



**Hassan v Republic (Criminal Case E081 of 2022)
[2023] KEHC 18488 (KLR) (Crim) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E081 OF 2022
DR KAVEDZA, J
JUNE 14, 2023**

BETWEEN

NO. 799249 SGT AHMED RASHID HASSAN ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. The accused was charged with II counts of the offence of murder contrary to section 203 as read with 204 (*Cap 63*) Laws of Kenya. The particulars of the offence are that on 31st March 2017, at about 1400 Hrs at Eastleigh 1st Avenue within Starehe Sub-County, within Nairobi County murdered Mohamed Kheri Dahir in count I and Jamal Mohamed in count II. The accused took plea and pleaded not guilty to the offence of murder on both counts.
2. He has now approached this court seeking to be released on reasonable bail/bond terms pending his trial.
3. In response to the application, Benedict Otieno a Senior Investigation Officer at the Independent Policing and Oversight Authority filed an affidavit dated 17th April 2023 in opposition to bond. The averments made were that the accused is a serving police officer and exercises all powers and privileges. That the key witnesses in the matter have received threats and intimidation from the accused. As a result of the charges against him, the accused staged demonstrations in Nairobi and Garissa which action threatened civilian witnesses. Pursuant to the threats and intimidation, he travelled to Garissa to address the safety concerns of the witnesses. The witnesses are apprehensive that if released on bond, their safety and security are at risk. In addition, the families of the deceased persons are also greatly affected by the loss of their kin. Therefore, releasing the accused would allow him to influence other potential witnesses.



4. He further stated that given the security threat, the Oversight Authority has already engaged the Witness Protection Agency. In addition, the accused has on several occasions refused to honour duly served summons. He is therefore likely to abscond court. finally, he averred that the matter is of great public interest. If released, there is a possibility of public demonstrations. He urged the court to detain the accused until the conclusion of his trial.
5. Ignatius Yambasa Kembu a Senior Security Consultant at Independent Medico Legal Unit (IMLU) also filed an affidavit dated 20th April 2023 in opposition to bond. He reiterated the averments made by Benedict Otieno and added that he was representing the interests of the victims in the matter. That the accused has not demonstrated whether he has returned his firearm. He argued that the provisional cash bail of Kshs. 200,000 is not commensurate to the nature of the sentence if found guilty. In addition, nothing is preventing the accused from fleeing the jurisdiction of the court. he maintained that the threats and intimidation posed by the accused should be considered compelling reasons for the denial of bail/bond pending his trial.
6. In response, the accused filed an affidavit dated 28th April 2023. He averred that since his interdiction, the powers and privileges as a police officer were held in abeyance. He maintained that the allegations made on interference with witnesses were baseless and not backed by evidence. He maintained that he obeyed all summons during the investigations. He urged the court to grant the prayers sought.
7. Simultaneously, the accused filed a notice to cross-examine the 1st deponent Benedict Otieno on his affidavit dated 17th April 2023.
8. The application was canvassed by way of written submissions.

Accused's submissions.

9. Mr. Omayo learned counsel for the accused submitted that the prosecution had failed to provide sufficient evidence to support the allegation that the accused had interfered with witnesses. He argued that the burden was on the prosecution as provided under Section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya and Article 49 (1) (h) of *the Constitution* of Kenya. He cited the case of *Republic vs William Mwangi Wa Mwangi [2014] eKLR*.
10. Learned counsel maintained that there were legislative mechanisms in place to protect witnesses who are shown to be under real threat. He urged the court to strike a balance between the rights of the accused while considering the administration of justice. He prayed for reasonable bail terms.
11. On the prayer to cross-examine the deponent, learned counsel submitted that the provisions of Order 19 Rule 2 of the Civil Procedure Rules exemplify the recognition of cross-examination as a valuable tool for uncovering, modifying, clarifying or establishing facts. That the allegations made by the deponent have grievous implications on the accused person and will affect the trajectory of whether the accused should be granted bail or not. That the cross-examination will not unduly delay the proceedings but rather hasten the clarification of fundamental issues. He urged the court to ensure the fulfilment of the accused's constitutional right to adduce and challenge evidence.

Respondent's submissions.

12. In rebuttal, learned prosecution counsel submitted that owing to the operations of the accused as regards his training, surveillance, and counter-surveillance, this places him at a higher pedestal over witness. The apprehension that he is likely to interfere with witnesses is therefore well founded. In light of the threats that were already reported by the witnesses to IPOA, the accused should be denied



bail/bond. The case of [Republic vs Nabashon Muchiri Mutua \[2015\]](#) eKLR was cited in support of this position.

13. It was further submitted that the witness protection agency is not always a remedy where witnesses are apprehensive of their safety. It is usually a measure of last resort. It is only used where all known measure of protection has been exhausted owing to the rigours that come with witness protection. It was argued that the court should deny the accused bond and cancel the provisional bond terms.

Issues for determination.

14. Having considered the application, the response thereto, the submissions of the parties herein, and the applicable law, the issue for determination is whether there are compelling reasons to deny the accused reasonable bail/bond terms.

