



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi & another v Republic (Criminal Case E017 of 2023)  
[2023] KEHC 23216 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E017 OF 2023  
LM NJUGUNA, J  
OCTOBER 5, 2023**

**BETWEEN**

**JOHN MURIGI MWANGI ..... 1<sup>ST</sup> ACCUSED**

**STANLEY NJOGU IYOMBA ..... 2<sup>ND</sup> ACCUSED**

**AND**

**REPUBLIC ..... PROSECUTION**

**RULING**

1. The applicants face the charge of murder contrary to section 203 as read together with Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya. The particulars of the offence are that on September 6, 2023 at Ngabari village in Ntharawe sub-location within Embu County, the accused persons, jointly with another not before court murdered Wilson Muchiri Ngari.
2. After taking plea, counsel for the applicants made an oral application seeking that the accused persons be released on bail/bond terms. The application was opposed by the investigating officer through an affidavit dated October 2, 2023 in which she averred that the 1<sup>st</sup> applicant who is a retired inspector of police, is a flight risk as he has an alternative home in Murang'a and the 2<sup>nd</sup> applicant has no known place of permanent residence but appears to be under the command of the 1<sup>st</sup> applicant. That the applicants have been heard interfering with the prosecution witnesses and using proxies to threaten the relatives of the deceased who are following up on the case.
3. In response, counsel for the applicants stated that the averments of the investigating officer are unfounded and that the applicants are not a flight risk. That the investigating officer has not done his work well and has not produced witnesses in support of his claim that the applicants have no fixed abode. That so far, the applicants have continued to co-operate with the police and that they could not have been able to threaten the prosecution witnesses because they have been in custody. That the



people alleged to have been threatened have not filed affidavits, neither have they produced evidence to express their apprehension to this court. He urged the court to allow the application.

4. An accused person is presumed innocent until proven guilty. It is on this basis that applications for bail are founded. [Bail and Bond Policy Guidelines](#) recommended that:

“The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.”

5. However, the right to bail is not absolute as provided under Article 49(1)(h) of the [Constitution](#) which provides for the right to bail pending trial as follows:

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.

6. The court may deny bail under certain circumstances and where the court is satisfied that there are compelling reasons to deny bail. Section 123A of the [Criminal Procedure Code](#) provides instances where bail may not be granted, as follows:

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 fulfillment 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. The [Bail and Bond Policy Guidelines](#) provide guidance on factors the court can consider in assessing whether or not to grant bail. They are, 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 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.
8. With this in mind, I have taken note that both applicants live within the community where the murder occurred, and are well known to the villagers. The 1<sup>st</sup> applicant has interacted a lot with the members of the community and has his retirement home and miraa farm in the area. The 2<sup>nd</sup> applicant told the police that he hails from Ngabari village where he lives with his parents. The investigating officer alleged that the 1<sup>st</sup> applicant is a flight risk as he has another home in Murang'a which he moved from in 1985 and settled in his Embu home. The other allegation is that the applicants have been threatening the family members of the deceased, through proxies. That in the presence of the investigating officer, he said that 'he feels like landing with blows' on the brother of the deceased who is following up on the case.
9. The investigating officer's apprehension that the applicants will interfere with witnesses, cannot be ignored. In fact, it may well be a compelling reason to deny bail pending trial. A compelling reason is not merely an allegation. In the case of *Michael Juma Oyamo & another Vs Republic* (2019) eKLR the court of appeal adopted the meaning of the phrase "compelling reasons" as was stated in the case of *R Vs Joktan Malende and 3 Others* Criminal Case No 55 of 2009 where the Learned Judge held as thus; -
- “..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the *Constitution*.”
10. Previous courts have addressed themselves on the issue of whether interference with witnesses is a compelling ground to deny bail. In the case of *Republic Vs Gerald Mutuku Nyalita & another* (2015) eKLR it held that; -
- “In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of the *Constitution* of Kenya, the Prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant...”



11. Similarly, in the case of *Republic Vs Patrick Ntarangwi* (2020) eKLR, the court held that:

“In considering the question of bail or bond, the court should balance the right of an accused, pursuant to the presumption of innocence, to be released on bail pending his trial against the public interest of prevention of crime and the right of the victims to access to justice. The right of the victims to access justice no doubt will be gravely affected if the prosecution witnesses are interfered with.”

12. In the premises, to grant bail to the applicants would mean to hamper justice itself. Consequently, the application fails and is hereby dismissed.

13. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. NJUGUNA**

**JUDGE**

