



**Republic v Omwono (Criminal Case E007 of 2024)
[2024] KEHC 14540 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE E007 OF 2024
AK NDUNG’U, J
NOVEMBER 21, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

NELSON MANDELA OMWONO ACCUSED

RULING

1. The Accused persons in this case, Nelson Mandela Omwono is charged with murder contrary to sections 203 and 204 of the Penal Code. It is alleged in the information dated 22/04/2024 that on 06/11/2020 in Laikipia East Sub-County within Laikipia County murdered Simon Karinga Macharia. On 04/06/2024 he pleaded not guilty to the charge. The Republic has now opposed bail by an affidavit dated 30/05/2024 sworn by an investigating officer of Independent Policing Oversight Authority (IPOA) one Judith Kawira Kinyua. The reasons advanced for opposing bail are;
 - i. The accused being a trained police officer with the knowledge of handling firearms, there is a reasonable apprehension that there will be interference and intimidation of the witnesses. That two of the witnesses informed the authority of threats they were facing from the accused and his agents and a request was made for their protection to the Witness Protection Agency.
 - ii. That the accused is a flight risk for reasons that he was previously summoned to appear in court on 30/04/2024 but he failed to avail himself in court which warranted a warrant of arrest to be issued but his superiors told the court on 02/05/2024 that they could not trace him as his phone was off and he was not on duty. That he availed himself on 13/05/2024 and his reason of failure to attend court was declared not plausible by the court. That the accused is therefore a flight risk since he was able to disappear for several weeks and if given an opportunity, he will be able to abscond court.



- iii. That he is facing an offence that carries a death penalty hence there is a probability of him absconding if released on bond.
 - iv. That the prosecution has overwhelming evidence that points to the guilt of the Accused person and there is a probability that the prosecution will secure a conviction hence, when released on bail he may flee in fear of being sentenced.
2. The victim's family filed an affidavit sworn by Daniel Wanjama Macharia a brother to the deceased dated 03/06/2024 opposing bail on the ground that following the disappearance of the deceased, the accused and his colleague from Ngare Nyiro police station followed him on several occasions. After reporting the matter to the IPOA, police officers from the accused's station went looking for him at his home and deceased's friends where they assaulted D1's wife who was with the deceased on the fateful night in order to intimidate them to drop the complaint from IPOA. That he received numerous calls and messages requesting him to drop the case and he reported this to IPOA who promised to secure witness protection for them. That intimidation from unknown numbers and from police officers from Ngare Nyiro police station have intensified following the arraignment of the accused and he contacted IPOA who informed him that the process of engaging the Witness Protection Agency is yet to be completed. He averred that the accused may abscond court if granted bail since he failed to show up in court when he was required to. Other witnesses close to the family have been intimidated not to testify. That they have been waiting for justice since November 2020 and accused has delayed this by failing to show up in court. That should the court be inclined to grant bail, the same be deferred until crucial witnesses have testified.
3. In response, the accused filed a replying affidavit dated 10/06/2024. He deponed that Article 49(1)(h) of *the Constitution* guarantee him the right to be released on bail unless there are compelling reasons not to and the State and the victim have not demonstrated any compelling reason. That the alleged crucial witnesses have not sworn affidavits to confirm their connection with him and he has no intention of interfering or intimidating any witness. That Philip Ewaton and Daniel Wanjama are unknown to him and the deceased was unknown to him and he is presumed innocent until proven guilty. That he is not a flight risk as he did not wait to be arrested but presented himself in court and his absence on 30/04/2024 was explained and found to be plausible. That the allegations he might be found guilty and sentenced to death and that the prosecution has overwhelming evidence is baseless. That the allegations that Daniel Wanjama was harassed together with D1's wife is without factual basis and the alleged messages sent to Daniel have not been exhibited in court and therefore, they have failed to demonstrate any solid compelling reasons to deny him bail.
4. In response to the accused replying affidavit, the victim, Daniel Wanjama Macharia filed a replying affidavit dated 29/07/2024. He maintained that witnesses were threatened by accused colleagues and they reported to IPOA who investigated the matter and made recommendations to the DPP who recommended disciplinary action against the accused colleagues and witness protection for him and D1. That the accused knows him contrary to his allegation in his affidavit since he is the one who reported the matter to him and recorded an OB. That his explanation on why he failed to attend court was found to be unsatisfactory and it took this court to issue warrants of arrest. That he gave all the evidence in relations to threats, calls and messages to IPOA which gave rise to recommendations by the DPP. That should the court be inclined to grant bail, that D1-D4 be allowed to testify first.
5. Application was canvassed by way of written submissions. The State submitted that although Article 49(1)(h) of *the Constitution* grants an applicant rights to bond, the same is not absolute and can be denied if there are compelling reasons. That the accused and his colleague know the crucial witnesses and their place of abode. That one David Wanjama Macharia through his affidavit stated that the



accused and his colleagues started trailing him after he reported the matter to the IPOA and also received numerous calls from unknown person requesting him to drop the case and therefore there is a reasonable apprehension that as a mean of self preservation, there will be interference and intimidation of prosecution witnesses.

