



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Gasike (Criminal Case E062 of 2023)  
[2024] KEHC 8136 (KLR) (Crim) (1 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL CASE E062 OF 2023**

**LN MUTENDE, J**

**JULY 1, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**GODFREY LOTOME GASIKE ..... ACCUSED**

**RULING**

1. Godfrey Lotome Gasike, the accused, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the offence being that on 13/9/2018 at Kayole Embakasi East within Nairobi County he murdered Damiano Kirie Ngare .
2. Having denied the information presented by the State through the Director of Public Prosecutions he seeks to be released on bail pending trial.
3. The application is opposed by the State through an affidavit deposed by Benedito Otieno an Investigating Officer from Independent Policing Oversight Authority (IPOA) which investigated the complaint. He avers that the deceased sibling is a witness in the case and that crucial witnesses have also been harassed and intimidated by police officers from Kayole Police Division, acts suspected to be related to their role in this case as key witnesses.
4. That the witnesses are business wo(men) and have expressed concern of their safety, the police have also asked for appropriate action by the Witness Protection Agency. That the police informer also came from Soweto area where the accused resides. The accused will also intimidate witnesses whose evidence has been disclosed through the committal bundles supplied to him.
5. That the accused a police officer, has powers and privileges of access to firearm and also technical knowledge and resources to track witnesses which calls for the accused being denied bail.



6. A second affidavit opposing bail is deposed by Bernard Ngari Mutahi, the deceased's father and secondary victim, who states that the family is still in agony following the demise of the deceased who at the time was in company of his twin brother Julius Kariuki Ngari and is still traumatized. That they received calls from unknown people warning them not to pursue the case. He asks the court to defer the question of bail until the family and other crucial witnesses testify.
7. Through an affidavit deposed by the accused he disputes the allegations by the State. He avers that there is no evidence that Bernard Ngare is the father of the deceased and the affidavit is in breach of Section 17 of the *Oaths and Statutory Declarations Act*.
8. That he is not known to the family and therefore cannot contact them; that the murder occurred in 2018 and he complied during the investigations. That the allegations are suspicious and that he has been in custody since his arraignment.
9. The application was canvassed through written submissions. the accused submits that the State has not demonstrated harassment or intimidation of witnesses. That no report was made on the alleged threat to their safety and how it was influenced by him. That he has been interdicted and has no access to phones or firearms. That he complied during investigations and there had been no complaint. The accused further submits in his rejoinder that there is no evidence of communication and no incidence of interference was proved and that he will stay in his ancestral home in Isiolo County. Reliance in this respect is placed on the case of *Dwight Sagaray v Republic* (2013) eKLR; and, *Republic v John Kabindi Karisa & 2 Others* (2010) eKLR .
10. The State submits that it had raised two compelling reasons to deny the accused bail, specifically, the likelihood to interfere with witnesses and the need to protect victims of the crime. That the accused is a serving police officer and is trained in use of firearms raising legitimate anxiety to the victims and witnesses. That the 3 crucial prosecution witnesses reside in Soweto within or near Kayole Police Station where the accused was attached as an undercover police officer. That the witnesses have not testified and the perceived fear is still live. In this regard reliance is placed on the case of *Republic v David Ochieng Ajwang alias Daudi & 11 Others* (2013) eKLR; and, *R- Vs- Fredrick Leliman & 4 Others* (2019) eKLR.
11. That the deceased father suffered intense anguish and trauma over the death of his loved one and release on bail would cause more trauma to the victim family.
12. Lastly that the accused should be protected. There is fear of undermining public order, peace and security and that the community, the family and the victim are still volatile. There is fear that the residents would retaliate. That public interests must be taken into account and the State has a duty to protect the safety of the accused and the integrity of the criminal justice system. That bail should not be allowed until the 3 witnesses and other close family members testify.
13. Pursuant to the Victim Protection Act, views of the victims were also captured through the pre-bail report. From the report, the accused hails from Kisima in Meru County and is the 2<sup>nd</sup> born in his family, he joined the police force and has been attached at SPIU in Soweto area. He does not have any disciplinary action and cooperated with IPOA during investigations.
14. He has 2 children and he caters for their subsistence. His family also vouches for his release on bail. That the accused will reside in their rural home where he has a permanent house. The accused expressed his fearful stay in remand stating that he receives death threats from fellow remandees and has limited access to facilities.



15. Secondary victims opposed the application for bail and indicated that the charges have been brought after 5 years. They have been harassed by police and the deceased brother has faced trumped up charges and attempts of arrest at Kigumo, Kangema and Soweto. He had to move out of Kayole and change his contacts as a result.
16. The deceased's father stated that his children are in different parts of Nairobi and have stress. He calls on government agencies and the Witness Protection Agency to protect the deceased brother.
17. The community at Soweto were divided, some oppose the accused release on bail stating that he is dangerous and has instilled fear in witnesses. Others stated that he is known for his role in fighting violence and that the offence is related to his duty and he deserves bail.
18. I have considered rival arguments and pre-bail reports. The accused right to bail is guaranteed under Article 49(1) (h) of the Constitution and should not be limited or denied unless there is proof of compelling reasons:
19. The burden of proof is on the prosecution to adduce compelling reasons, this burden is beyond mere speculation and must be established beyond reasonable doubt. The paramount reason being whether the accused will turn up for his trial if he is released on bail.
20. It is contended that if released on bond, the accused will interfere with witnesses. Such an averment must be demonstrated through evidence, the prosecution must prove a real likelihood or apprehension that the accused may have close contact with witnesses and/or take actions that would adversely influence their testimony. Witness interference has been stated be through threat or intimidation and in the whole is considered to be prevented in order to protect the wider public interest and to protect the criminal trial.
21. In Republic v Gibson Kiplangat Bett (2022) eKLR, Gikonyo J held that:

