



**Republic v Chebii (Criminal Case E028 of 2022)
[2023] KEHC 2182 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E028 OF 2022
RN NYAKUNDI, J
MARCH 22, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

KENNETH KIBIWOTT CHEBII ACCUSED

RULING

1. The accused herein, faces the charge of Murder contrary to section 203 as read with section 204 of the Penal Code(Cap 63) Laws of Kenya. The particulars of the charge were that on August 3, 2022 at around 9:00pm at Chemamwes Village, Kelji Sub-location in Moiben Sub-County within Uasin Gishu County in the Republic of Kenya murdered HYVINE JEPKORIR KURUI. He was mentally examined on January 9, 2023 and found to be mentally sound and fit to stand trial. On January 19,2023, the accused took plea and pleaded not guilty to the charge of murder.
2. The accused has applied to be released on and/or admitted to bail/bond on reasonable terms pending the hearing and final determination of this case.
3. The accused contended that he is not a flight risk and has a permanent place of residence in Uasin Gishu County and Mombasa County. The accused is willing and ready to go live in Mombasa upon being released on bond.

Determination

4. The only issue for determination is whether this Court should release the accused person on bail/bond, pending trial, and if so, on what conditions.

Article 49(1)(h) of the Constitution provides that: -

An accused 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.

In *S vs Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), the Court held that:

“ The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will: -

- (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
- (ii) not stand his or her trial or appear to receive sentence; or
- (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question...the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely: -
 - (i) the period for which the accused has already been in custody since his or her arrest;
 - (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
 - (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
 - (iv) any impediment in the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
 - (v) the state of health of the accused;
 - (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be.



5. The courts have defined compelling reasons in numerous cases. In [*Republic v Albert Njiru & 5 others HCCR No 79 OF 2012*](#) Korir J held thus on compelling reasons;

“It is however my considered view that the apprehension on the part of witnesses would not be limited to the applicant, access to guns. It would extend to a perceived position of influence and balance of power between a law enforcement officer vis viz a civilian. Such balance in the mind of any ordinary citizen tilts heavily in favour of the enforcement officer. I would therefore agree with the prosecution counsel that indeed the witnesses would fear to see the accused walking freely in public. They would feel intimidated. Such a state would not serve the interest of justice in the trial at hand. Indeed it is a compelling reason not to release the applicants.”

[*Republic V John Kahindi Karisa & 2 Others Mombasa High Court Criminal No. 23 OF 2010*](#) (UR) the court observed;

“Murder is a serious offence and attracts a death penalty. Self-preservation is a natural reaction or response of any human being. Whatever the court will decide, the fear and anxiety on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused facing a capital offence is real and cannot be wasted away.”

6. Section 123A of the [*Criminal Procedure Code*](#) gives the parameters for the grant of the right to bail as follows:

- (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.

7. Kenya Judiciary’s [*Bail and Bond Policy Guidelines, March 2015*](#) at p 25 which sets out judicial policy on bail as follows: -

The following procedures should apply to the bail hearing: -

- a. That the accused person is likely to fail to attend court proceedings; or



- b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
 - c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
 - d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
 - e. That the accused person is likely to interfere with witnesses or evidence; or
 - f. That the accused person is likely to endanger national security; or
8. That it is in the public interest to detain the accused person in custody.

While appreciating that the accused herein is innocent until proven guilty as no evidence has been placed before this Court yet on his culpability.

9. A pre-bail report acts as a guide to the Court when considering the suitability of an accused person whether to be released on bail and/or bond. However, the pre-bail report is not the final say. The Court had directed that a pre-bail report be filed. According to the Pre-bail Assessment Report dated January 6, 2023 and filed on February 7, 2023 the victim's family out-rightly rejected the idea of the accused being admitted on bond, as reconciliation has not taken place.
10. In *Republic Vs William Mwangi Wa Mwangi [2014] eKLR* where Muriithi, J held that:

“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 Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding 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.”

