Republic v Mugendi & 3 others (Criminal Case E037 of 2024)
[2024] KEHC 13615 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL CASE E037 OF 2024

HM NYAGA, J

NOVEMBER 7, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

EMERSON MUGENDI ..... 1ST ACCUSED

SILAS MULIUKI M'M'KUBITU ..... 2ND ACCUSED

HENRY THIURU M'ITARU ..... 3RD ACCUSED

SHADRACK GITONGA SAMSON ALIAS RICHARD MUSAITI .. 4TH ACCUSED

RULING

1. The 4 accused person are charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal Code.

2. After the 3 files were consolidated, the Prosecution informed the court that they were objecting to bond/bail being granted to the accused. Their opposition to the grant of bond/bail is grounded on the Affidavit of No. 235775 Police Chief Inspector Daniel Opiyo.

3. Chief Inspector Opiyo avers that soon after the incident, the four accused persons went into hiding and were only arrested several weeks later. He further avers that one witness, Anthony Mutharimi was attacked and warned not to give evidence against the accused herein. An OB extract, P3 form and a hospital outpatient card were tendered in support to this claim.

4. Chief Inspector Opiyo further avers that from the above, there is reasonable belief that the accused are a flight risk and will interfere with witnesses if granted bond.

5. Chief Inspector Opiyo also avers that the accused are at risk of being harmed by the members of the public as a result of the incident herein.

6. Counsel for the 1st Accused in response to the Affidavit sought bond for him. She submitted that there are no compelling reasons adduced by the state.

7. Counsel for the 2nd Accused also submitted that no compelling reasons had been adduced to deny him bond. It was submitted that the 2nd accused has a young family to take care of. It was also submitted that the Accused has a right to bond.

8. Counsel for the 3rd accused also submitted that there are no compelling reasons adduced. He further pointed out that the 3rd accused was arrested way back in August this year and sought that he be granted bond forthwith.

9. The issue to be addressed is whether there have been compelling reasons adduced by the Prosecution or the State to warrant a denial of bond or bail to the accused persons.

10. Article 49 of *the Constitution* provides for the right of an arrested person. Article 49(1) (h) of *the Constitution* specifically states that an accused person is entitled;

> 'To be released on bond or bail on reasonable conditions pending a charge at a trial unless there are compelling reasons not to be released.'

11. The said article is clear that the right to bond /bail can only be denied if there are compelling reasons adduced by the state.

12. Courts of law are enjoined to ensure all rights granted upon an individual are jealously guarded and can only be denied when circumstances are clear.

13. *The Constitution* does not define what constitutes the "compelling reasons". However, Section 123A of the Criminal Procedure Code provides thus:

> "(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 offences;
>
> (b) the character, antecedents, associations and community ties of the accused persons;
>
> (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."

14. Also, in the well-known case of Republic – Versus- Danson Mugunya [2010] eKLR the court cited some of the grounds to be considered in whether to grant bond or bail to an accused. These include:

a. The nature of charge or offence and the punishment to be meted out if accused is convicted.

b. The strength of the prosecution case.

c. Character and antecedents of the accused.

d. The need to protect the victim or victims of the crime.

e. Likelihood of interfering with witnesses.

f. The relationship between the accused and potential witnesses.

g. Whether the accused is a flight risk or not.

h. Protections of the accused person.

15. This list is not exhaustive and each case has to be looked at on its own set of circumstances. It is for the State to provide these compelling reasons and not for the accused to disprove them.

16. In Republic –Versus-Robert Zippor Nzilu [2018] eKLR the court held that compelling reasons are dependent on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. As regards the severity of an offence, the court held in this case that the mere fact that the offence with which an accused is charged carries a severe sentence is not necessarily a reason for denial of bail. The court reiterated that the burden of proof lies on the prosecution to show that there are compelling reasons to deny an accused person bail/bond.