Analysis and determination

15. Article 49(1) (h) of [the Constitution](#) guarantees the right of an arrested person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released. The onus of proof in bail applications in respect of compelling reasons is borne by the state under section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya. The right for an accused person to be released on bail is not absolute.
16. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of [the Constitution](#), the courts are to be guided by the provisions of section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

 - (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfilment of obligations under a previous grant of bail;
 - (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 if released on bail, he would likely fail to surrender to custody;
 - (b) Should be kept in custody for his own good.
17. [The constitution](#) specifically requires under Article 49 (h) of [the Constitution](#) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the [Criminal Procedure Code](#), Article 49 (h) of [the Constitution](#) places the burden of proof on the state to demonstrate compelling reasons. It is therefore upon the prosecution to prove that there are compelling reasons why the accused should not be released on bail.



18. The two deponents from IPOA and IMLU vehemently objected to the application for bail/bond. They argued that the accused had already interfered with witnesses. This was done through intimidation and coercion. In addition, the victims were apprehensive of further interference since he still resided in his home in Garissa and Nairobi. The deponents maintained that there was reasonable apprehension that the accused would still interfere owing to his training, surveillance and counter-surveillance. That this placed him on a higher pedestal as compared to other accused persons. On his part, the accused undertook to abide by the conditions set by the court for his release. He also undertook not to interfere with any prosecution witnesses.
19. 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. More jurisprudence on the point is found in *R. vs Dwight Sagaray & 4 others, 2013* eKLR, where the court stated that: -
- “For the prosecution to succeed in persuading the court on these criteria, it must place material before the court which demonstrates 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.”
20. The arguments presented on interference with witnesses raises two pertinent matters. One, the protection of witnesses and victims of crime; and, protection of the integrity of the trial and criminal justice process. Under the law, the court has a duty to give effect to the rights of victims expressed in Section 10 of the Victims 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.
21. The second limb is the protection of the trial. Interference with witnesses undermines the criminal justice system and denies the integrity of the criminal process and in turn interference with the administration of justice, and prejudice to the trial. Thus, it is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in *Republic vs Fredrick Ole Leliman & 4 Others, Nairobi Criminal Case No. 57 of 2016 (2016)* eKLR where she succinctly stated 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 an 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.”
22. All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give



evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court, or during the trial; and can be committed by any person including the accused, witnesses, or other persons. The descriptions of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court that decides in the circumstances of each case 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.

23. The evidentiary burden of proving interference with witnesses lies on the shoulders of the prosecution, which must be proved by credible and cogent evidence. In the instant application, the IO Benedict Otieno in his affidavit has stated that the accused is a serving police officer exercising all powers and privileges of a police officer including access to and use of firearms and thus likely to intimidate the prosecution witnesses. The said contention has been vehemently contested by the accused who in his affidavit dated 28/04/2023 has averred that he was interdicted and currently not in service as a police officer. Indeed, it is the duty of the Investigating Officer to prove that the accused person has access to and use of a firearm and not upon the accused to prove the contrary.
24. Furthermore, no evidence was placed before court on the alleged interference of the prosecution witnesses. Additionally, no names of any witnesses have been presented before the court as evidence to prove interference with witnesses. In the absence of such evidence, the Investigating Officers' averment that there is a likelihood that the accused is likely to interfere with the witnesses is speculative and inadmissible. I, therefore, reject the averment for that very reason.
25. The deponents also argued that the release of the accused would lead to an uproar and may not be in the public interest. They stated that his safety was also at stake if released. This argument was brushed off as mere speculation. It should be noted that the accused has been out on bond all along and there has been no such uproar. Neither has there been any evidence of threat to his safety.
26. Is the accused person a flight risk? The prosecution has not adduced any cogent evidence to conclude that the accused is a flight risk. In fact, he has no passport and has no history of travelling outside the country. The prosecution's contention that the appellant is a flight risk lacks evidentiary basis and I hereby dismiss it for lacking in merit.
27. Even though bail is a constitutional right, the decision whether or not to grant bail to an accused person is in the discretion of the court to which the application is made; and subject to the discretion being exercised judicially and not capriciously. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by *the Constitution*. This high standard is more in accord with the stringent constitutional requirements in Article 24 of *the Constitution* on Limitation of rights and fundamental freedoms, in our case, it is the curtailment of the liberty of the accused person that is being sought. In light thereof, the court must be convinced by the prosecution that it is proportionate and justified in the circumstances of the case to deny the accused bail.
28. After taking all the foregoing matters into account, I find on the evidence and the applicable law that there are no compelling reasons to deny bail/bond to the accused.
29. In the premises, the application to cross-examine Benedict Otieno on his affidavit is moot. The application by the accused succeeds in the following terms:
 - a. The accused is granted a bond of Kshs. 500,000 with a surety of a similar amount to be approved by the deputy registrar. The provisional bail of Kshs. 200,000 to be reimbursed to the depositor.



- b. The accused shall refrain from making public pronouncements regarding this case pending its determination.
- c. The accused shall not contact or intimidate, whether directly or by proxy any of the witnesses in this case as per the Witness Statements and other documents supplied by the State to the defence.
- d. If the accused has a passport, which is denied by the defence, the same shall be deposited to court. The accused shall not travel outside the jurisdiction of this court without the court's approval.
- e. In the interim period, the accused will be remanded in custody until he complies with the terms of his release.

30 It is so ordered.

RULING DELIVERED VIRTUALLY ON 14TH DAY OF JUNE, 2023

D. KAVEDZA

JUDGE

In the presence of:

