



REPUBLIC OF KENYA



**Republic v Barasa (Criminal Case E021 of 2022)
[2023] KEHC 18289 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL CASE E021 OF 2022
F GIKONYO, J
APRIL 19, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALIAS PAULINE NANJALA BARASA ACCUSED

RULING

Bond/Bail Application

1. The accused/applicants herein is facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. On 20/12/2022, Mr. Ondimu, prosecution counsel stated that they object to bail for accused and they will file affidavit on compelling reasons.
3. Ms. Moraa counsel for the 1st accused person stated that the prosecution has not shown compelling reason to oppose bail. The 1st accused lives at Kitale. She will not abscond. She is not a danger to any witnesses. She was in custody for over 14 days before even charged. She has a child who depend on her. She urged the court to release the 1st accused person on bond on reasonable terms.
4. The prosecution filed an affidavit to oppose bond, sworn on 14/2/2023 by CPL Juliet Kimwei. The deponent stated reasons they believe constitute compelling reasons not to release the accused on bond, to wit: -
 - i. Severity of the offence and charge- the accused person is facing a serious charge murder contrary to section 203 as read with 204 of the penal code that attracts maximum sentence of death, if convicted and thus increases the temptation for him to abscond trial. The evidence gathered so far show that the accused person participated in commission of the crime.



- ii. Witness interference-that some of the key witnesses in the case worked with the accused and hence vulnerable due to the manner under which the offence and the circumstances under which offence was committed there is high likelihood of interference of witnesses and the conduct of the case.
 - iii. Flight risk- the identity of the accused person is unknown or where she exactly hails from since she has never obtained the national identity card.
 - iv. Safety and security of the accused-it will be in the interest of the accused person that she be detained pending hearing and determination of her case due to her own safety and health.
5. The bail assessment report dated 15th February 2023 was prepared by Lilian Oyie a probation officer. The gist of the report is as follows;
 - i. Family attitude- the family is of the view that the accused be granted bail. They are willing to support her in every way possible and ensure she attends court whenever needed. They have no property that can ensure her release and therefore this prayer is that the accused be released on a personal bond.
 - ii. Victims attitude- that unless the accused is released and goes to another place, relocates she is not welcome back to live in Narok for the heinous act she committed. That she can be a flight risk since she does not stay or work in one home for long, she moves from one area to another and therefore her chances of jumping bail and disappearing are very high. The family are trying to come to terms with the incident and if the accused is released on bond will interfere with their healing process.
6. The probation officer in her report has stated that the accused is not recommended for bond terms.
7. The accused person filed a replying affidavit sworn on 16/02/2023 by her. The accused denied the averments by the investigation officer.
8. The accused person averred that the seriousness of the offence should not be argued as a motivation to abscond. That she has a young child in need of her care and love.
9. That the prosecution should demonstrate to this court that the evidence and statements in the cover report have been duly proved, tested and formally admitted before the court either by the way of affidavits or viva voce evidence. That where documents are involved such can only be introduced either as annexures to affidavits or by the makers before the court. That the accused would be greatly prejudiced and it would be fair and just that the accused is granted an opportunity to examine the truthfulness of the statements.
10. That the claim that she had been interfering with the minor who had been charged with her by appearing in her dreams twice while at Ololunga police station and Narok police station is mere hallucinations and overstretching her boundaries with lies before court.
11. That her home is Kitale and she lived with her maternal aunt Beatrice Wanjala 6 years. That she will maintain a distance from the potential witnesses for the prosecution.
12. That the prosecution should seek orders from this court to impose conditions to safeguard the safety of witnesses and which conditions she will abide.
13. That lacking a national identity is not a legal reason at all to deny bail either in law, precedents or appellate courts or bail/bond policy guidelines.



14. The accused has proved all her three birth –issued names and her guardian has corroborated the same.
15. That she had never complained about her health or has any subsisting health issues.
16. Additionally, she has not had any reason to fear for her safety. The prosecution has not tendered any evidence to show that her safety was at risk nor that she is not in good health.
17. That she is ready to abide by the terms of bail or bond. That the prosecution has not demonstrated that the accused should not be admitted to reasonable bail terms. That she should be presumed innocent.

