



REPUBLIC OF KENYA



KENYA LAW
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**Kirika & another v Republic (Criminal Case E001 of 2023)
[2023] KEHC 1588 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE E001 OF 2023
GL NZIOKA, J
MARCH 7, 2023**

BETWEEN

JOHN KIRIKA 1ST APPLICANT

PAUL MUKUMU MBUGUA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants are charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, (Cap 63) of the Laws of Kenya. That, on 13th day of January 2023 at Miti Mingi Sub-Location in Gilgil Sub-County within Nakuru County, they jointly murdered Dennis Kennedy Mbugua.
2. By an oral application made on their behalf by their learned counsel Mr. Mongeri they are seeking for bond and/or bail pending the hearing and determination of the case. They aver that they were initially charged vide CMCR E215 of 2023; Republic v John Kirika and Paul Mukume Mbugua at Nakuru with offence of assault causing actual bodily harm and released on cash bail.
3. That they did not breach any bond terms nor interfered with the investigations in any way and presented themselves to court before being charged with the offence of murder. Further they do not know the witnesses in the matter and therefore cannot interfere with them and even then none of the witnesses have sworn an affidavit alleging interference. That they will comply with all the conditions court may give.
4. The 1st applicant states that he works for gain and has a work permit for New Zealand and that he will attend the court virtually or physically whenever required. Further he was released in the assault matter without the court requiring him to deposit his passport in court. Neither has he attempted to leave the country.



5. He further avers that the alleged offence is said to have taken place at Elementaita. That all the matters from Elementaita are prosecuted at Nakuru and this should not be any different. Further two miscellaneous applications were prosecuted before Nakuru court and therefore transferring the matter to Gilgil is an attempt to frustrate him. That, both matters can be heard in Nakuru Law courts. He further argues that there is no evidence adduced that the High Court in Nakuru is in any way biased against any of the parties in this matter.
6. That Article 49(h) of the Constitution grants an arrested person the right to be released on bond or bail pending charge or a trial, unless there are compelling reasons not be released.
7. However, the application was opposed by the Respondent vide an affidavit sworn by Sgt Hesbon Otieno the investigating officer in the matter. He averred that considering the seriousness of the offence there is a likelihood of each accused absconding the proceedings or interfering with the witnesses, as the key witnesses are their close family members and neighbors.
8. Furthermore, each accused is at high risk of fleeing the country as both of them are residing abroad. That, the first accused person is a Kenyan citizen and a holder of passport number AKO400221 with a New Zealand work visa permit No.39303508 expiring on 3rd November 2023 while the second accused has dual citizenship of Kenya and the United States of America and a holder of Kenyan Passport No. AKO991063 and USA passport No. 588953422.
9. That, on the 16th day of January 2023 the 2nd accused person was arrested while in the process of fleeing the country at Jomo Kenyatta International Airport and intercepted by immigration officers and handed over to police. Hence that is enough proof that both the accused persons are a flight risk and thus cannot be trusted if released on bond or bail.
10. Further, it is worth to note that the two have been out on cash bail of Kshs 100,000 which was issued by Chief Magistrate's court Nakuru on 17th and 18th January 2023 respectively and proven to be very difficult when it comes to co-operating with the police since when summoned to go DCI Gilgil, they refuse to do so as directed or fail and choose to come at the time of their choice.
11. I have considered the application, the objection raised thereto and pre-bail reports filed in relation to the same. I find that, the provisions of the law that govern bail and bond are stipulated under Article 50 (2) (a) of the Constitution which states as follows: -
 - “(2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved.”
12. In the same way, section 123 of the Criminal Procedure Code empowers the court to admit an accused person to bond or bail on reasonable terms and states as follows: -
 - “(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.



- (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
- (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced”.

13. Pursuant to the aforesaid, section 123A provides that: -

- “(1) Subject to Article 49(1)(h) of the *Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
- (a) the nature or seriousness of the offence;
 - (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant’s record in respect of the fulfilment of obligations under previous grants of bail; and;
 - (d) the strength of the evidence of his having committed the offence;
- (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
- (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection”.

14. In that regard, Article 49 (1) (h) of the *Constitution* states that: -

“An arrested person has the right—

- (h) “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.

15. Finally, Paragraph 4.9 of the *Kenya Bail and Bond Policy Judiciary Guidelines*, lays out different factors to be considered by the court when deciding with whether to grant or deny bail/bond and includes:

- a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
- b. The strength of the prosecution case
- c. Character and antecedents of the accused person.
- d. The failure of the accused person to observe bail or bond terms
- e. Likelihood of interfering with witnesses.
- f. The need to protect the victim or victims of the crime from the accused person.
- g. The relationship between the accused person and potential witnesses.



- h. Child offenders. where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
 - i. The accused person is a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security. whether the release of an accused person will disturb public order or undermine public peace or security.
 - l. Protection of the accused person. whether pre-trial detention is necessary to protect the accused person.
16. In the instant matter the pre bail report indicates that, each of the accused has business interest outside the country, either on employment basis or otherwise. The first accused has even been a resident in Botswana from 1999 to 2007 and occasionally travels to New Zealand for short work assignment lasting a few minutes after which he returns to Kenya. That he holds a New Zealand work visa permit.
17. The 2nd accused on the other is said to have gotten a job in New Zealand in 2004 where he worked until 2012. That, in 2012 he got an American Green Card and in September 2013, he migrated to USA where he has been working as a care giver. It is alleged that he had gone into hiding after the occurrence of the offence and was arrested at JKIA on his way to USA.
18. In my opinion, all these indicates clearly that unless this court imposes stringent bond terms and take into account the seriousness and gravity of the offence the accused are indeed flight risk.
19. In that regard I make the following orders; -
- a. That, each accused shall be released on bond of Kshs 2 million with a surety or two sureties of similar amount. The sureties must be Kenyans and domiciled in Kenya; where in proof thereof should be provided.
 - b. No order for cash bail at this stage.
 - c. All their travel documents namely; passports, work permits or any other documents that will enable them travel out of the country must be surrendered to court before they are released.
 - d. Each accused shall not travel out of the country during the pending of this case without leave and/or order of the court. To enforce the aforesaid this order be circulated to all exits points.
 - e. The applicants will initially report to the investigating officer or DCIO on a two weekly basis for the initial three months and based on progress report, the court will review duration of visits.
 - f. To safeguard the witnesses, they will not attempt or interfere with witnesses in any way before, during and after their testimony. The consequences of breach of this condition will be cancellation of bond.
 - g. Unless undue prejudice will be suffered they should move from where the offence was committed or witnesses reside.
 - h. The bond approval will be carried out by the Hon. Deputy Registrar in strict compliance of the orders the court as given above.

Those then are the orders of the court.



DATED, DELIVERED AND SIGNED THIS 7TH MARCH 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mongeri for the accuseds

Mr. Atika for the state

Mr. Mwongela for the victim's family

Ms Ogutu -court assistant

