



REPUBLIC OF KENYA



**Republic v Ithong'a & another (Criminal Case E030 of 2022)
[2023] KEHC 27394 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE E030 OF 2022
DO CHEPKWONY, J
SEPTEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

RICKSON KIBIRU ITHONG'A 1ST ACCUSED

LESKAR L SIARA ALIAS BARAKA 2ND ACCUSED

RULING

1. The accused persons are charged with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 Laws of Kenya.

The particulars of offence are that:-

“On the night of 16th July, 2022 at Kidfarmaco area within Kikuyu Sub-County of Kiambu County with others not before court jointly murdered John Ithong'a Kahuho”.

2. On 2nd September, 2022, a plea of “Not Guilty” was entered for the accused after they confirmed mentally fit to plead and the court ordered that each one of them release on a bond of Kshs.500,000.00 with sureties of a similar amount.
3. The 1st Accused person satisfied the bond terms whereby the same was approved and he was released. However, the 2nd Accused person was unable to raise the bond terms and through his Counsel has urged the court to review the said bond terms.
4. The prosecution had filed Supporting Affidavit of No. 95658, PC Paul Ebole Maloba sworn on 6th October, 2022 seeking cancellation of the bond terms granted to the 2nd accused for the reasons that he is Tanzanian citizen who does not have fixed residence hence he is a flight risk.



5. In view of this, the court directed that a social inquiry be conducted on the 2nd accused and a Bail Information Report to be compiled, which report was filed in court on 6th July, 2023.
6. The court has read and considered the report and from the recommendations therein notes that the 2nd accused person is a Tanzanian citizen with no fixed abode. The community and the local administration have confirmed that they do not know him. According to his friend Olden Naseka, a watchman in Kikuyu, the 2nd accused person had only been a visitor in Kenya for less than two weeks hence does not know him well. The family of the deceased, it has been reported is strongly opposed to the release of the 2nd accused on bond as they believe he could be holding crucial information regarding the death of the deceased. In view of this, it is recommended that the court exercised its discretion in determining whether or not to released the 21st accused on bond since he might be a flight risk.

Determination

7. In considering whether or not to review the bond terms that were granted for the 2nd accused, it is trite that although bail and bond is a right of an accused person as provided for under Article 49(1)(h) of *the Constitution*, the same is not automatically granted if there are compelling reasons to deny it. Article 49 (1)(h) 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.’
8. Clearly, from the said provisions, what ought to be considered is if the reasons tendered are compelling enough to warrant the denial of bail and bond terms. The Court in the case of *Republic v Joseph Thiongo Waweru & 17 Others* [2017] eKLR defined compelling reasons as follows:-

“The Constitutional standard for denying bail is “compelling reasons” test. The burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify denial of bail. Our emerging jurisprudence on the question is clear as to the kind of evidence needed to establish the “compelling reasons”: The evidence presented must be “cogent, very strong and specific evidence” and that mere allegations, suspicions, bare objections and insinuations will not be sufficient.”
9. There are various factors which ought to be considered in bail and bond application. The factors have been provided for under Section 123A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, and they include:-
 - (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.
10. Under Paragraph 4.9 of The Judiciary Bail and policy guidelines the factors that ought to be considered by the courts in bail and bond applications include:
- 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 strength of the prosecution case.
 - iii. The character and antecedents of the accused person.
 - iv. The failure of the accused person to observe bail or bond terms.
 - v. The likelihood of interfering with witnesses.
 - vi. The need to protect the victim or victims of the crime.
 - vii. The relationship between the accused person and the potential witnesses.
 - viii. The best interest of child offenders.
 - ix. The accused person is a flight risk.
 - x. Whether the accused person is gainfully employed.
 - xi. Public order, peace and security.
 - xii. Protection of the accused persons.
11. At Paragraph 4.9 of The Bail and Bond Policy Guidelines, it is restated as a general guideline that:-
- “In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of *the Constitution* of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”
12. In this case, both the prosecution and the bail report have confirmed that the 2nd accused is a Tanzanian citizen with no fixed abode hence there is a likelihood of him failing to attend court or comply with the bail and bond terms if he is released on bond, as he has been seen to be a flight risk. This has not been rebutted by the accused.
13. It is therefore the court finding that although the 2nd accused person was granted release on bail and bond terms on September 2, 2022, his application for the said bail and bond terms is not meritable in view of the uncertainty of his attending court if he is released.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER, 2023.



D. O. CHEPKWONY
JUDGE