The accused’s submissions.

18. The 1st accused person submitted that given the fact that she does not hail from the same locality as the potential witnesses there is absolutely no reason for the prosecution to believe there is any risk whatsoever.
19. The accused person submitted that PW1 only agreed to testify against her to save her own skin and not because the accused participated in the crime. That she will be able to prove as the trial progresses that, she did not commit the alleged offence. The accused will prove that she lacked the mens rea or the opportunity to commit the offence.
20. The accused person submitted that she has a fixed abode in Kitale with her aunt where she lived since she was a child. She does not own a passport and has never left the county.
21. The accused person submitted that the prosecution has not demonstrated that her safety and health are at risk. That she does not suffer from any illness.
22. In the end, the accused submitted that the prosecution has failed to prove any compelling reasons not to be admitted to reasonable bail or bond terms.
23. The accused person relied on the following authorities;
 - i. Article 49(1) (h), and 50(2) (a) of *constitution* the Constitution.
 - ii. Section 123 A of the *Criminal Procedure Code*.
 - iii. Republic v Patius Gichobi
 - iv. *R v Dwight Sagaray & 4 Others*, 2013 eKLR
 - v. *Antony Ngirita v R* 2016 eKLR
 - vi. *Panju Vs Republic* [1973] E.A 282
 - vii. *Foundation For Human Rights Initiatives v Attorney General* [2008] 1 EA 120
 - viii. *Republic v Stephen Kinini Wang’ondur & 4 Others* [2021] eKLR.
 - ix. Republic v Damson Mgunya & Another
 - x. *Republic v William Mwangi Wa Mwangi* [2014] eKLR
 - xi. *Republic v Ahmed Mohammed Omar & 6 Others* [2010] eKLR

Analysis and Determination

24. Under *the Constitution* of Kenya, 2010, all offences are bailable. This is on the premise of right to be presumed innocent until the contrary is proved. Accordingly, under Article 49 (1) (h) of *the*



Constitution an accused person is entitled to bail pending trial unless there are compelling reasons not to release him (*R. v. Richard David Alden* (2016) eKLR.)

25. The overarching objective of bail is to ensure the accused gets his liberty, but also attends his trial (*Muraguri v Republic*).

Onus of proof

26. The prosecution bears the onus of proving compelling reasons- reasons that justify limitation of right to liberty in the context of article 24 of the Constitution.
27. But what amounts to compelling reasons, depends on the circumstances of each case after consideration of evidence presented by the prosecution and facts thereto against the right to be presumed innocent until proven guilty as well as the right to liberty.
28. The prosecution cited four grounds on which they opposed bail; i) severity of the offence and charge ii) witness interference iii) flight risk iv) safety and security of the accused.

Applying the test

29. Has the prosecution proved compelling reasons not to release the accused on bond?

Severity of the offence and charge

30. Gravity of the offence as a consideration was appreciated by Mbogholi, J (as he then was) in Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge v Republic (unreported) at page 3, wherein he held as follows:

“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”

32. Nevertheless, it should be noted that the accused still enjoys the right to be presumed innocent until proven guilty. And also death is not the only sentence for murder. Other sentences other than death may be imposed for the offence of murder. See *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR,

Interference with witnesses

33. The prosecution alleges likelihood of interference with prosecution witnesses. On this ground see *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 schewed 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.”

34. See also *R v Patius Gichobi* that proven interference with witnesses is an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (i) (h) of *the Constitution*. Accordingly, the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground.
35. Also see *R v Dwight Sagaray & 4 others*, 2013 eKLR, that: -
- “For the prosecution to succeed in persuading the court on these criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others.”
36. Some of the witnesses herein are said to victims of the crime. Others are neighbours who lived with accused of whom includes a minor. Protection of such witnesses and of the integrity of the trial and criminal justice process is paramount.

Protection of victims

37. Under the law, the court has a duty to give effect, uphold and promote the rights of victims expressed in Section 10 of the *Victim Protection Act* No. 17 of 2014, as follows: -
- 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.

