



**Republic v Kiparus & 2 others (Criminal Case E017 of 2022)  
[2023] KEHC 976 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 976 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL CASE E017 OF 2022  
F GIKONYO, J  
FEBRUARY 15, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NOONGUTA KIPARUS ..... 1<sup>ST</sup> ACCUSED**

**DOREEN CHEPUKEL ..... 2<sup>ND</sup> ACCUSED**

**MARGARET TIO ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons herein are facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. On November 10, 2022, the accused persons through their defense counsel M/s Bosibori, M/s Lepore, and Mr Kiprono orally applied that the accused persons be released on bond.
3. Ms Torosi, counsel for the prosecution in response to the application for bond/ bail urged this court to call for pre bail report and a social inquiry for purposes of views of the victims and community.
4. On November 15, 2022, Ms Torosi orally submitted that the probation officer's reports and on victim's statements are favourable. She argued that the community ganged up to discipline an individual causing death. The husband has no problem with bond but other suspects are at large. They are not flight risk. But as the matter is serious, she urged this court to give a bond with a surety and on conditions that they do not leave the jurisdiction of this court and report to Narok South DCI office every month.
5. Nchoko watching brief for the victim's family opposed the application for bond. He stated that the deceased 's family are being threatened by the suspects at large. Releasing the accused persons herein will compromise the whole trial process. Those at large should be arrested first. It is not in the interest of justice to release them.



6. Nchoko further urged this court to ask for another probation report focusing mainly on the real victims who are the children of the deceased. He further indicated that he will file affidavits on the threats.
7. Following the submissions by the counsel for the victim's family, Ms Torosi recanted her earlier submissions. She stated that her earlier submissions were based on the probation officer's report which favoured release on bond. She added that the IO had not given her any compelling reasons. She stated that she had called OCS Olulunga and IO who confirmed to her that a child had been arrested and another who is a witness (Musa Musekenya) on allegation of attempted defilement but was released on a free bond and investigations are ongoing. She also spoke to the probation officer who interviewed the said Musa Musekenya and he and the IO said to her that the boy was earlier persuaded to change his statement in this murder case but they said there were no threats upon him. Persuasion was before the arrest. The deceased had 9 children and only Musa has been interviewed. This son was not even living with the deceased at the time of death.
8. Ms Torosi stated that she agreed with the court that the children of the deceased who are the direct victims should give their views. She argued that the affidavits that they will file will consider all these issues. Therefore, there is no need for the probation officer's report.

#### **Directions of the court**

9. On November 16, 2022, this court issued the following orders and directions;
  - i. The accused persons shall remain in custody until the application for bail is heard.
  - ii. To enable court determine the bail application, the IO in conjunction with counsel watching brief and the prosecution counsel shall within 7 days file and shall serve comprehensive affidavits on compelling reasons.
  - iii. Upon service, defence counsel shall each file replies thereto within 7 days.
  - iv. As the victims are young children, I order a probation officer's report be filed and served in 7 days today.
  - v. Mention on December 14, 2023.
10. On December 14, 2022, this court ordered as follows;
  - i. Parties be supplied with victims' impact assessment report and ensure they have filed and served their respective replying affidavits by close of day.
  - ii. The DPP to file and serve written submissions in 7 days from tomorrow
  - iii. Upon service, defence counsel to file and serve their submissions within 7 days thereof.
  - iv. Ruling on February 15, 2023.

#### **The probation officers report**

11. The probation officer, Lilian Oiyie, filed a victim impact statement report on November 24, 2022. According to the report, the probation officer visited the victims' family. All the children were home save for two ladies who are married in Transmara; they could not make it home due to financial constraints but the probation officer was able to communicate with them nonetheless.



