



REPUBLIC OF KENYA



**Republic v Kamau (Criminal Case E041 of 2021)
[2023] KEHC 599 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE E041 OF 2021
MM KASANGO, J
FEBRUARY 9, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

EVANS NJACHA KAMAU ACCUSED

RULING

1. The accused Evans Njacha Kamau was in this case charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). He pleaded not guilty.
2. The trial commenced on March 7, 2022. So far, prosecution has called 14 witnesses. The accused applied to be released on bail/bond pending the conclusion of his trial and this Court by a Ruling of December 9, 2021 declined to release accused pending his trial. In order to appreciate why the application was declined, I will reproduce excerpts of that Ruling as follows:-
 11. There is allegation herein by the State and by victim's family that there is possibility of accused interfering with the witnesses, in particular the children of the marriage, if the accused is released on bail. It has often been stated that the interference of witnesses of a case is tantamount to undermining with the criminal justice system.
 12. The investigating Officer stated that the main witnesses of this case are the children of the marriage. It was also deponed that the children witnessed the accused assault the deceased when their deceased's mother was alive and they were now fearful of the accused. Article 53 of the [Constitution](#) provides under Sub-Article (2) thus:-

'A child's best interest are of paramount importance in every matter concerning the child.'



13. In this matter, the court is called upon to strike the balance between the constitutional rights of the accused to be released on bond/bail and the rights of the children who are witnesses in this case and who are yet to testify in this matter.
 14. Being conscious of the need to affect a balance between the two rights stated above, and having considered all the submissions without over or under appreciating any particular factor, I find and hold the only suitable words to use here is that detention of the accused is necessary in order to maintain confidence in the administration of justice. Indeed, it will be in the best interest of the children, who are witnesses in this case, that the application of the accused be declined.
 15. It is because of the above finding that I decline to release the accused on bond or bail. The accused will however have the undoubted right to seek review of today's order once the children of the marriage and their grandmother conclude with their testimony in this case.
3. After the fourteenth witness concluded testifying prosecution applied for an adjournment to enable the remaining three witnesses to be bonded to appear and testify.
 4. The application for adjournment was not opposed by the accused's counsel. However, the accused's counsel applied for review of the court's earlier Ruling and sought that the accused be released on bail/bond. Counsel submitted that the accused has a constitutional right to be released on bail. The accused offered to deposit into court his passport and the court was informed that the accused would reside in Nyahururu during the pendency of this trial and further, that he was willing to report to the investigating officer if so required.
 5. The victim's family advocate opposed the revision application. He submitted that the court needs to consider whether revision by granting accused bail would compromise the welfare and security of the children witnesses and that the court should bear in mind that prosecution witnesses who had already testified had stated that the accused during the lifetime of deceased threatened the deceased which had been reported to the police.
 6. The prosecution also opposed the application for bail arguing that the declination of bail for the accused, through this Court's ruling of December 9, 2021, was informed by the likelihood of accused interfering with prosecution's witnesses. In this regard, prosecution stated that there was on key prosecution's witness who prosecution wished to call to testify but that witness cannot be traced. Prosecuting counsel submitted that:-

' We cannot entirely say that accused does not have a hand in the key witness not being available.'
 7. Prosecution also submitted that the accused having worked at the boarder of this country and because of the porous boarders that exist, there was a risk the accused even if he deposits his passport at the court, that he might abscond this trial.
 8. Further, prosecution submitted that it may require to recall the deceased's mother to testify and because her security was one of the considerations, that this Court declined to grant bail to the accused, the accused shall continue to be detained in custody.
 9. Accused's learned counsel responded to those submissions by stating the conditions which led to the bail application being declined had been met. Further that the prosecution had not stated the difficulties it has encountered in tracing the key witness to testify.



Decision And Revision

10. When an application for review of bail is made, the applicant bears the burden to prove that the circumstances that led to the earlier order had changed. A case in *Republic V Joseph Kuria Irungu Alias Iowie & Another (2019) eKLR* as follows:-

' 14) The Applicant bears the burden on review to show on a balance of probability why the earlier order should be vacated and why it should be unjust not to vacate the order. He must show that the circumstances of the case are so altered that compelling reasons are disclosed for review of the earlier order.'

11. This Court's Ruling of December 9, 2021 found that on a balance of probability there was likelihood of interference with prosecution's witnesses and more particularly with the children of the marriage, between deceased and accused and the grandmother of those children. Prosecution in opposing the revision has indicated that because the prosecution's case is not closed, the prosecution may possibly recall some of the witnesses whom the court secured by denying accused bail.

12. The accused should be reminded that the granting of bail always remains at the discretion of the court. The court is of the view that revision of the bail/bond Ruling cannot be granted at this stage before the key witness testify and before the prosecution determines that it shall not recall the vulnerable witnesses who have already testified. In balancing the accused's constitutional right to bail and the rights of the victim's family, I find that the balance tilts in favour of declining to review the earlier Ruling.

Conclusion

13. The application for review of the Ruling of December 9, 2021 is dismissed.

14. This case shall be fixed for further hearing before the in-coming judge because I am soon due to leave the station of the High Court at Kiambu.

RULING DATED AND DELIVERED AT KIAMBU THIS 9TH DAY OF FEBRUARY, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant : Mourice/Julia

EVANS NJACHA KAMAU (Accused) : - present

For accused:- Mr. Kago Advocate

For victim's family – Mr. Njoroge

For prosecution : - Mr. Gacharia

RULING delivered virtually.

MARY KASANGO

JUDGE