Non-interference with witnesses generally

38. All witnesses in a criminal trial should also be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse by any person including the accused. Similarly, no one including the accused should threaten their safety and that of their family. And when such occurs, they will receive state protection under the Protection of Witness Act. These are important considerations where witness interference has been claims.

Protection of integrity of trial

39. As a consequence, interference with witnesses undermines the criminal justice system and dents and prejudices the integrity of the trial which is really an issue of administration of justice.
40. Thus, it is the duty of the court to preserve the integrity of the trial. See the reasoning of Lesiit J (as she then was) in *R v Fredrick Ole Leliman & 4 Others*, Nairobi Criminal Case No. 57 of 2016 [2016] eKLR that: -

“Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere



with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.”

41. In the present case the prosecution stated in the affidavit in objection of bond the accused is likely to interfere with vulnerable witnesses; the victims, neighbours who lived with the accused of whom is a minor. The manner and the circumstances in which the offence was committed would instill on and make witnesses rescind to fear never to give evidence in the case.

42. See *Republic v Fredrick Ole Leliman & 4 others* [2016] eKLR, where the Court explained how witnesses may rescind to fear due to the presence of the accused in their midst, that: -

“In my view, the above fears are not mere whims on the part of the prosecution. I am persuaded that because of the volatility of the situation on the ground, the temptation to jump bail is heightened to such an extent that this court cannot overlook it. It is not in dispute that all the accused persons hail from the same locality as the potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons so soon after the ghastly death of the deceased persons is a real possibility. In addition, the fact that the accused persons are so many is likely to send a cold shiver down the spines of such witnesses and corner them into resigning not to appear in court during the hearing of the case even if the accused persons turn up. In a nutshell there will be no witnesses to testify. As Makhandia J (as he then was) said in the *Kiteme Maangi* case (above), Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.”

43. The court must therefore, strike a perfect balance which ensures that the trial is not impeded by acts of interference with witnesses, but at the same time, upholding the rights of the accused to fair trial (*KKK v Republic* [2017] eKLR)

44. The circumstances of this case are; that key witnesses in the case worked with the accused. It is stated that the heinous act of murder happened in the presence, inter alia of the key witnesses. In these circumstances, likelihood of interference of witnesses, directly or indirectly, is not far-fetched. The key witness, in this case would be intimidated by the presence of the Accused.

Safety and security of the accused

45. The investigating officer in his affidavit has stated that the accused should be detained for her own safety and health.

46. The defence has brushed off the allegations as mere perceptions.



Taking law into own hands

47. My view has always been not to encourage this to be a ground for denial of court lest we inadvertently encourage people to take the law into their own hands. It is not axiomatic that the anger of the public towards the accused due to the heinous crime committed means the life of the accused is in danger or that his or her security can only be guaranteed in remand custody. The police have the duty to protect all including the accused.
48. I, do not find any evidence that her security is in danger and could only be guaranteed in remand custody. I therefore, find the argument that the accused be detained for fear her own safety and health to be without any factual basis and I reject it.

Flight risk.

49. In his affidavit, CPL Juliet Kimwei averred that the accused person has no known place of abode since she never obtained the national identity card. There is also claim that she hardly works in one home for long.
50. Her claim that she has a place of abode at her the maternal aunt's residence in Kitale, is not quite assuring she will not abscond in the face of claims above. The material placed by the prosecution before court give power and punch the apprehension by the prosecution that the accused is likely to abscond.

Conclusion And Orders

51. In conclusion, the court finds that compelling reasons have been established. More potent reason is likely interference and intimidation of witnesses especially the minor and his mother and the neighbours owing to the manner in which the murder was carried out. Possibility of absconding is also high. There is compelling reason to keep the accused person in custody pending trial. Accordingly, the accused is denied bail.
52. In light thereof, the Court directs that the hearing of this case be on the basis of priority.
53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 19TH DAY OF APRIL 2023.

F. GIKONYO M

JUDGE

In the presence of:

1. Ms. Mora for accused
2. Ms. Mwaniki for DPP
3. Court Assistant – Mr. Kasaso