17. In Republic –Versus- Danford Kabage Mwangi [2016] eKLR the High Court held that the grounds of denial of a bail application must be proved by the prosecution to the satisfaction of the court. The court stressed that mere allegations or possibility is not enough. The court also held that bail cannot be denied simply because an accused has been charged with a serious offence but the seriousness of the offence can be taken into consideration as a factor in determining if one of the grounds for refusing bail exists.

18. In Republic -Vs- Joseph Wambura Mutunga (2010) eKLR the High Court further expounded on the issue of what compelling reasons are. The court held that "compelling reasons" and "in the interests of justice" would basically amount to the same thing. The court did refer to a decision in the Supreme Court of Malawi namely Fredrick Mwiha -Vs- Republic Misc Application on Appeal NO. 25 OF 2000. In the said case the Supreme Court of Malawi tackled the issue of granting or denying an accused bond/ bail. The Judges held as follows:

> " To my mind the phrase "in the interest of justice" can readily be replaced with the word "compelling reasons" as used in our constitution. I say so because it is a compelling reason to ensure that the court always act in the interest of justice. Therefore, should there be a compelling reason for depriving an arrested person bail pending trial. It should automatically follow that such deprivation was in the interest of justice".

19. I don't think that I need to add anything to the above cited cases on what would constitute compelling reasons. They have clearly set out the law on the issue.

20. In presenting a case for the court to deny an accused person bond or bail, the prosecution is only required to prove, on a balance of probability, that there are compelling reasons not to grant bail to the Applicant. This was so stated in R v Muneer Harron Ismail & 4 Others [2010] eKLR. There is no requirement that the Prosecution proves the compelling reasons beyond reasonable doubt. Indeed,

such a standard would be impossible to meet at this point in the trial. [See, Bail and Bond Policy Guidelines at p. 19.]

21. The first contention by the Prosecution is that the accused persons are likely to interfere with witnesses. The Prosecution's fears are founded upon the alleged attack on the said Antony Mutharimi, in order to deter him from testifying.

22. The prosecution also argued that due to the gravity of the offence the accused person is likely to abscond as they were on the run for quite some time, before they were eventually apprehended.

23. Lastly, the prosecution contend that the accused persons are in danger as there is hostility from the community.

24. I will address the issues raised sequentially.

25. With respect to likelihood of the accused interfering with witnesses, the issue was well discussed in Republic V Dwight Sagaray & 4 Others [2013] eKLR where the court held that;

> " For the prosecution to succeed in persuading the court on this criteria (interference with witnesses) it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; close familial relationship between the accused and witnesses among others."

26. The bail and bond policy formulated by the Judiciary gives guidelines on issues relating to threats of witnesses. At page 17 it states as follows;

> " Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if-
>
> I. There is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted and
>
> II. The court cannot impose conditions to the bail or bond to prevent such interference.

27. When it comes to issues of threats, the court may not be dealing with tangible evidence as such. The question is whether the accused could probably inflict genuine fear and anxiety in the potential prosecution witnesses. If the answer is in the affirmative, then that would constitute a compelling ground for denial of bail.

28. The hospital card in respect to Antony Mutharimi as presented to the court has an unexplained discrepancy. The same was issued on 20th June 2024. The 'history' section of the document has an alteration that has the date of 30/5/2024 superimposed over another date which appears to be 07/6/2024, as the date of the alleged assault. A look at the P3 Form indeed confirms that the date of the assault was indeed on 7/6/2024. Therefore, the contents of paragraph 10 of Chief Inspector Opiyo's affidavit consists of distorted facts. Also there is no statement or affidavit from the victim to show that the assault was occasioned by the accused or their proxies and that it was in a bid to silence him. It is thus difficult to connect the two incidents. It is also easy to conclude that he alteration in question was done for the purpose of this application by the State to detain the accused.

