



**Republic v Gathigia (Criminal Case E006 of 2023)
[2023] KEHC 19999 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE E006 OF 2023
FN MUCHEMI, J
JULY 6, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MERCY MWIHAKI GATHIGIA ACCUSED

RULING

Brief Facts

1. The accused person faces a charge of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence are that on the 1st day of March 2023 at Kiaguthu Sub-location, within Mathira East Sub-County within Nyeri County, he murdered the deceased Wilson Koine Wachira. On March 29, 2023, the accused person entered a plea of not guilty and applied to be released on bail.
2. The prosecution filed an Affidavit of Compelling Reasons on April 12, 2023 sworn by PC Leonard Githinji the investigating officer in this case. He depones that from the evidence gathered so far, the accused person participated in the brutal murder of the deceased. He further states that the key witness is a son to the accused and is apprehensive that the accused person may harm or interfere with the evidence of the witness. Based on those contentions the deponent states that the accused person is a flight risk and should therefore remain in custody pending the hearing and determination of the case.
3. The deponent further states that he has information that the life of the accused person is at risk from the public and society at large who do not believe in the process of justice if the accused is released from custody. As such, the prosecution argues that there are compelling reasons to warrant the detention of the accused person pending the hearing and determination of the case.
4. The accused person filed a Replying Affidavit dated May 29, 2023 whereby she states that she is a single mother of four children with the eldest being in Form Four and the youngest in class six and a resident of Karatina, Nyeri County. She further states that she is the sole breadwinner of her four children.



If she is retained in custody, it would not be in the best interest of the children who are minors. It is further argued that the accused has every reason to avail herself to court and is therefore not a flight risk as alleged by the prosecution.

5. The accused further deposes that she submitted herself to the police station in the company of one of the witnesses. It is further stated that although the witnesses are known to her she has no intention of interfering with them in any way or causing harm to any of them. The accused further states that her son visits her in prison and she has not threatened him and is not likely to do so.
6. It is further deposed that the prosecution has not provided any proof that the life of the accused is in danger and in any event she states that she is ready and willing to relocate to her parents' home at Kiunyu in Karatina should her residence at Kiaguthu, Mathira prove to be inappropriate in the circumstances.
7. The accused person states that the offence is bailable unless there are serious proven reasons for bail to be denied which the prosecution has not done.
8. The accused person put in written submissions.

Accused's written submissions

9. The accused relies on article 49(1)(h) of the Constitution and submits that she has a constitutional right to be granted bail despite the charge being serious. She further argues that although the prosecution states that the evidence gathered indicates that she participated in the murder of the victim, she has a constitutional right under article 50(2)(a) of the Constitution to be presumed innocent until the contrary is proved. In support of her submission, the accused person relied on the Bond and Bail Guidelines at paragraph 4.9(b) and the case of Republic vs Edwin Odiwuor Otieno & 2 others (2021) eKLR. As such, the accused person submits that the prosecution has not established compelling reasons why she should not be placed on reasonable bail or bond terms. She therefore prays that the court allow her application for bail and set reasonable bail and bond terms.

Analysis & Determination

Whether the reasons for opposing bail are merited in terms of Article 49(1)(h) of the Constitution.

10. Article 49(1)(h) of the Constitution provides that:-
An accused person has the right...
(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
11. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail thus:-
“the following procedures should apply to the bail hearing:
 - a. The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:-
 - b. That the accused person is likely to fail to attend court proceedings; or
 - c. That the accused person is likely to commit, or abet the commission of, serious offence; or



- d. That the exception to the right to bail stipulated under section 123A of the Criminal Procedure Code is applicable in the circumstances; or
 - e. That the accused person is likely to endanger the safety of victims, individuals or the public; or
 - f. That the accused person is likely to interfere with witnesses or evidence; or
 - g. That the accused person is likely to endanger national security; or
 - h. That it is in the public interest to detain the accused person in custody.”
12. Before the enactment of the Constitution of 2010, courts applied cardinal principles in granting bail and which are still valid in bail applications.
13. In Republic v Fredrick Ole Leliman & 4 others [2016]eKLR the court held that:-
- “The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of *Ng’ang’a v Republic* 1985 KLR 451 where Chesoni J, as he then was thus:-
- “The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-
- a. The accused will fail to turn up at his trial or to surrender to custody;
 - b. The accused may commit further offences; or
 - c. He or she will obstruct the course of justice
- The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;
- a. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
 - b. The strength of the prosecution case;
 - c. The character and antecedents of the accused;
 - d. The likelihood of the accused interfering with prosecution witnesses.”
14. The fear of the prosecution is that the accused is likely to interfere and harm the key witness who is the son of the Applicant. It is further argued that the life of the applicant will be in danger if she is released from custody due to hostility of the members of the public. The accused person deposes that she is not a flight risk for she presented herself to the police accompanied by one of the witnesses following the alleged commission of the offence and that her son has been visiting her in prison without any fear of harm.
15. For the prosecution to establish the allegation of interference with witnesses, it was important to attach an affidavit of the witness in question explaining the facts upon which the prosecution relies on. In the absence of such evidence, the prosecution, are only speculating that such interference may take place. There is no evidence that the investigating officer talked to the said key witness before swearing his affidavit.



16. The allegation that the accused is a flight risk is not supported by any evidence. Again, this is just another matter of speculation. The same case applies to the allegation that the life of the accused is in danger. The investigating officer produced no evidence from any member of the community in which the accused lives to support the said allegations.
17. In the case of *R vs Joktan Mayende & 3 others* (2012)eKLR, the court in considering the scope of article 49(1)(h) stated as follows:-

“The phrase “compelling reasons” denote that the reasons are forceful and convincing as to make the court feel strongly that the accused should not be released on bond. Bail should therefore not be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.”
18. The prosecution in my view, has failed to present any cogent evidence to support the allegations in the affidavit of compelling reasons. Having carefully considered the grounds relied on, I find that the reasons given do not pass the test set out under section 49(i)(h) of the Constitution.
19. The accused shall be released on bond of Kshs.500,000/- with a surety of the same amount. Alternatively, the accused may deposit cash bail of Kshs.250,000/-. Further the accused shall not leave the jurisdiction of this court without its permission and shall attend court as and when required.
20. In processing bail, the Deputy Registrar shall take and place on record the mobile phone contacts of the accused, her surety and those of a parent of the accused.
21. The accused upon release shall relocate to her biological parents home at Kiunyu in Karatina and shall not in any way interfere or interact with the key witness until such a time that the witness has testified. Failure to comply with any conditions of bail may lead to cancellation of the accused’s bond.
22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 6TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 6th day of July 2023.

