



Republic v Kiiru (Criminal Case 2 of 2020) [2023] KEHC 20348 (KLR) (20 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 2 OF 2020**

TA ODERA, J

JULY 20, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH NGIGI KIIRU ACCUSED

RULING

1. The accused herein is charged with murder contrary to section 203 of the *Penal Code*. Plea was taken on January 28, 2020 before Hon Justice JM Ngugi. On that day prosecution informed the court that they had filed an affidavit in opposition of bond and so a bail hearing date was given and an order for filing of pre-bail report made but was not heard for various reasons which are recorded in the proceedings. The pre-bail report dated July 13, 2021 was filed herein.
2. On March 16, 2023, accused raised the said issue of bond and bond hearing was set for April 18, 2023. On April 18, 2023, Miss Mungai told court that prosecution had not objected to bond but Miss Mburu for State indicated that they had filed an affidavit of Joseph Ngigi Kiiru in opposition to bond. This court directed that the application proceeds by way of written submissions. On June 20, 2023 defence confirmed filing of submissions but the State sought more time to file theirs. The application was allowed and the State was granted 14 days to file the same and ruling was set for July 18, 2023. On July 18, 2023 the court file could not be traced and so the ruling was set for today. The file has since been traced but I note that prosecution did not file their submissions.
3. There is an affidavit on record filed on October 28, 2020 and the deponent is indicated to be Edwin Metto. The same had not been commissioned, and so I proceed to strike it out.
4. There is also an affidavit by Hanna Wanjiku Njoroge the mother to deceased sworn on November 11, 2020 she told this court that accused is a flight risk as he was arrested in Limuru on the same day he committed the offence and that on the material day at 20:00 hours she received a call from accused who threatened to end her life and that of her children whom she had taken in after the incident. She



said that this caused her anxiety and fear for her life and that of her grandchildren. She said that her life and that of her grandchildren will be jeopardized if accused is released on bail. She also stated that the life of accused is also in danger due to the reaction of members of public. The contents of the said affidavit were not controverted.

5. The probation officer in his report found that accused is not a flight risk and though he ran away after the incident and he later surrendered to the police. The local administration has no issue with the accused but their concern was that the victim's family may not have come to terms with the incident and the chief recommended that accused relocates to another area. The probation officer also raised the concerns of the mother to the victim on her security due to the threats by accused. The officer found that accused had strong community ties and the family was willing to bail him out and recommended that he be released on bond as there was no compelling reason to deny him bond.
6. Counsel for accused submitted that Article 49 (1) (h) of the constitution guarantees an accused person a right to bond unless there are compelling reasons. Also that section 123 A of CPC provides for circumstances which a court should consider when dealing with bond application to wit ;

123A. Exception to right to bail

- (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. I have carefully considered the application and submissions by defence. Bond is available to all accused under Article 49 (1) (h) of the constitution of Kenya unless there are compelling reasons to deny the same.
 8. Section 123 A of the criminal procedure code and the bail bond guidelines of Kenya provides for factors the court should consider before granting or denying bail. In the case of Margaret Syombua Kyalo v Republic [2019] eKLR it was held, “In her ruling the learned trial magistrate has clearly set out what should be taken into account when the court is considering the release of an accused person on bond. She set out the criteria as follows: -
 - i. The nature of the charge.
 - ii. The strength of the evidence which supports the charge.



- iii. The gravity of the punishment in the event of conviction.
- iv. The previous criminal record of the Applicant.
- v. The probability that the criminal may not present himself at trial.
- vi. The likelihood of further charges being brought against the accused.
- vii. The likelihood of accused interfering with witnesses or suppress any evidence that may incriminate him.
- viii. The probability of finding the Applicant guilty as charged.
- ix. The detention for the protection of the accused
- x. The necessity to preserve medical or social report pending finding disposal of the case.”

9. The granting of bond to an accused person is guaranteed by the constitution under Article 49(1) (h) which provides that:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.

10. The same can only be denied if there are compelling reasons to warrant the same.

11. The application seeks denial of bond on the ground that accused is a flight risk and that he threatened to harm the mother to the victim and his children. The mother to the victim swore an affidavit whose contents have not been controverted. Though the pre-sentence report indicates that there are no compelling reason to deny accused bond, it does not address the security of the mother to the victim who deponed that she fears for her life and her grandchildren and accused has not denied that he was arrested in Limuru after the incident. Security of victims and witnesses of crime is of paramount importance in bond proceedings and cannot be wished away.

12. Prosecution has shown that accused is a flight risk and that he is a threat to the mother of the victim and his children. I am satisfied at this stage that these are compelling reasons to deny accused bond at this stage. I proceed to allow the application for denial of bond. Hearing on October 5, 2023.

DELIVERED VIRTUALLY IN OPEN COURT AT NAKURU IN THE PRESENCE OF

Accused,

Miss Mungai H/B for Mr Orege for accused person,

Kihara for Prosecution,

Court Assistant: Bor.

T.A. ODERA - JUDGE

20.7.2023