29. If indeed the accused were involved as alleged, it is not stated that the accused have been charged with the said assault. The threshold for denying a person bail on grounds that he will interfere with witnesses was laid down in the case of Republic v Asbel Kiprop Malel [2014] eKLR where the court cited the case of Jaffer -Vs- Republic [1973] 1 E.A. 39 in which the court while dealing with the question of

tampering with witnesses, Wilson AG C.J (as he then was) said in Bhagwanji Kakubhai -Vs- Republic, 1 T.L.R. 143

> 'That the tests laid down (in English Cases) were that there should be a definite allegation of tampering or attempted tampering with witnesses, supported by proved or admitted facts showing reasonable cause for the belief that such interference with the cause of Justice was likely to occur if the accused was released...'

30. Having considered the affidavit by the investigating officer against the principles set out in these authorities, I am of the view that the reasons presented by the Prosecution do not meet this threshold on the question of interference with witnesses. In any case measures can be taken to mitigate against the possibility of that happening.

31. The other limb of the Prosecutions application is that the accused are a flight risk as demonstrated by the fact that they went into hiding after the alleged incident. The investigating officer states that the 1st accused was arrested after he returned to open his shop. That the 2nd Accused was arrested just five kilometers from the scene of the crime. That the 3rd Accused was arrested at KK within Igembe North Sub County. That the 4th Accused was arrested when he surrendered to the police.

32. All the accused were arrested within Igembe North Sub County where the alleged offence took place. The initial report, according to the investigating officer was that of a missing person and was made on 31/5/2024. He was not clear as to when the murder probe commenced. It is not shown that the police had been looking for the accused persons specifically before they were apprehended.

33. I am thus not persuaded that the accused persons, who appear to be residents of Igembe North Sub County, can be termed as flight risks. In any case the court can impose terms that will be geared towards them not even contemplating the idea of fleeing from the court's jurisdiction.

34. On the issue of community hostility against the Accused persons, it is my opinion that no satisfactory material has been placed before this court in support of this ground. The investigating officer has averred that most of the accused were actually apprehended by members of the public and taken to the police station. If there was hostility that could have led to a threat to their safety, it would have been manifested then and not now, when time has elapsed.

35. In Republic v Stephen Kinini Wang'ondu & 4 others [2021] eKLR the court stated as follows in regards to security of the Accused person;

> " The case of R v. Lucy Njeri Waweru & 3 others 2013 eKLR was cited by the defence where the court observed that tempers and emotions cool with time. The prosecution also relied on the same case to state that the public may out of sympathy seek to revenge on behalf of the victims. In this regard, I am of the considered view that the state has the required legal machinery to protect its citizens. Any person taking the law into their hands must face the full force of the law. The rights of the accused persons to be released on bail will not be restricted for fear of hostility or revenge by the public."

36. I am also guided by the case of Nicholas Kipsigei Ngétich & 2 Others vs. Republic [2011] eKLR where Ouko, J (as he then was) held that;

> " ...it is the duty of the State in terms of Article 29(c) and 238 of *the Constitution* to ensure the security and safety of the applicants, a duty which the State cannot run away or abdicate.

> It cannot be in the mouth of a State official charged with this duty to imply that Kenyans will only be safe in prisons...."

37. Relying on these cases I also find that the third ground relied upon to object to bond fails to meet the requisite threshold.

38. The court has to be careful not to curtail rights of the accused persons unreasonably and bail or bond should not be refused merely as a punishment as this would conflict with the presumption of innocence.

39. In R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009, the court restated this point and held 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*"

40. After a careful evaluation of the issues at hand I find that no compelling reasons have been adduced to deny the accused persons their right to be released on bond/bail.

41. In the circumstances I grant each accused a bond of Ksh. 500,000/- with a surety of similar amount.

42. For the avoidance of doubt I find that it would not be appropriate to grant a cash bail, given the nature and circumstances surrounding the offence.

43. The Accused are warned and ordered that they shall not contact or intimidate and or threaten, whether directly or by proxy, any of the prosecution witnesses during the pendency of this case. Any proven contact of the like shall lead to the cancellation of their bond terms.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 7TH DAY OF NOV 2024.

H.M. NYAGA

JUDGE