“Interference with witnesses undermines the criminal justice system and dents the integrity of the criminal process; in turn interference with the administration of justice, and prejudice to the trial. Thus, it is the duty of the court to preserve the integrity of the trial.”
22. The accused is a police officer on interdiction having been attached to Soweto police station which is within the area where the offence is stated to have been committed. The State (Prosecution) is duty bound to place material particulars before this court demonstrating the likelihood of interference or that he is connected to the alleged threats of witnesses and the victim family residing in the area.
23. It has been alleged that 3 witnesses and the deceased immediate family have been exposed to threats and intimidation and have been warned not to pursue the case. This was stated to have happened during investigations.
24. It is trite that witness interference may occur at different stages which include investigation and arrest stages. (See the case of R. -Vs Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR). However, the prosecution must adduce grounds which are forceful and attach relevant evidence to prove compelling grounds. The family members did not report the threats and strange calls. These remain to be mere allegations which do not meet the burden of proof under Article 49 of the Constitution.
25. The community is divided , some are amenable to his release since he has a record of fighting crime and also that the offence occurred in the course of duty .The latter is to be proved during trial. On the other hand, the prosecution has urged that there is fear of retaliation from residents of Kayole. From



the affidavit evidence adduced and the prebail report filed following social inquiry, this ground has not been demonstrated.

26. It has also been alleged that the accused has knowledge on firearms and intel on witness contacts which is a threat to them. This remains speculative until the prosecution proves the position. It is not in dispute that the accused is on interdiction and in such case is unable to access the weaponry or alleged intel. Further, there is no report linking him to violence and abuse of office. Instead, he is stated to be a person of good conduct with no pending disciplinary action against him.
27. An accused person is guaranteed bond or bail unless it is demonstrated that pre-trial detention is necessary. The accused case is that if released he would relocate to Isiolo/ Meru where he has a permanent residence and which is also his rural home. The danger and threats of retaliation or interference can be controlled and prevented and this should not be a reason to deny a citizen his fundamental right. The state has a public duty to arrest and prosecute following such actions.
28. From the affidavit evidence adduced and the prebail report, it is apparent that the offence took place in 2018. The accused had been in contact with the community at Kayole during the 6 years period, the contact and interaction was not supervised or limited in any way. If retaliation was intended, that would be the appropriate period. These incidences, if any, had to be reported, but, there is no evidence of such report which leaves averments merely speculative.
29. As to whether the victim's interest would be prejudiced, Section 10 of the [Victim Protection Act](#) provides:  
10  
(1) a victim has a right to: -
  - a. Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
  - b. Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and
30. Section 9 as read with 20 and 21 of the [Victim Protection Act](#) allows the court to record and consider the victim's concerns and interest in a criminal trial and at the bail hearing.
31. The affidavit of Benard Ngare Mutahi has been contested on ground that the deponent has not been proved to be the father of the deceased. Section 17 of the [Statutory Oaths and Declaration Act](#) provide that:  
17. Subject to the provisions of section 19, oaths or affirmations shall be made by –
  - a. all persons who may lawfully be examined, or give evidence or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence
32. The general rule is that any person with information relevant to an action and who is duly authorized can swear an affidavit in the action. Further, affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.
33. The pre-bail report captured the concerns raised in the impugned affidavit, the information is said to have come from the deceased father. There is no reason to doubt the capacity of the deponent or reason to believe that the deponent or the prosecution acted in such fraudulent manner by misrepresenting the facts and identity of the deceased father.



34. The fact that the deceased family is still in fear and that they still have trauma after the death have been noted. These concerns must be interrogated together with and in a manner that does not prejudice the accused right to be presumed innocent, his right to a trial process where his fate would be determined and lastly to be released on bail during the period.
35. Section 9 (2) of the *Victim Protection Act* provides that:
- Where the personal interests of a victim have been affected, the Court shall—
- a. permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and
  - b. ensure that the victim's views and concerns are presented in a manner which is not—
    - i. prejudicial to the rights of the accused; or
    - ii. inconsistent with a fair and impartial trial.
36. All allegations against the accused must be proved. It would not be right to deny him bail on account of volatility on the ground of trauma and anxiety of victims which remains speculative. These fears and anxiety may be countered by imposing conditions to be met, and, in the result, the fear will dissuade with time.
37. The accused having indicated to court that he will reside in Meru/Isiolo County where he has a permanent home and would be traced. It is clear that he may not trace, locate or hunt for witnesses or in some way interfere with the case. Further the victim family is said to have relocated from Soweto and now reside in different parts of Nairobi.
38. The Witness Protection Agency and investigating officers have also been empowered to take appropriate steps to ensure that during the trial witnesses are safe. The prosecution is enjoined to make the relevant application for witness protection if need be.
39. The prosecution having failed to demonstrate to the required standard the necessity to the accused being denied bond, I allow the application for bail pending trial on the following conditions;
- a) The accused shall post bond of Ksh.2,000,000/- with two sureties in a similar sum.
  - b) The accused shall not contact witnesses directly or indirectly through proxy during trial.
  - c) The accused shall not be seen within Soweto area or its environs.
  - d) The accused shall relocate to his rural home and at the appearance in court avail a letter from the Chief confirming the relocation.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 1<sup>ST</sup> DAY OF JULY, 2024.**

**L. N. MUTENDE**

**JUDGE**