12. The family has nine children, six are female and three are male. Brenda Naanyu a firstborn stated that she has come to terms with the loss and does not harbour any grudge against the accused persons. If the court decides to grant the bond, she has no objection but prays for justice to prevail.
13. Moses Musekenya a firstborn son of the family also indicated that he has no objection to the accused persons being granted bond. He confirmed that indeed he had been arrested for attempted defilement. He stated that the issue had since been sorted out between him and the complainant and the matter had nothing to do with the murder case. He stated that he had been persuaded to recant his statement. but he refused and no one has ever again insisted. He stated that he has never received any threats to life and he has not recorded or reported any threats because there is none.
14. Alex Leshan is apprehensive that the suspects who have not been apprehended might disappear if the three accused persons are granted bond. He, however, does not object to the accused persons being granted a bond.
15. The rest of the minors seemed to be out of touch with the issue and the probation officer chose not to burden them with questions lest she awaken the emotions and healing wounds.
16. Naiserian Ngeet swore an affidavit in opposition to the application for bond on December 7, 2022. She stated that she is duly authorized by the family of the deceased to swear the affidavit. The deceased was her aunt. She stated that the attack and murder of the deceased were premeditated and planned by the three accused persons and the other suspects on the run. She averred that a crucial witness a minor (VT is 13 years and lives with her father who is not interested in pursuing justice for his deceased wife. She argued that there is a possibility of witness interference as the accused persons may persuade the widower to interfere with VT, a crucial witness in this case. She averred that Musa Musekenya has been threatened in order to recant his statement. She stated that the investigators have failed to arrest other suspects despite being supplied with a list of names by the victims.
17. The 1<sup>st</sup> accused person filed a replying affidavit sworn on December 14, 2022. She averred that the main factor to be considered when deciding the issue of bail is whether the accused will attend the trial or whether there is a likelihood of absconding. That no evidence has been presented before this court showing that they may abscond. That the seriousness of the offence is not a ground for denying bail. That interference with witnesses does not suffice since the prosecution and the counsel for the victims have not provided evidence of actual interference or any likelihood of interference. Therefore, the prosecution has not presented real and cogent grounds to warrant this court to deny bail. That the alleged unwillingness of the police to arrest other suspects cannot be sufficient ground to deny them their constitutional right to bail pending trial.
18. The 2<sup>nd</sup> accused person swore a replying affidavit on December 14, 2022. She averred that she is a resident of Oloirien Village(Narok South) Ololulunga location within Narok county. She stays with her parents at their home. She has a permanent place of abode. Therefore, she is not a flight risk and cannot abscond court when she is released on bond/ bail pending trial and final determination of the case. She is a single mother of 3 minors who depend on her. Therefore, her continued incarceration would greatly affect her family. She stated that she has not interfered with investigations and has no previous criminal record. She stated that she is committed to abiding by all bail/ bond terms and conditions that this court shall impose upon her release. That she is constitutionally entitled to bond. That the police have already completed their investigations and recorded statements from potential prosecution witnesses and therefore there is no possible interference with prosecution witnesses. That she has a right to be presumed innocent until proven guilty. Article 49(1) (h) of the [Constitution](#) entrenches the right of the arrested person to be released on bail pending a charge or trial unless there



are compelling reasons for refusing bail which must be demonstrated to the satisfaction of the court. that section 123 of the CPC permits bail for all criminal cases and makes bail available at all times.

19. The 3rd accused person in her replying affidavit sworn on December 24, 2022 reiterated the contents of the 1st accused person's replying affidavit. She added that the Constitution of Kenya 2010, guarantees an accused person under article 48(1) (h) the right to bail except where there are compelling reasons for denial of bail. Further that she has a 2-year-old child and therefore her continued incarceration is infringing both her rights and that of her child.

**Submissions on behalf of the victim/deceased's family.**

20. Counsel for the victim's family submitted that there is a need to protect the victims of the crime. The children of the deceased should be protected from interference by the accused persons and their testimony, thoughts, and feelings of the victims should be heard before any decision affecting them is made. That releasing the three accused persons undermines the criminal justice system and dents the integrity of the criminal process without taking the testimony of the children
21. It was submitted that there is a likelihood of interference with witnesses. That releasing the accused persons on bond at this stage before the witnesses testify is a shot in the leg for this trial and will cause fear, misapprehension and anxiety to the witnesses who are of tender age and they may refuse to testify again due to genuine and misapprehension of their safety.
22. It was further submitted that the accused persons are flight risk. The other suspects are still at large. The nature of the charge and the seriousness of the punishment. If the accused persons are released on bond may abscond or further collude with those who are fugitives to defeat the process of seeking justice for the decease.
23. Counsel for the deceased's family relied on the following authorities;
- i. Article 49(1)(h) of the Constitution
  - ii. Para 4.9 of the bail and policy guidelines.
  - iii. Section 2(1), and 10(1)(b) of the Victim Protection Act.
  - iv. R Vs Fredrick Ole Leliman & 4 Others Nairobi Criminal Case No 57 Of 2016.
  - v. Section 94(e) of the Children's Act.
  - vi. Republic V Robert Kipkorir Tonui Bomet Criminal Case No E001 Of 2020
  - vii. Republic V Peter Mwebia High Court of Kenya At Meru Criminal Case No 45 Of 2017

**2<sup>nd</sup> accused person's submissions.**

24. It was submitted on behalf of the 2<sup>nd</sup> accused person the 2<sup>nd</sup> accused person is not likely to abscond and no evidence has been placed before this court on the culpability of the accused. that the 2<sup>nd</sup> accused person has a permanent place of residence that is her parents' home.
25. It was further submitted that there are no compelling reasons that have been established by the victim's family that warrants denial of bail of the accused persons.
26. Counsel for the 2<sup>nd</sup> accused person submitted that witnesses can be placed on witness protection hence it is not a compelling reason to deny the accused persons' bail. He admits that there is need to protect witnesses.



27. The 2<sup>nd</sup> accused person has relied on the following authorities;
- i. Article 49(1)(h) of the Constitution.
  - ii. *Dominic Inziani Vs Republic Criminal Case No E043 Of 2021*
  - iii. *Republic V John Kabindi Karisa & 2 Others [2010] eKLR*.
  - iv. *Republic V Titus Kathurima [2015] eKLR*
  - v. *Republic Vs Francis Kimathi [2017] eKLR*
  - vi. Republic Vs Dwight Sagaray & 4 Others [2013] eKLR

### **Analysis And Determination**

28. Every accused person enjoys the right to presumption of innocence and is entitled under Article 49 (1) (h) of the Constitution to bail pending trial unless there are compelling circumstances. See *Muraguri v Republic [1989] KLR 181*, and *R V Richard David Alden (2016) eKLR*.
29. The overarching objective of bail is to ensure the accused gets his liberty, but also attends and does not prejudice his trial. *Muraguri v Republic* [supra].
30. The issue is whether there are compelling reasons to deny the accused persons bail or bond.

