



**Kipngetich v Republic (Criminal Case E019 of 2022)
[2023] KEHC 2558 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL CASE E019 OF 2022
F GIKONYO, J
MARCH 23, 2023**

BETWEEN

COLLINS KIPNGETICH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Bond/Bail Application

1. The accused person herein is facing a charge of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. He applied on January 19, 2022, through his defense counsel to be released on bond.
3. Ms Moraa urged this court to release the accused on reasonable bail/bond terms. She argued that the accused has a fixed abode and will always attend court. Further that the accused will not interfere with investigations or witnesses. Therefore, no compelling reason not to release him on bond.
4. Ms Torosi prosecution counsel urged the court to call for pre- bail report. On her part, she was to seek from the IO whether there are compelling reasons.
5. A bail assessment report was filed on January 19, 2023. The gist of the report is that;
 - i. Views of the family of the accused-the deceased was an employee of the accused's mother at a lodging. The family of the accused (mother of the accused) is willing to stand surety and promised to relocate the accused to another safe place if a bail/bond term is granted.
 - ii. Sentiments of the deceased family-the mother of the deceased is still bitter and traumatized about the incident that happened. She indicated that the deceased was blessed with one child



who has since dropped out of school at the age of 15 years after her mother's death. The girl is now married. She strongly opposed the accused bail/bond terms.

- iii. Attitude of the local administration- the area chief Mulot location, Mr Korir indicates that the home environment is not conducive for the accused. he urged the court not to release the accused but bail/bond can be reviewed in the future.
6. The probation officer in his recommendation left the matter to the court to determine the bond application.
 7. The prosecution filed an affidavit to oppose the bond, sworn on January 23, 2023 by SGT George Otuoma. The deponent stated reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -
 - i. Witness interference -that the accused person resides within Mulot central together with witnesses. Should the accused be released on bail or bond there is a high risk of interference with witnesses. The witnesses were once threatened by the respondent and fled their houses and might migrate to other locations if the accused is released on bail/bond.
 - ii. Flight risk- the accused person was arrested while hiding in Bontet near Mau Forest on suspicion of committing murder. That the accused is a flight risk and may not be traced when released on bail or bond.
 - iii. Safety and security of the accused- - that the members of the public wanted to lynch the respondent and his mother before they were rescued by police officers thus releasing the respondent may cause insecurity.
 8. The applicant filed a reply vide a replying affidavit sworn on February 15, 2023 by Collins Kipngetch. He responded as follows;
 - i. Witness interference- that the allegation that he allegedly threatened witnesses before causing them to flee their houses is a complete falsity. That he has never threatened any potential witnesses in this case and he does not intend to. That the claim is without any evidence to back it up. Therefore, the allegations are baseless and unsubstantiated.
 - ii. Flight risk- that if granted bail/bond pending trial he shall have a fixed abode in Sekemyang where his mother resides. Sekemyang is 40 km from Mulot where the respondent's witnesses reside and thus negating the possibility of his interference with the testimonies or evidence by the prosecution witnesses. That the allegation that he is a flight risk could not be any further from the truth. The allegation is unfounded on any facts. He does not own a passport and therefore there is no risk that he may flee from the country. That his large extended family will account for his whereabouts whenever the need arises.
 - iii. Safety and security of the accused- that the averments that the public attempted to lynch him are not true as well as the insinuation that the public is a threat to him. That the respondent is swinging between alleging that he is a threat to the public and that the public is a threat to him. The respondent has not taken a stand. That the bail assessment report, the area chief Mulot location stated that the home environment is not conducive for him. In response, he indicated that he will not be returning to Mulot. He only lived in Mulot to take care of his mother's business but his home where he lives with his extended family is Sekemyang which is miles away from Mulot. Additionally if released he will be in the custody of his mother in Sekemyang.



Submissions

9. The prosecution chose to rely on the affidavit filed and not file written submissions.
10. The accused person chose to file written submissions.

Accused/ Applicant's Submissions

11. The accused/applicant's counsel reiterated and elaborated on the applicant's replying affidavit in the submissions. I will therefore not repeat the sentiments set out therein as they have already been captured earlier in this ruling.
12. The accused/applicant relied on the following authorities;
 - i. Article 49(1)(h) of the *Constitution*.
 - ii. Section 123A (1)(2) of the *Criminal Procedure Code*.
 - iii. *Republic v Patius Gichobi Njagi & 2 others* [2018] eKLR
 - iv. *R v Dwight Sagatay & 4 others*, 2013 eKLR
 - v. *Foundation For Human Rights Initiatives v Attorney General* [2008] 1 EA 120.
 - vi. *Republic v Danson Mgunya & another* [2010] eKLR
 - vii. *Republic v William Mwangi Wa Mwangi* [2014] eKLR
 - viii. *Republic v Ahmed Mohammed Omar & 6 others* [2010] eKLR

Analysis And Determination

Right to bail

13. All persons charged with a criminal offence are entitled to be released on bond on reasonable conditions except where there are compelling reasons not to be so released (art 49(1)(h) of the *Constitution* of Kenya, 2010). This is on the premise of the right to be presumed innocent until the contrary is proven (*R v Richard David Alden* (2016) eKLR.)

