



**Republic v Gitau & 3 others (Criminal Case E016 of 2024)
[2024] KEHC 14944 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E016 OF 2024
E OMINDE, J
NOVEMBER 20, 2024**

BETWEEN

REPUBLIC COMPLAINANT

AND

NANCY WANGU GITAU 1ST ACCUSED

STEPHEN KARIUKIWAIGWA 2ND ACCUSED

JOHN GACHIHI MBURU 3RD ACCUSED

DANIEL MURIUKI MAINA ALIAS KARIS 4TH ACCUSED

RULING

1. This Ruling is with respect to an Application made by the Accused persons seeking that they be released on bond pending the hearing and determination of the case.
2. The Accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of the 9th and 10th of April 2024, at Burnt Forest Township, in Ainabkoi Sun County, within Kakamega County, in the Republic of Kenya jointly murdered Paul Gitau Njenga.

The Submission by the State

3. PC Edwin Chirchir Yego swore an affidavit in opposition to the release of the accused persons on bond. He deposes in the said Affidavit that the 1st accused hired the 2nd, 3rd, and 4th accused persons as hitmen to murder the deceased and make it look like he was missing.
4. He stated further that their investigations revealed that the 2nd, 3rd and 4th accused persons murdered the deceased in his own house and placed his body in a gunny bag which was placed on a motorbike



and take to the home of the 2nd accused. That the body was then later dumped in Timboroa forest. That the incident was witnessed by a close family member of the deceased and the first accused.

5. The deponent also deposed that the accused persons should not be granted bond for various reasons including that the manner in which the murder was committed was truly gruesome and horrific especially to a key prosecution witness who witnessed the incident; That the accused persons know the exact location and residence of a key prosecution witness who witnessed the incident; That the offence was witnessed by a person who is a very close family member of the deceased and 1st accused and that crucial witness is yet to testify and should the accused person be released on bond, he is likely to compromise that witnesses or cause them fear.
6. The deponent stated that the crucial witness and eye witnesses in this matter are persons within easy reach of the accused persons and he believes that the .accused persons will reach out to them and intimidate them and/or adulterate their evidence should they be released on bond. He further stated that the evidence against the accused persons is quite overwhelming and so are the chances of securing a conviction which raises the chances to jump bail.
7. The deponent further deposed that due to the heinous manner in which the murder was committed coupled with the fact that it was pre-meditated, the prosecution will be seeking for the death penalty and this raises the chances of the temptation on the part of the accused persons absconding bond to avoid suffering the sentence.
8. Lastly, the Investigating Officer deposed that the 2nd-4th accused persons are a flight risk because they have no fixed abode and there is a high chance that they will not attend trial if granted bail or bond. That further, the deceased was a well-known and beloved member of the society. The news of his gruesome murder at the hands of his wife and assassins has caused uproar in the community therefore, in the event that the accused are released on bail/ bond, there is a high likelihood that they will be put in harms' way by the members of the community.

The Submissions by the 1st Accused

9. The 1st Accused person was represented by the firm of George Kirيامa Sonkule Advocates. On behalf of the 1st Accused, Counsel submitted that the Constitution under Article 49(1) (h) provides that bond is a matter of right unless there are compelling reasons to warrant a denial. Counsel defined compelling reasons as something "evoking interest, attention or admiration in a powerfully irresistible way, really convincing, not able to be refuted.
10. Counsel urged that from this plain meaning, it follows that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would jeopardize the trial because either the possibility that the Accused will fail to attend court exists or granting bond in these circumstances would be contrary to the parameters set in Section 123 A of the Criminal Procedure Code.
11. Counsel urged that Section 123 A of the Criminal Procedure Code gives the parameters for the grant of the right to bail as well as the Judiciary Bail and Bond Policy Guidelines, March 2015
12. He submitted that at page 25 of the Guidelines, the policy on bail is set out as follows:

The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including;

 - a). That the accused person is likely to fail to attend court proceedings



- b) That the accused person is likely to commit, or abet the commission of, a serious offence or
 - c). That the exception to the right to bail stipulated under Section 123 A of the Criminal Procedure Code is applicable in the circumstances or
 - d) That the accused person is likely to endanger the safety of victims, individuals or the public or
 - e) That the accused person is likely to interfere with witnesses or evidence; or f).That the accused person is likely to endanger national security or
 - g) That it is in the public interest to detain the accused person in custody.
13. Counsel submitted that whereas it is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted, he maintained that it is upon the prosecution to show that there exist compelling reasons to warrant the denial of an accused person bond.
 14. He submitted that what constitutes compelling reasons however, depend on the circumstances of each case. The mere fact therefore that the offence with which an accused is charged is serious is not necessarily a reason for denial of bail. That ground only becomes a factor if it demonstrated that it may be an incentive to the accused to absconding.
 15. He urged that the real question that the court must keep in mind is whether or not the accused will be able to attend the trial and whether or not a free and fair trial can be achieved notwithstanding the release of the accused on bond and further, that bail should not be denied unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. He cited the case of *S vs. Nvaruviro & Another* (HB 262-17, HCB 122-17. XREF CRB 1454A-B-17) 120171 ZWBHC 262 (31 August 2017) in support of this submission.
 16. Counsel stated that he had carefully reviewed the material before court and is of the opinion that there are no compelling reasons to deny the 1st accused person bond. She is still presumed innocent and that whether the prosecution has a strong is yet to be demonstrated since that stage has not been reached.
 17. He further submitted that the 1st Accused also has a home in Nyeri which is far away from the alleged scene of crime, that she gives an undertaking that she will not interfere with witnesses and will religiously attend to this court as and when required. That she is equally not a flight risk and has no power or means to jeopardise the prosecution case in whatever manner. He urged the court to admit the accused person to bond as prayed.

