



Republic v Njuguna & 2 others (Criminal Case E008 & E037 of 2023 (Consolidated)) [2024] KEHC 8022 (KLR) (Crim) (3 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E008 & E037 OF 2023 (CONSOLIDATED)**

LN MUTENDE, J

JULY 3, 2024

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER KAMAU NJUGUNA ALIAS SOLDIER 1ST ACCUSED

GIDEON NJOROGE KINUNGI ALIAS HAMISI ALIAS JITU 2ND ACCUSED

KENNEDY NJUGUNA WAMBUI ALIAS KEN 3RD ACCUSED

RULING

1. The accused are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence being that on 16/1/2023 at around 0200 hours at Marurui area in Kasarani within Nairobi County, they jointly murdered Simon Nganga Mutuku.
2. Having denied the allegations, they seek to be released on bail pending trial. The 1st accused submissions are not on record. It is submitted in respect of the 2nd accused that the charges levelled against the accused are serious allegations, but, the accused enjoy a constitutional presumption of innocence. That the accused will religiously attend court if released and will appear when he is needed.
3. For the 3rd accused, it is submitted that there is no reason why he should not be admitted to bail as he is a Kenyan, not a flight risk and a first offender. That the State has a duty to protect the accused, hence prays for lenient bail terms.
4. The application in respect of 1st and 2nd accused is not opposed. However, the 3rd accused application is contested. Notably, neither the replying affidavit, nor the pre-bail report in respect of the 3rd accused were filed as directed by court.



5. It is urged for the 3rd accused that there is no evidence he is a flight risk. That the prosecution alleges that he fled the scene, however, the accused was arrested while working as a tout on 15/6/2023. The accused has unqualified right to be presumed innocent until he is proven guilty. The prosecution has a duty to urge compelling grounds.
6. The right to bail is a fundamental right which can only be limited in a manner provided in law and where the prosecution proves existence of exceptional, convincing, forceful or compelling reasons to deny the accused bond.
7. In *Republic v Danson Mgunya & Another* (2010) eKLR Ibrahim J (as he then was) held that the principle that the liberty of accused should only be limited where there are compelling reasons not to be released and it is the duty of the State to demonstrate the same, and even then each case must be decided on its own circumstances.
8. The paramount purpose of bond is to ensure the accused attends court. The court should liberally grant bond and also be seen to facilitate the accused fundamental right by granting reasonable terms. Article 49(1)(h) of the *Constitution* of Kenya 2010 provides for the right to bail. It enacts thus:

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.

9. The accused right to bail pending trial should be guaranteed and should be protected unless the prosecution or the police adduce compelling reasons requiring them to be denied bail. These reasons must be persuasive and forceful and should be proved beyond reasonable doubt.
10. The 1st and 2nd accused application is unopposed. Prebail reports were however filed further to their applications, in the interest of justice, the accused personal circumstances had to be considered. The 1st accused has a family and his wife was expectant at the time of his arrest, they are estranged and the children are with the wife. The accused has a history of drug abuse and this may interfere with adherence to bond terms. It is suspected that he might commit other offences while out on bail. His mother also acknowledges the challenge of the 1st accused being a drug addict who was undergoing rehabilitation through a methadone programme. The accused sibling was also killed on being suspected of stealing and stabbing a person in Marurui.
11. The victim and community views are captured. the accused is said to have threatened one witness at the police station and his release may lead to retaliation. The victim's family indicate that the deceased worked at a car wash in Marurui and that the accused release will make witness develop cold feet. The accused is also a flight risk.
12. The court has a duty under the principles of bail and bond to consider the pre-bail report where serious offences are concerned. The granting of bail is discretionary and each case should be determined on its merit as long as the administration of justice and public interest and/or order is preserved.
13. The accused did not rebut the contents of the pre-bail report. The accused is not suitable to be granted bail as per the report. The character and antecedents of the accused, the possibility of committing other offences and also jumping bail are compelling grounds to be considered. The need to ensure public order is also important in granting bail.
14. Section 123A of the *Criminal Procedure Code* lists the considerations for granting bail as:

The nature of the offence; strength prosecution case;



character accused and antecedents;
failure by the accused to observe previous bail or bond;
witness interference;
protection of the victim;
relationship between the accused and the potential witness(es);
whether the accused is a child offender;
whether the accused is a flight risk;
if the accused is gainfully employed; public order;
peace security;
and whether there is need for the protection of accused person.

15. In *Republic v Richard David Alden* (2016) eKLR, the High court held that under guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.
16. The 1st accused does not have a competent surety and his mother admits that he has a history of drug addiction. It would be difficult to supervise bail terms under such circumstances. On the other hand the accused attendance will be guaranteed and supervised while in remand custody where it is recommended that he undergoes counselling and rehabilitation pending trial.
17. The 2nd accused is 48 years and recently separated from his wife who took custody of their two children leaving the eldest with the accused who is now of the age of majority. His family vouched for his release and that the accused will relocate to his rural home. The deceased mother opposed bail on the ground that witnesses will develop fear, and the accused is also a flight risk.
18. The State has indicated that It is not opposed to the 2nd accused release on bail. The community and administrators do not object to his release on bail. The fear of witnesses and /or interference though genuine must be demonstrated which was not done. The 2nd accused has a history of drug and alcohol abuse. Further the fact that he is a flight risk must be proved by some attempt and plan to evade the jurisdiction of the court or abscond trial. These may be prevented and controlled by stringent bond terms limiting his movement within the court's jurisdiction. (See the case of *R v Dwight Sagaray & 4 others* (2013) eKLR).
19. The fact that the accused was arrested later and at a different place does not prove that he is a flight risk. The accused was still within the jurisdiction of the court and the police investigating the case. There was no evidence that he evaded trial.
20. The 3rd accused was also charged in Criminal Case No. E037/23 which was consolidated with this case. The court has not been informed that charges were brought separately because the accused frustrated prompt arrest and arraignment.
21. Just like the 2nd accused, there are no compelling grounds on record to deny the 3rd accused bail. For that reason, the 1st accused is denied bail; but, the 2nd and 3rd Accused are granted bond. Each one of



them may be released on bond of Ksh, 3,000,000/- with two (2) sureties in a similar sum on condition that they do not step foot at Marurui area and its environs upon release.

22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 3RD DAY OF JULY, 2024.**

L. N. MUTENDE

JUDGE