11. Similarly, in the case of *Kelly Kase Bunjika V Republic [2017] eKLR* the court had this to say: -

“It is clear that the primary consideration for bail is whether the accused will attend his trial for charges facing him and it must therefore be a compelling reason if it is demonstrated that the accused person is likely to fail to attend court proceedings. The question in this matter becomes whether there is on a balance of probabilities evidence that the accused is likely to abscond.”

12. In this case the only compelling reason advanced through the pre-bail report, is that the family of the deceased were still not ready for the bond terms at the moment and that reconciliation had not taken place. These to my mind are not sufficient compelling reasons to enable the Court deny the accused person the enjoyment of his constitutional right to bail as they can be mitigated through appropriate bond and bail terms. Further the prosecution has not tendered any evidence to suggest that the accused herein is unlikely to attend Court or is likely to interfere with the prosecution witnesses.
13. Homicide crimes once committed are an infringement of Article 26 of the *Constitution* on the right to life. The victim family often get traumatised and experience a lifetime shock, disbelief, anger, denial, rage, confusion, frustration, fear of the unknown grief, stress, and uncertainty as to the future given the sudden loss. Many victim families, hold the view that any suspect of murder contrary to Section 203 or manslaughter as specified in Section 202 of the *Penal Code* deserve no mercy from



any legal system. The impact of the crime hits more traumatically the vulnerable, the poor the young, the disabled, the married couples etc. These characteristics have found their way to our court rooms when determining pre-trial bail under Article 49 (1 h) of the Constitution. Sometimes my appreciation of the victim impact statement denotes that the right to bail ought to be limited, notwithstanding crystal clear constitutional provisions on the same subject matter. However, the court must not give a higher weight on emotional stress of the victims as a compelling reason to exercise discretion to decline grant of bail to the suspect. Yes I sympathise with the circumstances of the crime committed against humanity well known, loved, cared, appreciated or cherished by her family. On the face of it the deceased died at her prime age when more was expected of her by the birth family. The celebration of a loved one may not be determined by the burial or interment season. Depending on culture, family values, relationships it is a life time observance of remembrance. That is the reason why in my view courts should tread cautiously when factoring emotional stress and other related elements as strands of compelling evidence in Article 49(1) (h). Such characteristics of evidence might not qualify as a compelling reason to deny an Applicant a right to bail as prescribed in that Article of the Constitution. It is purposed by the law that the court when dealing with bail application matters it should not delve into the substance and merits of the murder case or as the case may be. Having balanced all this considerations there are no compelling circumstances to be found in the victim impact statement to warrant denial of constitutional right to bail to the applicant. In the instant case therefore there is really nothing to limit the exercise of the courts discretion in favour of the Applicant.

14. Having considered the circumstances of this case, the pre-bail report, I therefore find and hold that there being no compelling reasons to deny the accused bail/ bond, he be released on the following terms:

1. Bond of Kenya shillings five hundred thousand (Ksh. 500,000) with one surety of similar amount
2. The accused person shall upon his release, be escorted by the Investigating Officer in the case to his residence in Uasin Gishu County to collect all his personal belonging therefrom and shall not thereafter be seen at the said police post during the period of the trial.
3. The accused person shall provide the Investigation Officer with the details of his local Chief in Mombasa County and shall upon release from custody report to the said area Chief on the last Thursday of each subsequent month, who shall make a report to the said Investigating Officer of the accused reporting.

15. The accused shall present himself at this Court without fail whenever required to do so.

16. The accused person shall make no contact of whatever nature with any of the prosecution witnesses during the period of the trial.

17. In default of any of the terms herein, the bond/bail granted shall stand set aside without any further order of this court.

It is so ordered.

DATED and DELIVERED at ELDORET this 22nd day of March, 2023.

In the Presence of: Warige for the Accused

Mugun for the State

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R. NYAKUNDI
JUDGE

