



**Republic v Abuga & 2 others (Criminal Case 8 (E008) of 2023)
[2023] KEHC 21099 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE 8 (E008) OF 2023
PN GICHOHI, J
JULY 11, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

JENERY ONDARI ABUGA 1ST ACCUSED

JOASH OSORO ABUGA 2ND ACCUSED

BENARD ABUGA AYIEKO 3RD ACCUSED

RULING

1. The three accused persons herein are charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the February 8, 2023 at Inani village, Bombaba East location within Kenyenyia sub county within Kisii county jointly murdered James Moya Omundi.
2. Each of them pleaded “not guilty” to the charge and while relying on the case of *Republic v DKN* [2021]eKLR and *Republic v Robert Kipkorir Tonui* [2020]eKLR, Mr Ochiengo for the prosecution opposed their release on bond on the grounds that there were compelling reasons to do so in that:
 1. At the time they were arrested, they were rescued by the police from the mob that was lynching them and therefore, their lives will be in danger if they are released.
 2. The 1st accused had been threatening to kill the deceased and the deceased’s wife, who is now the key witness, and therefore, she is apprehensive that he will actualise his threat and kill her if he is released on bond.
 3. The three accused persons are habitual offenders and a danger to the society if released on bond.



3. In support is an affidavit sworn on March 8, 2023 by No 256675 PC (W) Phanice Okemwa who is the investigating officer in this case. While urging the court to deny them bond, he states that the threats by the 1st accused to kill the wife of the deceased is the subject of Criminal Case No E 270 of 2023 at Ogembo Law Courts where he was set to take plea on February 8, 2023 when the accused persons murdered the deceased herein. That a warrant of arrest is in force for him. Further , he states that the 2nd and 3rd accused have been threatening witnesses in this case .
4. He further states that the accused persons are suspected of committing other criminal offences within their neighbourhood and a threat to their existence and a danger to the general public.
5. In response, Mr Nyakundi for the accused persons submits that the prosecution has not supplied evidence to show that the accused persons are facing other charges and that the prosecution has not disclosed if the cases are ongoing or not. Further, he states that it is not shown if the threats have been reported to the police.
6. He therefore submits that the concerns being released by the prosecution can be addressed by way of investigations and not used to deny the accused persons bond. He therefore urges the court to release them on cash bail or bond and they will abide by the conditions set by the court. In a rejoinder, Mr Ochengo submits that it has not been disputed that the three accused persons are a danger if released on bond. Further, he submits that there is a specific case mentioned by the Investigating Officer and that is a court file which is a public document which can be accessed by defence counsel.

Determination

7. I have considered the arguments advanced by the parties herein. Pursuant to this court's directions, a pre- bail report in respect of each of the accused person was filed on May 23, 2023 and all are dated and signed by Gerald Atinda on May 30, 2023. It is not clear why the report is dated and signed after filing. It is not the first time this court has come across such an issue and it is the high time the probation offer confirms if it is an error on his part or whether it is the court's registry staff who puts the wrong stamp date. Be that as it may, the court regards that as a technicality that does not go to the core of the matter in the circumstances of this case.
8. The 1st accused (Jenery Ondari Abuga) and 2nd accused (Joash Osoro Abuga) were found not suitable for bond. The report in regard to the 1st accused reveals that from the local administration's view, the 1st accused is a fright risk and likely to interfere with the witnesses.
9. When interviewed , the widow (Wilther Mokeira) of the deceased and her eldest son (Dominic Moya) who are key witnesses in the case told him that the 1st accused person used to issue threats to her and feared that accused would actualise the threats if released on bond.
10. The 2nd accused had been charged in Kehancha Law Courts with an offence of stealing. His father deposited a cash bail of Kshs 10,000/= but he failed to attend court saying that the complainant wished to withdraw the case and therefore he has a history of absconding when given bond. Further, the local administration view is that he will not be safe at home and if released on bond. The widow of the deceased and her son fear that he will harm them if released on bond.
11. Despite the fact that accused persons have a constitutional right to be released on reasonable bond terms as argued by the defence counsel, article 49 (1) (h) also shows that the said right is not absolute. That right can be limited or denied by the court if there are compelling reasons to do so.
12. The evidence availed by the prosecution that the accused person is likely to abscond hence a fright risk and that he has been threatening witnesses and hence likely to interfere with the witnesses are



compelling reasons to deny the accused person bail. Further, it must be emphasised that under article 50 of the *Constitution*, ‘every person has a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court...’

13. In my considered view, that right is to every person whether an accused or key witness in a criminal case. In this case, threats by an accused person on a key witness like the widow of deceased herein is meant to keep off the witness from pursuing justice and this amounts to interference with her right to be testify before a court of law. That is a compelling reason to deny the accused bond.
14. As regards the 3rd accused (Benard Abuga Ayieko), the Probation Officer’s report indicates that he had just completed form 4 last year and had no identity card. The Assistant Chief one Margret Kerubo intimated to the probation officer that from her reliable information, the community had no issues with accused being given bond. The Probation Officer found him suitable for bond but proposed stringent terms.
15. From that information and with no evidence to support that the blanket prosecution averment that “the accused persons are suspected of committing other criminal offences within their neighbourhood and a threat to their existence and a danger to the general public” remains suspicion as regards the 3rd accused. Being a young Form Four leaver, with no National Identity Card and having a attained a C-Grade, his life may be ruined by his continued incarceration in custody awaiting trial.
16. In the circumstances, the court makes the following orders:
 1. The 1st and 2nd accused persons are denied bond.
 2. The 3rd accused be released on a bond of Kshs 500,000/= with a surety of similar amount.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF JULY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ochengo for the State

Accused person

Mr. Nyakundi for Accused persons

Kevin Isindu, Court Assistant