6. She submitted that he is a flight risk on account that he was served with summons to appear in court on 30/04/2024 but he failed to do so and a warrant of arrest was issued. On 02/05/2024, his superior appeared in court and informed the court that they could not trace him as he had not reported to work, his phone was off and his whereabouts was unknown and warrants were extended for him to appear in court on 13/05/2024 and the reasons he gave for absconding court were found not to be plausible by the court. As such, the accused demonstrated that he is a flight risk and has knowledge and the means of evading security agencies and should he be released on bond, there is a reasonable apprehension that he might go into hiding. That given the nature of the charge and the seriousness of the punishment, it can be assumed that there are more probabilities and incentives for the accused to abscond court and that he is fully aware of the weight and strength of the case against him and this might be an incentive for him to abscond.
7. Mr Nyaga for the victims argued that the fact that there is a likelihood of the accused interfering with witnesses is weighty enough to warrant his denial to bail. There is also need to consider his safety as the pre-bail report raised concerns over his safety as the deceased was well loved in the community. That there is evidence how the accused and his colleagues intimidated the witnesses by visiting key witness and coking guns in an attempt to derail justice which led the DPP to recommend that the witnesses be admitted to witness protection.
8. In rejoinder, the accused counsel submitted that the accused has a constitutional right to bail which entails the right to be presumed innocent until proven guilty. He has not been convicted of the offence charged and hence the presumption of innocence subsists. That he is a Kenyan citizen and a police officer and has a permanent residence at Kagura village of Nyakach subcounty in Kisumu county where he resides with his family and is ready to attend court without fail. On the allegation that the accused will intimidate or threaten the witnesses, he submitted that the allegation is not supported by evidence as there is no statement by any witness that the accused had threatened them with harm therefore, the prosecution has failed to advance any compelling reasons for denial of bail.
9. I have considered the arguments proffered by the parties. I have also read the pre-bail report filed herein. It is noted that the strength or otherwise of the case facing the accused has not been revealed to the court as the court was not supplied with copies of witnesses' statements and documentary evidence.
10. Bail pending trial is now a constitutional entitlement in all criminal offences. It will be denied only for compelling reasons; and any conditions that the court might impose, again by constitutional edict, must be reasonable. See Article 49(1) (h) of *the Constitution* of Kenya, 2010 which states that every accused person has a 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. “Compelling reason” is not defined in *the Constitution* or in any law that this court is aware of. The term is also not defined in Black's Law Dictionary, Tenth Edition. However, the term “Compelling need” is defined there as –

“A need so great that irreparable harm or injustice would result if not met.”



A note following that definition states –

“Generally, courts decide whether a compelling need is present based on the unique facts of each case.”

12. Compelling reason therefore, in this court’s view, is a reason that must militate against granting the accused bail, such as proven likelihood of him/her not attending court, interference with witnesses, harm to witnesses or to himself/herself, and the like. The important word here is proven. It is not just a matter for the discretion of the court. He who seeks to deny an Accused person his constitutional right to bail pending trial must therefore place evidence before the court as would establish, on balance, the compelling reason urged. It is not enough to merely allege without evidence.
13. The reasons advanced by the prosecution for denial of bail are;
 - i. The Accused person is a flight risk.
 - ii. Interference and intimidation of witnesses.
 - iii. The nature of the charge and seriousness of the punishment.
 - iv. The strength of the prosecution’s case.
14. The fourth reason can be dismissed right away. The court is not aware of the case facing the accused person since the court was not supplied with the witness statements or evidence the prosecution tend to rely on. Further, the perceived strength of the prosecution case in my view is not a compelling reason to deny an accused person his constitutional right to bail. The Accused persons have a constitutional and legal right to the presumption of innocence until and unless proven guilty to the required standard. In Oscar Edwin Okimaru v Republic [2021] eKLR it was stated that;