4th Accused Persons' submissions

18. The 4th accused person filed submissions through the firm of Jemeli Sang & Co Advocates. Counsel on his behalf submitted that the 4th accused person has a right to be released on bond. Counsel too cited the provisions of Article 49(1)(h) of *the Constitution* and Section 123A of the Criminal Procedure Code in support of his submissions. Additionally, he cited the case of *Mohamood Chute Wote & 2 others v Republic* [2021] eKLR where Hon. Grace Nzioka expressed herself on the Article 49(1)(h) and section 123 of the Criminal Procedure Code as follows;

The key word is; “reasonable.” Thus, the question that arises is: what criteria should be used in determining what is reasonable” In my considered opinion, the starting point is the recognition of the fact that, under Article 50(2) of *the Constitution* of Kenya, 2010, every accused person is presumed innocent until proved guilty. The purpose of bail and bond terms is to ensure therefore that the accused attends the trial. Further, the provisions of section 123A of the Criminal Procedure Code provides the relevant circumstances to be considered, including; nature and seriousness of the offence, character of



the accused, record of compliance with previous bail and bond terms and strength of the evidence to be adduced.

19. Counsel submitted that at Paragraph 3.1. (d) of the Judiciary Bail and Bond Policy Guidelines (at page 9) it is provided that:

d) “...Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”

20. He also cited the case of Republic v Edwin Odiwuor Otieno & 2 Others (2021) eKLR and urged that the 4th accused has a right to be released on bond. That he is not a flight risk and he will not interfere with the prosecution witnesses. He urged that no compelling reasons have been adduced to deny bond to the 4th accused person and prayed the court grant him bond.

Analysis & Determination

21. Pre-bail Reports date 7th October 2024 were filed at the direction of the Court with respect to each of the Accused persons and I have perused them. With regard to the 1st Accused, the victim’s family while noting that the ground is still hostile to the accused at Burnt Forest where she hails from and where her two children who are being taken care of by their maternal cousin live, say they have no animosity towards the accused and still view her as family and would have no problem if the accused relocates to her home in Mwea if released on bond

22. The local Administration and the Security agency have also expressed fears that the community is still hostile as the matter is still fresh in their minds and in the event that the Court grants the accused bond, her security will not be guaranteed.

23. With regard to the 2nd Accused, the report in summary recommends that even though the accused father with whom he has largely not interacted with for the past 5 years is ready to stand surety for him, his bond application should pend for now and be reviewed at a later date.

24. That this is because the accused has largely been living alone with limited contact with his family and of particular significance is the accused is reported to have an anti-social behaviour and has abandoned his wife and children with whom he has kept minimal contact. In the observation of the Probation officer he is therefore a flight risk.

25. That further, there is a lot of interest within the community in the matter owing to the nature of the alleged offence was committed and as such an early release maybe a risk to the accused person himself; The victim’s family who are still in grief expressed concerns over their safety especially considering that the deceased daughter as also a witness in the case.

26. With regard to the 3rd Accused, the report in a nutshell is that the family of the deceased expressed concern about their safety if the accused and his alleged accomplices are released for reasons that the accused has resided in the neighbourhood for long and he knows them so well.



