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced."
14. In reviewing the bond granted, it is essential that the court succinctly brings out the purpose of bail and bond. The purpose of bail and bond is to ensure the accused person attends court and to safeguard his/her freedom.
15. The issue of terms to be placed or grant of the right to bond or bail is a matter of discretion of the court. And the court is expected to exercise its discretion on the same judiciously taking into account the



individual circumstances of each case. The overriding principle being that the terms set must guarantee the accused's attendance in court for his trial. The *Bail-Bond Policy Guidelines* of paragraph 3.1(c) direct that the securities must aim at procuring the release of the accused together with sufficient undertaking that he will appear for trial.

16. The Court of Appeal, in the case of *Bernard Kimani Gacheru v Republic* (2002)eKLR on the issue of discretion of a lower court on a sentence (or order as in our case), held that;

“It is now settled law, following several authorities by this court and by the High Court, that sentence (read order) is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence, unless, any one of the matters stated above is shown to exist.”

17. In *Mohamood Chute Wote & 2 others v Republic* [2021] eKLR Hon. Grace Nzioka expressed herself on the Article 49(1)(h) and Section 123 of the *Criminal Procedure Code* as follows;

“The key word is; “reasonable.” Thus, the question that arises is: what criteria should be used in determining what is reasonable? In my considered opinion, the starting point is the recognition of the fact that, under Article 50(2) of the *Constitution of Kenya*, 2010, every accused person is presumed innocent until proved guilty. The purpose of bail and bond terms is to ensure therefore that the accused attends the trial. Further, the provisions of section 123A of the *Criminal Procedure Code* provides the relevant circumstances to be considered, including; nature and seriousness of the offence, character of the accused, record of compliance with previous bail and bond terms and strength of the evidence to be adduced.”

18. At Paragraph 3.1. (d) of the *Bail and Bond Policy Guidelines* (at page 9) it is provided that:

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“d) ... Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”

19. In the instant case the court has been told by the defence counsel that the accused has been unable to raise the initial aforesaid bond terms and can only raise cash bail of Kshs. 200,000/=.



20. I have considered the submissions by both parties in this matter. From the Prosecution's submissions, I discern her ground for opposition of the accused's application, is that the accused's family has indicated they have a title deed and as such the initial bond terms should be maintained and not that the accused will interfere with the witnesses. The defence counsel chose not to comment on this issue despite the presentence report expressly indicating that the accused relatives are willing to deposit a title deed worth Ksh.3 million in court in order to secure the release of the accused on bond. The defence counsel submissions therefore were not in tandem with the views of the accused's family.
21. The court is alive to the fact that the bond/ bail terms set are not out of the ordinary. They are in tandem with other terms for similar offences.
22. For the foregoing reasons, I do not see a justifiable ground to interfere with the earlier set bond terms.
23. Accordingly, the Accused application is disallowed and dismissed. The accused's family should process the title deed and have the surety appear before the Deputy Registrar for approval in the usual manner.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of:-

Nancy for state

Court Assistant Jeniffer

Accused present

