



REPUBLIC OF KENYA



**Owaka v Republic (Criminal Case E008 of 2022)
[2023] KEHC 313 (KLR) (4 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE E008 OF 2022
GL NZIOKA, J
JANUARY 4, 2023**

BETWEEN

JULIUS GAO OWAKA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant is charged with the offence of murder contrary to section 203 as read together with section 204 of the [Penal Code](#) (cap 63) Laws of Kenya. The information was read to him and he pleaded not guilty. He now seeks for bail or bond pending the hearing of the case.
2. The application was canvassed orally wherein, his learned counsel Mr Owuor submitted that, the only reason why the applicant can be denied bond, is if he is a flight risk. However, the reason given by the respondent in opposing the application is that, he has no fixed place of abode, but the applicant will stay with his brother upon release.
3. Further, bail and bond application was initially declined as the victim's family sought for six (6) months delay, which period has lapsed. Finally, the accused's brother is ready to offer security for the bond and the accused shall abide by all the conditions given by the court.
4. However, the respondent opposed the application vide a replying affidavit sworn by the Investigation Officer No 74532 Corporal Vincent Ngereza, wherein he avers that, after the accused committed the alleged offence, he disappeared to Nairobi and was arrested at Githurai Kibo staying with a friend. That he has no fixed place of abode.
5. Furthermore, he is likely to interfere with witnesses who are family members of the deceased and who are known to him. Further, due to the gravity of the offence and overwhelming evidence the applicant is likely to abscond the proceedings. These averments were repeated verbatim by the Learned State Counsel, Ms Maingi in her oral address to the court.



6. However, the accused's learned counsel argued that, the respondent is acting on mere suspicion that the applicant will interfere with witnesses. That, there is a relative who has offered to stay with the applicant upon release.

7. I have considered the application and note that, as a matter of fact an accused person is presumed innocent until otherwise proved. This is provided for under article 50 (2)(a) which states as follows:

- (2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved;

1. In the same vein article 49 (1) (h) of the Constitution states that:

- 1. 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.

2. Similarly, the provisions of section 123 of the Criminal Procedure Code empowers the court to admit the accused person to bond or bail on reasonable terms and states 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.

3. In addition, section 123A provides that: -

- (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 Bail and Bond Policy Guidelines (b) should be kept in custody for his own protection.
- 4. The Bail and Bond Policy Guidelines also make provisions for provision of bail and bond terms. The general principles 3.1 states that bail and bond decision-making shall be guided by the following principles, which are derived from international best practices:
 - a. The right of accused person to be presumed innocent. That every accused person shall be presumed innocent, as that is primary rationale for the requirement of the Constitution that an arrested person has the right to be released on bail or bond. Thus, pre-trial detention should not constitute punishment and they should be treated different from convicts as provided for under the *International Covenant on Civil and Political Rights* (ICCPR) provides that, “accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons.”
 - b. Accused person’s right to liberty. That every accused person has the right to liberty. As a general rule, therefore, every accused person should not be detained, but should be released subject to his/her guarantee to appear for trial.
 - c. Accused’s obligation to attend trial. That bail and bond provide guarantees that accused persons will attend trial.
 - d. Right to reasonable bail and bond terms: 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. This is because the ultimate goal of bail or bond is to guarantee that an accused person attends his or her trial.
 - e. Bail determination must balance the rights of the accused persons and the interest of justice. Thus where there is convincing evidence that an accused person may undermine the integrity of the criminal



justice system, by, for example, intimidating witnesses or interfering with the evidence, then a need arises to either deny such a person bail or bond, or set stringent bail or bond terms. That the interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons.

- f. The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. As such the safety of victims and victims' families in fixing the amount of bail and the release conditions for suspects and accused persons, should be considered.
5. The general principle 4.9, states that the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. In a nutshell the following factors should be considered: -
 - a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
 - b. The strength of the prosecution case.
 - c. Character and antecedents of the accused person
 - d. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.
 - e. Likelihood of interfering with witnesses.
 - f. The need to protect the victim or victims of the crime from the accused person.
 - g. The relationship between the accused person and potential witnesses.
 - h. Child offenders. Where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
 - i. The accused person is a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security.
8. Pursuant to the aforesaid, in the end, the main issue to consider is whether the applicant will turn up for the trial, so that, the victim of crime can have her rights protected. In this regard I note from the Probation officers pre-bail report filed in court on December 7, 2022, that, the victim's family still object to the release of the applicant on bond, citing interference with key witnesses who are well known to him.
9. Furthermore the area chief still holds the view that, it is still not advisable to release him on bond as he may experience difficulties to go back to Ndabibi area where the offence was committed.
10. However, I note a contradiction in the probation officers report wherein she states at page 5, that, the area chief Mr. John Kamau indicated that, it is not safe to release the applicant on bond now and that, it be deferred for six(6) months, yet in conclusion at page 6, the Probation officer states that the accused



person is now suitable for release on bond/cash bail, and that he should take the wise advice of the chief, to relocate completely from the area for his own security as his presence in the area can elicit community anger and revenge.

11. In view of the aforesaid, two issues emerge, that, it is not safe to release the applicant on bond or bail as his life may be in danger. Two the witnesses feel unsafe with his release.
12. Indeed, as much as the accused may relocate, one cannot rule it revenge upon him from wherever he may be. Similarly, in view of the affidavit by the deceased's brother, it is advisable to have witnesses testify before the applicant is released.
13. In that regard, the matter be heard on priority basis, at least for the very key witnesses. Thereafter, bail application for bail and bond be renewed for consideration. I therefore decline to allow the application at this stage.
14. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 4TH DAY OF JANUARY, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Mr. Owuor for the applicant

Mr. Ndiema for the respondent

Ms Ogutu Court assistant