“To my mind, for this court to base its decision on the weight of the evidence to be adduced against the accused persons at the stage of determination of an application for bail, may well be prejudicial. While the Court is not necessarily barred from taking a dim view of the evidence in in setting conditions for the grant of bail, that cannot be the basis for denial of a constitutional right to bail.”
15. The same applies to the third reason. The perceived seriousness of the offence and the sentence in my view can never be a compelling reason to deny an accused person the constitutional right to bail. Though the Judiciary Bond and Bail Policy 2015 lists the seriousness of the offence as a tenet for consideration, court must not lose sight of the fact that Article 49(1)(h) grants an accused the right to bail irrespective of the seriousness and the nature of the offence. I also believe that this reason has to be considered alongside other factors. It cannot stand alone without other compelling reasons. See R V Mwangi [2016] eKLR where the court held that:-

“Bail cannot be refused simply because the accused has been charged with a very serious offence but the seriousness of the offence can be taken into consideration as a factor in determining if one of the ground for refusing bail exists.”
16. Being a flight risk and likelihood of interference with witnesses if proved on balance, are compelling reasons to deny an accused person bail, one because the accused will not turn up for the trial as and when required, two because interference with witnesses will be subversion of justice.



17. In the present case, have those allegations been proved on balance? It is trite that the specific instances of or likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence in support thereof as to persuade the court to deny the accused bond on this ground. See *R. V. Dwight Sagaray & 4 others*, 2013 eKLR, where the court stated that: -

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.”

18. The victim Daniel Macharia through his affidavit averred that he and some other crucial witnesses were threatened and intimidated by the accused and his colleagues to drop the case when they reported the matter to the IPOA. He further stated that he received calls and messages from unknown numbers threatening him to drop the case and when he was following up on the disappearance of the deceased, the accused and his colleague started trailing him. After reporting the matter of threats to IPOA, the agency forwarded the complaints to the DPP who recommended disciplinary action to be taken and the crucial witnesses be placed under witness protection. One letter is dated 21/10/2021 from IPOA to Director of the Witness Protection Agency in relation Philip Ewaton Namosingo and Daniel Wanjama Macharia. The letter reads in some part that;

‘...I write to inform you that the above named persons are vulnerable witnesses and are key in the investigation against the said police officers. The witnesses fear for their life since unknown people have been pursuing their movements while involved police officers threaten them by pointing a gun at one...The authority’s recommendation that three police officers from Ngarengiro police station be charged with threats to life of Philip Ewaton and Daniel Wanjama...’

19. The other letter is dated 31/03/2022 from the office of the Director of Public Prosecution proposing that disciplinary action be taken against the involved police officer.

20. The other reason advanced by the State is that the Accused person is a demonstrated flight risk in that he was served with summons to appear in court on 30/04/2024 but he failed to do so and a warrant of arrest was issued. On 02/05/2024, his superior appeared in court and informed the court that they could not trace him as he had not reported to work, his phone was off and his whereabouts was unknown and warrants were extended for him to appear in court on 13/05/2024 and the reasons he gave for absconding court were found not to be plausible by the court.

21. Indeed, the accused was summoned by this court to appear but he failed to do so and warrants had to be issued. When he appeared, he informed the court that he was sick but this court found the reason not to be plausible vide a ruling delivered on 13/05/2024.

22. Those are the compelling reasons advanced by the prosecution which the court has to determine whether on balance, they are compelling enough to deny the accused his right to bail.

23. The court also has to consider the content of the pre-bail report which, on perusal in this case, is not favorable to the accused on account that since the deceased was loved by the community, the community may pose a threat to the accused. Further, the community expressed concerns about their safety and there was a potential of the accused interfering with the witnesses as he had done it before.



24. I have also noted that it is indicated that the accused hail from Kisumu where he has built a semi-permanent house. He has a wife and one child. He was working at Ngarengi'ro police station at the time but was later transferred but has since been interdicted after he was charged with this offence.
25. Looking at the totality of the facts as presented before court, am of the very strong persuasion that compelling reasons exist for the denial of bail to the Accused. The Accused has through disobedience of summons to this court demonstrated that he cannot be relied upon to religiously appear in court and thus he is a flight risk. His conduct of contacting and threatening witnesses when investigations were ongoing also make him unsuitable for bail.
26. With the result that the opposition to bail is upheld. The Accused shall be remanded in custody during the pendency of the trial. To avoid injustice arising from a long incarceration noting that the Accused enjoys a presumption of innocence, I direct that measures be put in place by the Deputy Registrar of this court and other players in the criminal justice chain for an expedited hearing.

DATED SIGNED AND DELIVERED THIS 21ST DAY OF NOVEMBER, 2024

A.K. NDUNG'U

JUDGE

