



REPUBLIC OF KENYA



**Republic v Komu (Criminal Case E006 of 2023)
[2023] KEHC 18424 (KLR) (Crim) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE E006 OF 2023**

DR KAVEDZA, J

JUNE 2, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD KIOKO KOMU ACCUSED

RULING

1. The Accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal* Cap 63 Laws of Kenya. The Particulars of offence are that on January 14, 2023 at Thigiri ridge in Westlands Sub County within Nairobi County the accused murdered Gershon Mwitii.
2. The Accused took plea on March 1, 2023 and denied the charges. His Counsel, Mr Outa, promptly applied that he be admitted to bail pending trial.

The submissions of the accused

3. The application was canvassed by way of oral submissions. Mr Outa, counsel for the accused person submitted that the prosecution has not adduced any compelling reasons to warrant denial of bail to the accused.
4. Counsel further cited the case of *Republic v Nuseiba Mohammed Haji Osman (2018) eKLR* as cited with approval in the case of *Michael Juma Oyamo & another v Republic (2019) eKLR*, where the Court stated that denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture. Counsel invited the court to admit the accused to reasonable bail/bond terms.



The case for the respondent

5. The respondent opposed the application of the accused through the affidavit of No xxxx CL Clement Mwangi (the IO), whose major averments are as follows. The deceased (Dr Gerishon Mwiti) was murdered on January 14, 2023 at his garden, after having been last seen with the accused on that material day. Immediately after the deceased's body was found by his wife, efforts to trace the accused went futile as his phone was usually off.
6. He was however arrested on 1 January 8, 2023 at Mabatini Area of Mathare Settlement after having been lured by police officers. It was submitted that his conduct of fleeing the scene and switching off his phone are compelling reasons, enough to suggest that if he is released on bond/bail, he will not attend court.
7. He further averred that the accused has no fixed abode as he was residing at the deceased's home at the time of the incident. It was further averred that the prosecution has strong evidence against the accused and are apprehensive that he may flee the jurisdiction of the court if released on bail/bond.
8. The pre-bail report indicated that the accused is the last born in a family of 7 siblings. The accused's sister is ready to be the contact person and accommodate the accused at her rural home. As to the accused's background, he had lived in Thigiri for about 7 months, in Meru for close to two years and at Mabatini area of Mathare slums for about five (5) years from 2013 to 2018. At the time of the incident, he was living with the deceased in Thigiri Ride within Westlands where he worked as a gardener. It is also noted that the accused was married to Catherine Katunge but the two separated in 2017 and the wife took two of the children. The accused has no intention of reuniting with his former spouse as she is reported to have remarried and blessed with other children.
9. On the victim statement, the deceased's wife (Dr Gladys Mwiti), stated that the murder of the deceased has left her with intense psychological pains. She feels very sad and her life has become very difficult. She is disturbed trying to unearth the motive of the murder and is fearful of the accused if he is released on bail/bond as she is apprehensive that he did not act alone. The deceased's family emphatically opposed the accused's release on bail.

Issues for determination

10. I have considered the parties' submissions, affidavits and the constitutional provisions cited. From the foregoing, the main issues for consideration are whether the accused person is flight risk and whether he is likely to interfere with witnesses or abscond court if released on bail/ bond pending hearing of the case.

Analysis and determination

11. Although Bail and bond is a constitutional right of an accused person under Article 49(1)(h) of the *Constitution*, there are circumstances under which an accused person may be denied bail if the prosecutor is able to demonstrate compelling reasons to warrant the denial.
12. In the case of *Republic V Danson Mgunya & Another [2010] eKLR*, which is a locus classicus on matters of bail/ bond, the issue was exhaustively addressed. The findings of the learned Judge are replicated in the Bail and Bond Policy Guidelines. The learned Judge stated:

' When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider



in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -

- (i) The gravity of the punishment in the event of conviction
- (ii) The previous criminal record of the accused, if any
- (iii) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him
- (iv) Detention for the protection of the accused
- (v) The necessity to procure medical or social report pending final disposal of the case.

The said court stated that the criteria was not exhaustive.

'The main function of bail is to ensure the presence of the accused at the trial. Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.'

13. The Judiciary Bail and Bond policy guidelines under paragraph 4.9 has also provided the factors that ought to be considered by courts in bail and bond applications, inter alia:
 - i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
 - ii. The likelihood of interfering with witnesses.
 - iii. The accused person is a flight risk.
 - iv. Whether the accused person is gainfully employed.
14. Is the accused person a flight risk? I find from the affidavit of No xxxx CL Clement Mwangi, the investigating officer, that the accused went into hiding on the material date of the incident after the body of the deceased was found by the deceased's wife. Efforts by the DCI Gigiri and DCI Headquarters to trace the accused bore no fruits even after visiting his rural home in Kitui. I further note that he was arrested four (4) days later, on January 18, 2023 at Mabatini Area of Mathare Settlement having been lured by officers from Criminal Intelligence Unit. It is therefore clear that he did not intend to surrender himself to the police for questioning.
15. Secondly, it is noteworthy from the pre-bail report that the accused used to live at the deceased's property where he worked as a gardener for about seven (7) months. He had previously lived in Meru for two years and at Mathare slums for five years (2013-2018). It is clear from the pre-bail report and the affidavit by the investigating officer that the accused has no fixed abode. Despite Catherine Nduku, the accused's sister, indicating that she can accommodate the accused at her rural home, there is no guarantee that she will ensure the accused attends court as she herself does not reside at the same rural home but in Nairobi.
16. Thirdly, even though the accused's family indicated to the probation officer that the accused used to support his son who was left behind by his wife upon separation in 2017, there is no evidence that he does so. In fact, to the contrary, the report indicates that the accused separated with his wife in 2017 and that the wife took two of the children. Interestingly, he has no intention of reuniting with his wife as it is reported that she remarried and has another family.



17. Indeed, from the foregoing the accused is a 'free-man' like a bird and can patch anywhere he wishes. Further still, the information provided to the probation officer by the accused himself reveals that he is not gainfully employed. Lastly, with regard to the community views, the Area Chief indicated that he could not vouch for the release of the accused on bail as he has spent most of his adult life in other areas. This is evident that the accused has no fixed abode and nothing will stop him from fleeing if released on bond/bail. Ultimately, I find that the accused person is a flight risk.
18. Is the accused person likely to interfere with witnesses? The deceased's wife indicated that the death of her husband left her with intense psychological problems. She also stated that the deceased's death has taken a heavy toll on the family and she is still disturbed trying to unearth the motive of the murder. She was anguished that the accused called her to the farm knowing very well that the deceased had already been killed. She feared that she was being called to suffer the same fate as her husband. Her social life has also been adversely affected due to security concerns and she feels insecure despite the accused being in custody. Indeed, I find that in the circumstances of this case, the likelihood of the accused person contacting the victim's family can inflict genuine fear and anxiety to them. It is my considered view that the release of the accused person is likely to inflict anxiety and fear leading to intimidation of potential witnesses.
19. For the foregoing reasons, this Court finds that there are compelling reasons to deny the accused admission to bail and the application is therefore temporarily disallowed until the tension cools down and primary witnesses have testified.
20. It is so ordered.

Ruling read, delivered and dated this 2ND day of **JUNE 2023**.

D. KAVEDZA

JUDGE

In the presence of:

3 | Page

