



**Prosecutor v Magenge (Criminal Case E032 of 2021)
[2023] KEHC 1033 (KLR) (Crim) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E032 OF 2021
DO OGEMBO, J
FEBRUARY 16, 2023**

BETWEEN

PROSECUTOR REPUBLIC

AND

ROBERT KERAMA MAGENGE ACCUSED

RULING

1. The accused person, Robert Kerama Magenge has moved this court by way of a Notice of Motion application dated 16.2.2021. The application seeks that the accused, applicant may be released on bond or bail on reasonable conditions. The application of the applicant is based on grounds that the offence of murder is bailable under *the constitution* of Kenya and that an accused person has a constitutional right to be presumed innocent until the contrary is proved.
2. The prosecution has opposed this application and relied on an affidavit of the investigating officer, No. 65509, sergeant Patrick Bwire sworn on 6.6.2022. In the said affidavit, it has been deponed that bail is not an absolute right under Article 49(1)(h). That 1 witness having testified, the accused now knows the weight of the prosecution's case and is likely to interfere with the witnesses if released on bond. That immediately after the incident on 7.4.2022, the accused moved out of his residence only to be arrested on 16.4.2021 at Mukuru Kwa Reuben, a demonstration of the fact that he is a flight risk.
3. The prosecution further, that the accused has no known place of abode and that he faces a serious offence of murder that carries a sentence of up to death sentence, which could be an incentive for the accused to abscond if released. The prosecution also submitted that the prosecution has a strong case against the accused including CCTV footage that points to the guilt of the accused. It was summed up therefore that the prosecution have compelling reasons that the accused should not be placed on bond or bail.



4. I have considered the 2 sets of submissions. Under Article 49(1)(h) all accused persons are guaranteed the right to bail irrespective of the nature of the charges they face in court. The right may however be limited where it is shown the existence of any compelling reasons. These are reasons that are strong and good enough as to justify a denial of the right to bail.
5. The bail bond policy guidelines and indeed judicial decisions have settled the issue of what would constitute compelling reasons. The policy guidelines at paragraph 4.9 lists some of the factors to be the following
 - i. Strength of the prosecution's case.
 - ii. Nature of the charge and the seriousness of the sentence in case of a conviction.
 - iii. Character and antecedents of the accused himself.
 - iv. Likelihood of interference with prosecution witnesses.
 - v. Whether the accused is a flight risk.
 - vi. Need to protect victims of crime.
 - vii. Relationship between the accused and the prosecution witnesses.
 - viii. Whether the accused is gainfully employed.
 - ix. Public order, peace and security.
 - x. Accused's own security.
6. In deciding whether any compelling reasons have been proved to exist herein, it is important to note that the main consideration for grant or denial of bail is whether the accused, if released on bail, will turn up in court for his trial (see *Republic versus Richard David Alden* (2016)eKLR, *Republic versus Godfrey Madegwa & 6 others* (2016)eKLR. Therefore, for the prosecution to succeed with the objection that accused is a flight risk, it must show to court evidence pointing towards the fact that the accused is likely to abscond if released on bail. In the absence of such evidence, the objection would with respect, remain a fear that the prosecution holds. And that would not amount to a compelling reason. In this case, the prosecution showed no evidence pointing to a likelihood of the accused person absconding.
7. Similarly, the prosecution did not show any evidence pointing to a likelihood of interference with prosecution witnesses. No evidence was shown as to any identities of any such witnesses, or their closeness or familial relationships with the accused. This objection must therefore fail.
8. The other objections raised by the prosecution were on the strength of the prosecution's case, the fact that the accused has no fixed place of abode or gainful employment. With respect these objections can no amount to compelling reasons on their own in view of Article 50(2) that guarantees every accused person the right to presumption of innocence.
9. The sum total is that I am not convinced that the prosecution has proved the existence of a compelling reason good enough to justify a denial of the right to bail to the accused. I accordingly dismiss the objections of the prosecution and order that the accused may be released on bond/bail on the following terms:
 - i. A bond of Ksh.2 million with 1 surety of a similar amount.
 - ii. In the alternative, a cash bail of Ksh.300,000/=



- iii. If released, the accused is ordered to contact and or interfere with the prosecution witness till this case is determined.
- iv. If released, the accused is hereby ordered to attend court at all times as will be ordered till this case is determined.

It is so ordered.

D. O. OGEMBO

JUDGE

16TH FEBRUARY, 2023.

Court:

Ruling read out in court (on-line) in the presence of the accused (Nairobi Remand, Ms. Marube for accused and Ms. Njoroge for state.

D. O. OGEMBO

JUDGE

16TH FEBRUARY, 2023.

