



**Republic v Kamau & another (Criminal Case E007 of 2023)
[2023] KEHC 20960 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL CASE E007 OF 2023
CW GITHUA, J
JULY 20, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ROBERT WAINAINA KAMAU ALIAS ISHATI 1ST ACCUSED

KELVIN KAMAU MWANGI 2ND ACCUSED

RULING

1. The two accused persons in this case namely, Kelvin Kamau Mwaya and Robert Wainaina Kamau alias Ishati are jointly charged in two counts with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars supporting the two counts are that on February 21, 2023 at Gitiri Sub-location, Mugoiri location within Murang'a County, jointly with others not before the court, the accused persons murdered Mary Njoki Mwangi and Jane Wambui Mwangi.
3. Upon being arraigned in court on April 18, 2023, each of the accused persons pleaded not guilty to the charge in each count. Their learned counsel, Mr Matu immediately made an oral application seeking that both accused persons be released on bond/bail pending their trial. Hearing of the application was adjourned to enable the prosecution file their response to the application. In the meantime, the court called for filing of a pre bail report in respect of each accused person.
4. In an affidavit sworn on April 20, 2023 by the Investigating Officer Inspector Titus Nzaka, the prosecution opposed the accused persons' application for bond pending trial. He deposed that the accused persons come from the same area as the deceased persons and the prosecution witnesses and releasing them on bond will inflict fear and anxiety in the prosecution witnesses; that the accused persons are a flight risk because they do not have a fixed abode and secondly, they are aware that they



are facing serious charges which carry severe punishment on conviction and they are therefore likely to abscond their trial.

5. The deponent further averred that there are suspects who are still at large and if released, the accused persons may interfere with investigations; that the community they hail from is still bitter about the loss of the two deceased persons and if released at this stage, the accused persons' security cannot be guaranteed.
6. The pre bail reports were filed on May 12, 2023. According to the reports, the accused persons and the two deceased persons are neighbours and there was tension on the ground and hostility towards the accused persons because of their alleged involvement in the crime; that their release would only serve to heighten that tension and animosity. The reports also captured views of members of the victims' family who were still grieving the loss of their loved ones and were apprehensive of their safety if the accused persons were admitted to bond particularly because other suspects in the matter were still at large.
7. The application was argued orally before me on July 4, 2023 by learned counsel Mr Matu for the accused persons and learned prosecution counsel Ms Muriu who appeared for the state.

Mr Matu urged me to allow the application on grounds that the accused persons had a constitutional right to be admitted to bond/bail pending trial if there were no compelling reasons and the prosecution had not demonstrated existence of compelling reasons to justify denial of bond pending trial in this case; that the accused persons were not a flight risk since the Pre-bail reports had confirmed that they had known fixed places of abode.

8. On her part, Ms Muriu in her submissions in opposition to the application relied on the depositions made in the affidavit sworn by Inspector Titus Nzaka and contents of the Pre-bail Reports. She emphasized that the right to bond was not absolute and was subject to existence of compelling reasons; that the apprehension that the accused persons' safety cannot be guaranteed if released given the hostility towards them in their community constituted compelling reasons that militated against grant of bond as sought.
9. I have carefully considered the rival submissions made on behalf of the accused persons and the prosecution as well as the depositions made in the affidavit sworn by the Investigation Officer.
I agree with both learned counsel that indeed the right to bond/bail pending trial though constitutionally guaranteed under Article 49 (i) (h) of the Constitution is not absolute as it is limited by existence of compelling reasons.
10. The court of Appeal in Michael Juma Oyamo & Another v. Republic (2019) eKLR defined what amounted to compelling reasons and stated as follows;

“..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution....”

11. It is trite that the duty to demonstrate existence of compelling reasons always lies on the prosecution. In this case, the prosecution has urged me to deny the accused persons bond pending trial on grounds, inter alia, that there were suspects who were yet to be arrested and if released, the accused persons are likely to interfere with ongoing investigations. The prosecution also claimed that the accused persons did not have a fixed abode and being aware of the severity of the punishment prescribed for the offence of murder they were likely to abscond and were therefore a flight risk. Lastly, that if released, their



security and safety cannot be guaranteed since there was still tension and hostility towards them in their community.

12. In determining applications of this nature, the court is called upon to exercise its discretion judiciously taking into account the facts and circumstances of each particular case bearing in mind that an accused person has a constitutional right to be presumed innocent until proven guilty. Other factors that the court should consider are enumerated in the Kenya Judiciary's *Bail and Bond Policy Guidelines* and Section 123A of the *Criminal Procedure Code* which includes a consideration of whether if released, the accused was likely to abscond and fail to attend his trial; whether he will interfere with investigations or witnesses. The court should also weigh the facts and evidence presented before it and decide whether if released, an accused person was likely to endanger the safety of victims of the offence and whether it was necessary to detain him in custody in the public interest or for his own protection.
13. In this case, the prosecution's claim that the accused persons were a flight risk as they did not have a fixed abode was disapproved by the pre bail report which confirms that the accused persons have known residences in Gitiri village where they lived with their families. The claim that the accused persons are likely to abscond given the severity of the punishment prescribed for the offence of murder is not based on any evidence and is merely speculative. In any event, under Article 49 (i) (h) of the *Constitution*, an arrested or accused person has a right to be released on bond pending charge or trial irrespective of the seriousness of the offence charged or is under investigations.

I am not therefore not persuaded that the prosecution has established that the accused persons are a flight risk and that if released, they are likely to abscond.

14. That said, I find that there is merit in the prosecution's claim that if released, the accused persons' safety may be compromised given that there is still tension and hostility towards them in their community. I say so because this claim has been buttressed in the Pre-bail reports whose contents I have no reason to doubt which have confirmed that the accused persons and the victims' family are neighbours. I have also noted from the record that the incident in which the two deceased persons died occurred in February 2023 which is about five months ago. This is fairly recent and it is safe to conclude that members of the victim's family who are also members of the community that the accused persons hail from may not have had sufficient time to come to terms with the loss of two of its members hence the tension and animosity against the accused persons as expressed in the affidavit sworn by the investigating officer and the pre- bail reports.
15. An accused person's life, just like any other life, is sacred and must be protected and safeguarded at all times. Taking everything into account, I am satisfied that in this case, releasing the accused persons on bond or bail at this point in time would not be prudent and in the interest of justice as it is likely to jeopardise their life or safety. This to me is a compelling reason to justify denial of the accused persons right to bond or bail pending trial.
16. In the premises, I decline to allow the application for now but the accused persons are at liberty to renew their application at a later date if the situation on the ground improves or becomes favourable or if they secure alternative places of residence away from Gitiri village during the pendency of their trial.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JULY 2023.

C. W. GITHUA

JUDGE

In the presence of:



Mr Matu for both accused persons

Ms Muriu for the State

Mr Quinteen: Court Assistant

