



**Republic v Gacangaca (Criminal Case E049 of 2022)  
[2023] KEHC 500 (KLR) (Crim) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 500 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E049 OF 2022  
DO OGEMBO, J  
FEBRUARY 6, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**STEPHEN KIMANI GACANGACA ..... ACCUSED**

**RULING**

1. The accused/applicant has moved this court by way of a Notice of Motion application dated August 18, 2022 seeking that the court do order for his release on bail on reasonable grounds. He has supported the application by an affidavit of his advocate also sworn on August 18, 2022. It was submitted by Mr Kimathi for the accused that bail is a Constitutional right. That the accused is a Kenyan, has no passport and so is not a flight risk. That he enjoys presumption of innocence.
2. It was further submitted that there is no evidence to show that the applicant would interfere with witnesses if released on bail. Commitment was made that the applicant would turn up for trial. The applicant buttressed his submissions by citing several decisions of the courts including the following.
  - i. *Cyril kipruto Serem Versus Republic (2020)eKLR*, that bond or bail amounts and conditions ought to be reasonable given the importance of the right to liberty and presumption of innocence.
  - ii. *Christopher Kyalo Kitila Versus Republic (2021)eKLR*, that bail is available to all irrespective of the nature of the offence charged. And that it is incumbent upon the prosecution to prove the actual or perceived interference with the prosecution witnesses.
  - iii. *Republic Versus Pauline Maisy Chesang and others (2019)eKLR*, on the subject of what constitutes compelling reasons.



3. The respondent has opposed release of the applicant on bail. First, on grounds that he is flight risk. That the applicant had been in a house of a witness who is yet to testify and that there is no evidence to show that he has a fixed place of abode or gainful employment. Secondly, that he is likely to interfere with witnesses if released on bail. That he knows the identities of the witnesses including the owner of the house. And lastly, that for the safety of the applicant himself, he should be remanded in custody. That the applicant went ahead and stabbed himself after the act, an indication that he can do it again if released.
4. I have considered the 2 rival submissions made by the parties herein. Article 49(1)(h) guarantees the right to bail to all accused persons irrespective of the nature of the charges that they face. There is however a proviso to this general declaration to the right to bail. That the right may be denied should there be shown to exist any compelling reason not to, grant the same. The bail bond policy guidelines (page 15 paragraph 4.9), lists some of the factors that may constitute compelling reasons as follows:- The nature and seriousness of the offence charged, Character and antecedents of the applicant. The defendants record in previous grants of bail. Strength of the prosecutions case. Whether the applicant is a flight risk. Whether the applicant is likely to interfere with prosecution witnesses if released on bail. Peace and national security. Applicants own safety.
5. It must be stated from the onset that the onus to prove the existence of a compelling reason lies on the prosecution and the same does not shift to the defence and that the main consideration for grant or denial of bail is whether the accused shall turn up in court for his trial. I accordingly align myself with the finding of the Hon Justice Muriithi in *Republic Versus William Mwangi Wa Mwangi (2014)* eKLR, in which the Judge held:
 

' It is now settled that in the event that the state is opposed to the grant of bail to an accused person, it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitution right to bail. It is trite that the cardinal principle which the court should consider whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.'
6. The same thread cuts across the jurisprudence emanating from the courts (see *Republic Versus Ahmad Abolafathi Mohammed and another, Nairobi Criminal Revision 373 of 2012*, *Republic versus Joktan Mayende and three others (2012)* eKLR, *Republic versus Dwight Sugaray and others, criminal case no 61 of 2012(Nai)*).
7. The prosecution herein has opposed bail herein first on the grounds that the applicant is a flight risk. If this ground is to succeed as a compelling reasons, the prosecution must lay a basis for the same. As it were, the prosecution only made this claim without laying any basis for the same. The applicant is a Kenyan citizen and without any evidence pointing to any possibility or probability of him leaving the jurisdiction of the court, this court is not convinced that this ground was sufficiently proved as a compelling ground.
8. It was further submitted by the prosecution that if released, the applicant is likely to interfere with prosecution witnesses. With respect, not a scintilla of evidence was shown to court the likelihood of the applicant interfering with any of the prosecution witnesses. In the Dwight Sagaray case above, court, on the same subject of likelihood of interference with witnesses held.

' For the prosecution to succeed in persuading the court on this criterial (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the court for example the existence of a threat or threats to witness, direct or



indirect incriminating communication between the accused and the witnesses close familial relationship between the accused and the witnesses amongst others, at least some facts must be placed before court otherwise it is asking the court to speculate.'

9. In the absence of any evidence pointing to any actual or perceived interference with the prosecution witnesses, the prosecution's objection clearly falls short and cannot amount to a compelling reason. I so find.
10. Lastly on the ground that the applicant ought to be remanded in custody for his own safety, this court takes note of the fact that the allegation that the applicant stabbed himself is only but a piece of evidence given by the prosecution in a case yet to be concluded and whose veracity is yet to be determined. This fear of the prosecution, in my view cannot amount to a compelling reason.
11. The upshot is that I am not convinced that the prosecution has proved the existence of a single compelling reason good enough to justify a denial of the right to bail to the applicant.
12. I accordingly dismiss the objections of the prosecution and order that the applicant/accused may be released on bond on the following conditions.
  - i. A bond of Kshs 2 million with 1 surety of a similar amount.
  - ii. In the alternative, cash bail of Kshs 300,000
  - iii. The applicant, if released on bail, is ordered never to interfere with the prosecution witnesses, either directly or indirectly till this case is determined.
  - iv. The applicant, if released on bond/bail, is ordered to attend court at all times as maybe appointed by the court from time to time till this case is determined.

It is so ordered.

**D. O. OGEMBO**

**JUDGE**

**6.2.2023**

**Court:**

**RULING READ OUT IN OPEN COURT (ON LINE) IN PRESENCE OF THE ACCUSED, MR. KIMATHI FOR ACCUSED AND MS. NJOROGE FOR THE STATE.**

**D. O. OGEMBO**

**JUDGE**

**6.2.2023**

