



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tumbo & another v Republic (Criminal Case E022 of 2022)  
[2024] KEHC 12968 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL CASE E022 OF 2022  
CW GITHUA, J  
OCTOBER 23, 2024**

**BETWEEN**

**PAUL MUMA TUMBO ..... 1<sup>ST</sup> APPLICANT**

**ISAAC MACHARIA NJUGUNA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The two accused persons herein face a charge of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).  
It is alleged that on 27<sup>th</sup> August 2022 at Kairo sub-location, Kairo location in Mathioya sub-county in Murang'a County, the accused persons (hereinafter the applicants) jointly with others not before the court, murdered Charles Wanjiku Maina. They each denied the charges.
2. On 4<sup>th</sup> October 2022, their learned counsel, Ms. Githinji, made an oral application seeking that they be admitted to bail or bond on reasonable terms pending their trial. The application was however rejected after the court noted that the pre-bail reports filed pursuant to an order made on 4<sup>th</sup> October 2022 were unfavourable to one of the applicants.
3. On 17<sup>th</sup> May 2023, Ms. Githinji filed a fresh application praying that the applicants be granted their constitutional right to bond pending trial. In support of their application, the applicants contended that if released, they were not likely to abscond since they have a fixed abode and they have no capacity to interfere with witnesses. They also urged the court to remember that they have a right to be presumed innocent until proved guilty.
4. In response to the application, the prosecution filed an affidavit sworn on 27<sup>th</sup> February 2024 by the investigating officer, PC Stephen Githinji. PC Githinji deponed that the applicants should not be



admitted to bail or bond until all witnesses had testified to avoid witness interference; that if released, the applicants lives might be in danger as members of the victim's family are yet to heal from the loss of their loved one.

5. To counter the claims made in the replying affidavit, the applicants swore supplementary affidavits on 9<sup>th</sup> April 2024. 29<sup>th</sup> April 2024 well after the timelines limited by the court had expired. The affidavits were thus irregularly filed without leave of the court and they are hereby struck out.

The court record however shows that the said supplementary affidavits were filed on

6. The application was canvassed orally before me on 24<sup>th</sup> September 2024. Ms. Githinji, learned counsel for the accused in her submissions reiterated the depositions made by the accused persons in their supporting affidavits and added that the applicants had been in custody since 2022 and they were entitled to be admitted to bond or bail since the prosecution had not advanced compelling reasons to mitigate their release as prayed.
7. On her part, learned prosecution counsel Ms. Muriu maintained her opposition to the application by relying on the replying affidavit. In addition, she asked the court to balance the interests of the applicants, the victims and the community when determining the application even if the pre-bail reports were favourable to both applicants.
8. I have duly considered the application, the affidavits on record and the rival submissions made on behalf of all parties. Admission to bond or bail on reasonable conditions pending trial remains to be a constitutional right for all accused persons subject only to existence of compelling reasons. It is trite that the onus of demonstrating compelling reasons lies squarely on the prosecution.

See: *Republic v Danson Mgunya & another* (2010) eKLR;

9. In this case, one of the reasons advanced by the prosecution to oppose the application is that if released, the applicants are likely to interfere with prospective prosecution witnesses.

The prosecution has not however explained to the court how the applicants were likely to interfere with witnesses. It has not been claimed, for instance, that the witnesses have any relationship with the accused persons or that they were neighbours. There is also no indication of the way in which the applicants were likely to interfere with the undisclosed witnesses.

10. The above allegation appears to have been casually made as a matter of course being one of the reasons usually cited by the prosecution to oppose bail in many cases. However, the law is that for such a reason to be upheld by the court as a compelling reason, it must be backed by concrete evidence showing actual or perceived interference by way of, for example, attempts to threaten or contact the witnesses whether directly or indirectly or other evidence demonstrating real likelihood of interference. Mere allegations cannot suffice. In the absence of such evidence, this reason must fail.
11. The prosecution has also claimed that if released, the lives of the applicants might be in danger as the family of the deceased are yet to heal from the loss of their loved one. Granted, the family of the deceased may still be hurting following the loss of the deceased but this in itself does not mean that they are likely to harm the applicants if they are admitted to bond.
12. If indeed the above claim by the prosecution has any truth to it, it is surprising that the victim's family were not hostile towards the applicants soon after their arrest and prosecution going by the prosecution's response to the accused person's initial bond application. It is noteworthy that the same investigating officer who has sworn the replying affidavit to the current application swore an affidavit filed on 1<sup>st</sup> March 2023 deposing that the prosecution had no opposition to the grant of bond to the accused persons. In the said affidavit which was sworn a few months after the incident, PC Githinji



did not indicate that there was any hostility towards the accused persons from the victim's family. No explanation has been given by the prosecution to reconcile the two contradictory positions taken by the investigating officer. It may also be important to note at this juncture that the current pre-bail reports filed in respect of each applicant are favourable.

13. For all the foregoing reasons, I have come to the firm conclusion that the prosecution has failed to demonstrate existence of compelling reasons to justify denial of bond to each of the applicants.

Consequently, the application is allowed on the following terms:

- i. Each accused will be released upon executing bond of Kshs 500,000 together with one surety of like amount.
- ii. The sureties will be approved by the Deputy Registrar of this Court.
- iii. Once released, the applicants will attend this court on all hearing dates or whenever required without fail.
- iv. Failure to comply with condition iii) above may lead to cancellation of bond.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 23<sup>RD</sup> DAY OF OCTOBER 2024.**

**HON. C.W. GITHUA**

**JUDGE**

In the presence of:

Both Applicants

Ms. Githinji for the applicants

Ms. Muriu for the State

Ms. Susan Waiganjo, Court Assistant

