



**Wainaina v Republic (Criminal Case E005 of 2023)
[2023] KEHC 20430 (KLR) (Crim) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E005 OF 2023
DR KAVEDZA, J
JULY 14, 2023**

BETWEEN

JOSEPH WAINAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant moved this court pursuant to article 49, 50 and 159 of the *Constitution of Kenya*, section 123 of the *Criminal Procedure Code* (cap 75) Laws of Kenya and enabling laws to be released on bail pending hearing and determination of his trial on a charge of murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63) Laws of Kenya.
2. The accused took plea on February 10, 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 95028 PC Victor Owino whose major averments are as follows. The deceased was murdered on the night of January 5, 2023 at Hurukai building first floor, room number A-6 in Tushauriane area in Kayole Sub-County within Nairobi County. The deceased was found by the police in her rented apartment while the accused was next to her but he was still alive with self-inflicted stab wounds on his neck and stomach.
6. The accused was arrested after being treated at Mama Lucy Hospital, he was later booked for the offence of murder. He further averred that the accused had travelled from Eldoret to visit her wife who stays in Kayole.
7. The pre-bail report indicated that the accused is the sixth born in his family. He dropped out of school due to financial constraints. The accused was operating his own shop at home before his arrest. The family is reported to be law abiding with no criminal history established. They held a consultative meeting and none of them was willing to yield to the accused's bail/bond request. His elder brother contended that the available title deed which can be used as a surety belongs to the larger family and so cannot be used as security for the accused.
8. It was noted that the accused was married to Mary Njeri Kimani for 11 years and their union brought forth two children Phylis Wairimu and Teresia Wangari aged 10 and Six years respectively. The children are currently in the custody of their maternal grandparents. The couple however separated and the deceased took the children with her and she was staying with them in Nairobi when the accused came to visit.
9. On the victim statement, the deceased's parents (Samson Kimani and Teresia Wangari Gitonga) stated that the death of their daughter caused them a lot of pain. That though the young children cannot comprehend the situation but the pain of loss is evident in their lives. The deceased's siblings are bitter at the way in which their kin met her death. The father of the deceased is yet to come to terms with the demise of her daughter and still mourns his child. He points out that the accused person was temperamental person and he had tried to guide him on so many occasions unsuccessfully.

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 a flight risk and whether he is likely to interfere with witness 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 or will interfere with witnesses? I find from the pre-bail report that the crime occurred in a different location from where the accused resides. It is also noted that unconfirmed reports indicate that the accused confided to one of his friends who sought anonymity that once he’s released on bail he intends to kill his two children then commit suicide. This information reached the father-in-law who is terrified to the core on the imminent release of the accused person if he is admitted to bail/bond.
15. It is noteworthy from the pre-bail report that the accused used to live with the deceased for a period of 11 years after which they separated and the deceased moved to Nairobi with her children.
16. The accused’s family indicated to the probation officer that the family is law abiding and not ready to take in the accused since the crime he had committed was grievous. They equally confirmed that the only source of security that they have is for the whole family hence they cannot release. Furthermore, the information provided to the probation officer by the accused himself reveals that he is not gainfully employed. Lastly with regards to the community views, the area chief indicated that the presence of the accused in the village if released on bail will spark off a war between him and the deceaseds’ family.
17. From the foregoing, I find that the likelihood of the accused person contacting the victims’ family is very high and this will inflict genuine fear and anxiety to the deceased’s family hence leading to the intimidation of potential witnesses.



18. This court therefore finds that there are compelling reasons to deny the accused admission to bail and the application is therefore temporarily disallowed until the primary witnesses have testified or until the prosecution is able to allay the fears.

19. It is so ordered.

RULING READ, DELIVERED AND DATED THIS 14TH DAY OF JULY 2023.

D. KAVEDZA

JUDGE