Compelling reason and burden of proof

14. The law places the onus of proving compelling reasons upon the prosecution- these are reasons that justify the limitation of the right to liberty in the context of article 24 of the *Constitution*.

Objective of bail

15. The overarching objective of bail is to ensure the accused gets his liberty but also attends his trial. However, in granting bond the court should ensure that the accused does not prejudice the trial (*Muraguri v Republic*).

Grounds for objecting bond

16. The prosecution cited three grounds on which they opposed bail; i) likelihood of absconding or flight risk; ii) safety and security of the accused persons; and iii) witness interference.
17. I will take each in time.



Flight risk.

18. In his affidavit, Sgt George Otuoma averred that the accused person went into hiding on suspicion of committing murder.
19. The accused person has stated that if granted bail/bond pending trial he shall have a fixed abode in Sekemyang where his mother resides. That therefore he will never abscond.
20. This argument is neither here nor there, for no evidence has been tabled before this court which gives the argument the power and grace, say, that the accused went into hiding to avoid the hand of the law. Merely that he left the crime scene is not sufficient as a suspect would ordinarily not be expected to remain at the scene of the crime until arrest. To lay the contrary as a legal proposition is dangerous. Real evidence is required to show that the accused went into hiding to avoid arrest and is likely to abscond trial. No such evidence upon which an inference may be drawn that he will abscond. For these reasons, the ground is not sustainable. I reject it.

Safety and security of the accused persons.

21. The investigating officer in his affidavit stated that the members of the public wanted to lynch the accused and his mother before they were rescued by police officers.
22. The accused in his response indicated that he will not be returning to Mulot but will move to Sekemyang.

Taking the law into own hands

23. Except in clear and extreme cases, it is this court's strong view that, allegation or suspicion that the accused is likely to be attacked, injured or killed by the public if released on bond, should never be encouraged as a ground to deny bail; lest it inadvertently promote or condone violence, disorder, and usurping of law by individuals or group of people.
24. In any case, it is the duty of the state to ensure the safety and security of its citizens including the accused person. The police should take appropriate measures to ensure the security of the accused person. Furthermore, the accused person has opted for an alternative of moving to a place far away from where the incident occurred. I, therefore, find the argument that the accused be detained for his own safety and security to be without any legal or factual basis and I reject it.

Interference with witnesses

25. A more potent ground, if proved, is the prosecution's allegation of the likelihood of interference with prosecution witnesses. See *R v Patius Gichobi* that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by article 49 (i) (h) of the *Constitution*.
26. See also a work of the court in *R v Jaktan Mayende & 3 others*, 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 skewed 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.”

27. Therefore, interference with witnesses prejudices and compromises the integrity of the trial, and is also a violation of the right of victims to justice. It constitutes a reasonable and justifiable reason to limit the right to liberty in law and in an open and democratic society as a way of safeguarding administration of justice.
28. However, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence as to persuade the court to deny the accused bond (*R v Dwight Sagaray & 4 others*, 2013 eKLR)
29. The prosecution claims that the witnesses were once threatened by the accused and they fled from their homes. Also, the accused person resides within Mulot central together with the witnesses.
30. These are victims of the crime which brings to the fore the duty of the court to uphold the rights of victims.
31. According to section 10 of the *Victim Protection Act* No 17 of 2014: -
 - 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.
32. It is not far-fetched or unfounded that, the presence of the accused amidst the witnesses makes them vulnerable to harm, intimidation, harassment, fear, tampering, blackmail, and abuse by the accused person. It is highly possible that such witnesses may resign to fear and may not give evidence or give skewed evidence to avert unpleasant repercussions.
33. It is therefore, mandatory that victims should be free from harm, intimidation, harassment, fear, tampering, blackmail, and abuse by the accused persons; a right under section 10 of the *Victims Protection Act*. It is not also lost to the court that the safety of victims is to be taken into account in determining bond issues.
34. Consequently, I find that the prosecution has proved that the accused is likely to interfere with witnesses herein.
35. I note that counsel for the accused person submitted that there is no possibility of interfering with witnesses since the accused’s residence is not in Mulot location where the crime allegedly occurred.
36. The court takes the view that the mere fact that the accused will change his place of residence is not a guarantee for non-interference with witnesses. Interference with witnesses may be committed even from far areas away from the location of the witnesses given the technology in communication and ease of reach within the global village.
37. In light thereof, the court must ensure that the integrity of the trial is not prejudiced by acts of interference with witnesses by the accused persons. The integrity of the trial guarantees fair trial (*R*



v Fredrick Ole Leliman & 4 others, Nairobi criminal case No 57 of 2016 (2016) eKLR and *K K K v Republic* [2017] eKLR)

Conclusion And Orders

38. In conclusion, I find there is a compelling reason not to release the accused person on bail. He will remain in custody during the hearing of the case. In light thereof, I direct the hearing of the case to be fast-tracked.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF MARCH, 2023

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F. M. GIKONYO

JUDGE

In the presence of:

1. Accused person
2. Ms. Moraa for accused
3. Ms. Mwaniki for DPP