### **Proof of compelling reason**

31. The prosecution bears the onus of proving compelling reasons- which brings conviction upon the court that releasing the accused on bond is inconsistent with the objective of bail. Has the prosecution proved compelling reasons not to release the accused on bond?
32. From the affidavits by the respective parties, it is apparent that the bond application has been opposed on two main grounds namely; flight risk and interference with witnesses.

### **Flight risk.**

33. Counsel for the victims has submitted that the accused persons may abscond because of the nature of the charge and the seriousness of the punishment. He also alleged that they may collude with the suspects at large. Nothing concrete was placed before the court to show they will abscond. I find this ground to be neither here or there. I dismiss it.

### **Interference with witnesses**

34. The prosecution alleges likelihood of interference with prosecution witnesses. Interference with witnesses undermines the integrity and the whole purpose of a trial. It is therefore, a justifiable basis for limitation of the right to liberty under article 49(1)(h) and 24 of the Constitution. On this ground the court in *R V Jaktan Mayende & 3 others*, stated that:

' In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010. Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not



to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.'

35. But, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground. See *R V Dwight Sagaray & 4 others*, 2013 eKLR, where the court stated that: -

' For the prosecution to succeed in persuading the court on these criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others.'

36. The witnesses who are said to have been or likely to be interfered with are children of the deceased. Therefore, two pertinent issues come to view; i) protection of witnesses and victims of crime; ii) protection of the integrity of the trial and criminal justice process.

### **Protection of victims**

37. Under the law, the court has a duty to give effect to the rights of victims expressed in Section 10 of the *Victim Protection Act* No 17 of 2014, as follows: -

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
- (c) Have their property protected.

### **Protection of trial**

38. Interference with witnesses prejudices the integrity of the trial, and undermines the criminal justice system. Thus, it is the duty of the court to preserve the integrity of the trial. On this, I content with the reasoning of Lesiit J (as she then was) in *R V Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No 57 of 2016 (2016) eKLR* where she succinctly stated that: -

' Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.'

39. As I settle to determine this issue, I do note the manner and circumstances in which the offence was committed- a sort of tradition or practice to punish a wife who physically beats her husband- and it appears it involves the community. The husband in such atrocities is a person holding contra interest



those of the victims. And, it is difficult in such circumstances to treat him as a victim. The direct victims should be the children of the deceased.

40. The statements by the children of the deceased as well as other family members express fear if the accused are released. In a pointed manner, Naiserian Ngeet in her affidavit averred that a crucial witness a minor (VT) who is 13 years and lives with her father who is not interested in pursuing justice for his deceased wife is likely to be interfered with if the accused persons are released. The minor VT, a crucial witness in this case is extremely vulnerable. She also averred that Musa Musekenya has been threatened in order to recant his statement. She stated that the investigators have failed to arrest other suspects despite being supplied with a list of names by the victims.
41. I note with concern that Musa Musekenya- the elder son of the deceased- confirmed that he had been persuaded to change his statement in this case. Given the circumstances of the commission of the offence, there is real possibility of interference with witnesses by the accused. Notably, there are other suspects who are still at large.
42. The accused persons have argued that they pose no danger to the victims since the investigations have been completed. I should state that interference with witnesses may be during investigations or trial.
43. From the probation officer's report, it is highly possible that the presence of the accused persons within the locality or vicinity of the victims herein will instill fear into or become a source of danger to the children of the deceased especially the minors- some of whom are crucial and vulnerable witnesses in this case. This is not far-fetched. It should not be forgotten, the circumstances of the commission of the offence. No wonder this case has elicited much interest amongst the members of the community who throng to court in their numbers. These are real matters which constitute the framework facts of the case.
44. A combination of these factors militate against releasing the accused persons on bond.

### **Conclusions and Orders**

45. Accordingly, interference with witnesses has been proved and is a compelling reason for which the accused persons are denied bail.
46. In striking a balance that ensures that the trial is not prejudiced by acts of interference with witnesses, but at the same time, upholding the rights of the accused to a fair trial, I direct the hearing of the case to be fast-tracked ([K K K v Republic \[2017\] eKLR](#)).

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2023**

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**F. GIKONYO M.**

**JUDGE**

**In the Presence of:**

- 1. All Accused persons**
- 2. Nchoko for family**
- 3. Ms. Bosibori for 1<sup>st</sup> accused person – Owuor holding brief**



4. Ms Lepore for 2<sup>nd</sup> accused – absent
5. Mr. Kiprono for 3<sup>rd</sup> accused – absent
6. Mr. Kasaso – CA
7. Mr. Ondimu for DPP