27. Further, the Report noted that the community viewed the accused with reservation largely due to his alcohol consumption and association with peers of questionable character. That he did not have a strong or positive standing within the community and his lack of support extended to his family who have not actively followed up on his case.
28. That even as his father is committed to secure the accused bond he stated that he does not have any form of security and further that no family member has committed to ensure that the accused attends court as and when he will be required to do so. That it is not only the victim's family, but also members of the community, the local leaders and security agencies because the matter is still fresh and emotions are still high.
29. The Report captured views similar to those expressed with regard to the 2nd and 3rd with regard to the 4th accused and it was recommended that the release of the accused on bond be deferred until vulnerable witnesses have testified.
30. Article 49 (1) (h) of *the Constitution* that states that: -
- “An arrested 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”.
31. Article 50 (2) (a) of *the Constitution* 2010, stipulates that every person is presumed to be innocent unless otherwise proved and states as follows:-
- “(2) Every accused person has the right to a fair trial, which includes the right:-
- a. to be presumed innocent until the contrary is proved.”
32. Section 123 of the Criminal Procedure Code states as follows: -
1. When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:
- Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
2. The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
 3. The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced”.
33. Section 123A of the Criminal Procedure Code provides that: -
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”.
34. Paragraph 4.9 of the Judiciary Bail and Bond Policy Guidelines, provide the factors to be considered by the court when deciding with whether to grant or deny bail/bond and which includes: -
- a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
 - b. The strength of the prosecution case.
 - c. Character and antecedents of the accused person.
 - d. The failure of the accused person to observe bail or bond terms
 - e. Likelihood of interfering with witnesses
 - f. The need to protect the victim or victims of the crime from the accused person.
 - g. The relationship between the accused person and potential witnesses.
 - h. Child offenders; where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
 - i. The accused person is a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security. whether the release of an accused person will disturb public order or undermine public peace or security.
 - l. Protection of the accused person. whether pre-trial detention is necessary to protect the accused person.
35. The Court of Appeal in the case of Michael Juma Oyamo & another v Republic [2019] eKLR while dealing with the issue of bail and/or bond stated that: -
- “
- “ 23. We have carefully considered the record of appeal, the submissions by counsel and the various authorities cited. Article 49(1)(h) of *the Constitution* states that 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”. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts



to compelling reasons as defined by the High Court in R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 as follows:

“..... 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*.”

36. In the case of Harish Mawjee & Another V Republic, [2020] eKLR, Lesiit J (as she then was) observed thus:

“First of all, courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or High Court on appeal.”

37. From my above summary of the relevant provisions of the law and policy guidelines it is not in doubt as Counsel for the accused persons have submitted that the release of an accused person on bond is a constitutional right which every accused person is entitled to as a matter of course in all cases unless compelling reasons are advanced by the prosecution. This being the case then, the only issue for the determination of the Court is

Whether the Prosecution has raised reasons that are sufficiently compelling to warrant the denial of bond to the accused persons

38. In a nutshell, what would be considered to be compelling reasons inter alia are as hereunder;

- i. That an accused person has no fixed abode and is therefore a flight risk
- ii. That an accused person has been granted bail/bond previously and has failed to honour the conditions therein set
- iii. That given the circumstances of the commission of the offence, it is in the interest of the accused own safety that he not be released on bond
- iv. That the possibility of the accused person interfering with witnesses if released on bond exists
- v. That it is in the greater public interest that an accused person be denied bond
- vi. That there possibility that an accused person will tamper with evidence if released on bond exists
- vii. That due to the seriousness of the charge and the severity of the sentence to be meted out upon conviction, the temptation to an accused person to jump bail if released on bond does exist

39. The requirement is that compelling reasons should be demonstrated by way of an Affidavit sworn by the Investigating Officer. In this case, the Investigating Officer PC Edwin Chirchir Yego swore an Affidavit opposing the release of the accused persons on bond and some of the reasons he gave as already summarised above are as hereunder restated;



- i. That the incident was witnessed by a very close family member of the deceased who is a crucial witness and who is yet to testify and should the accused persons be released on bond, they are likely to compromise that witnesses or cause them fear.
 - ii. That the accused persons know the exact location and residence of this key prosecution witness and further that the crucial witness and eye witnesses in this matter are persons within easy reach of the accused persons and so the possibility that the accused persons will reach out to them and intimidate them and/or adulterate their evidence should they be released on bond does in fact exist.
 - iii. That the evidence against the accused persons is quite overwhelming and so are the chances of securing a conviction. That due to the overwhelming nature of the evidence, the Prosecution intends to seek for the death sentence in the event of a conviction. That this then raises the chances that the accused persons may be tempted to jump bail.
 - iv. That the 2nd-4th accused persons are a flight risk because they have no fixed abode.
 - v. That the deceased was a well-known and beloved member of the society. The news of his gruesome murder at the hands of his wife and assassins has caused uproar in the community and so in the event that the accused are released on bail/ bond, there is a high likelihood that they will be put in harms' way by the members of the community.
40. In my considered opinion, the above reasons advanced by the Investigating Officer coupled with the conclusions reached by the Probation Officer in the Pre-Bail Reports as I have already summarised above are reasons that are sufficiently compelling to warrant the denial of bond to the accused persons.
41. I have also addressed my mind to the submission that the 1st accused particularly is ready to relocate from Burnt Forest to her parent's home in Mwea. I note however that it has been stated that her mother is deceased and her father lives with his other wife on another farm and not where he lived with the 1st accused mother.
42. I also note two of her youngest children notwithstanding the death of their father and the incarceration of their mother still live in Burnt Forest where the accused home is with their maternal cousin. This then means that the 1st accused roots are more in Burnt Forest than in Mwea and therefore the proposal to move to Mwea remains just that, a proposal whose chances of being actualized once she is released are very minimal.
43. For the above reason, the request by the accused persons that they be released on bond pending the hearing and determination of the case is denied and the Application by the 1st and 3rd Accused to that effect is accordingly dismissed.

READ DATED AND SIGNED AT ELDORET ON 28TH NOVEMBER 2024

E. OMINDE

JUDGE

