



REPUBLIC OF KENYA



KENYA LAW
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**Republic v K (Criminal Case E041 of 2021)
[2021] KEHC 1058 (KLR) (9 December 2021) (Ruling)**

Republic v ENK [2021] eKLR

Neutral citation: [2021] KEHC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE E041 OF 2021
MM KASANGO, J
DECEMBER 9, 2021**

BETWEEN

REPUBLIC PROSECUTION

AND

ENK ACCUSED

RULING

1. ENK is charged with the murder of ENN deceased.
2. The deceased was his wife. The accused's trial is yet to commence. He has applied to be released from custody on bond/bail pending the determination his trial.
3. The accused's learned advocate submitted that the accused is conferred with a right to be released on bail as provided under article 49(1)(h) of the *Constitution*. The advocate also made reference to article 50(2)(a) which states that an accused has a right to be presumed innocent until he contrary is proved. It was submitted that the object of granting bail is to ensure the accused does attend trial. That if there is allegation by prosecution that there are compelling reasons to deny accused bail, the prosecution had an onus to prove such compelling reasons.
4. The application for bail is opposed by the state and by the victim's family through the deceased's mother.
5. By an affidavit dated September 6, 2020 Sgt. David Mureithi the Investigating Officer deponed that there are compelling reasons to deny accused bail. He outlined in that affidavit the following:-
 - a. That the accused was the estranged husband of deceased.
 - b. The main prosecution's witnesses to the offence are children born from the union.



- c. That as consequence of the above, the accused should not be released on bond/bail because there are chances of “accused accessing, mingling and ultimately interfering with the said witnesses”.
6. The Investigating Officer by his said affidavit requested this court to consider the security of the children and deny the accused bail.
7. The deceased’s mother and grandmother of the children of the marriage also opposed bail application by filing an affidavit. In that affidavit, she deponed that the deceased and the accused were involved in divorce proceedings, initiated by the accused, and a children’s matter wherein the accused having failed to pay the children’s maintenance led to deceased applying for execution by issuance of his warrant. The said deponent, just like the Investigating Officer, referred to numerous reports made to police by the deceased in her lifetime where the deceased alleged assault by the accused.

Analysis

8. I have considered the parties’ submissions and the authorities cited by the accused. In the case of *Republic v Dennis Orora Unsando*(2020) eKLR the court on hearing submissions of allegations of interference of witnesses by the accused, the trial court stated:-

“These are serious and warranted concerns. However, they are not sufficient in themselves to deny bail to the accused person. There is a cure for that, which is to restrict the accused movement and post stringent bond terms...

Regarding threat to the witnesses, this is a matter that should be addressed through the Witness Protection Agency.”

9. Article 49(1)(h) provides 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 not to be released. The rider to that article that compelling reasons will lead to denial of bond/bail, demonstrates that the court in considering a bail application always retains discretion: See the case *Republic v Milton Kabulit & 60 Others*(2011) eKLR as follows:-

“My understanding of section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right to an automatic bond or bail are those charged with offences (which may be referred to as “petty offences”) the punishment of which {if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”

10. The fact that the accused faces a serious charge, that is the charge of the offence of murder, is a factor to be considered while the court renders its decision on bail application. This is what was stated in the case *Republic v Abamed Mohammed Omar & 6 Others*(2010) eKLR as follows:-

“... whereas the applicant is still presumed innocent; if he were to be convicted for murder, there is a possibility that the trial court could sentence him to death. To my mind, therefore, the severity of the sentence remains a significant factor for consideration in an application for bail pending trial.”

11. There is allegation herein by the State and by victim’s family that there is possibility of accused interfering with the witnesses, in particular the children of the marriage, if the accused is released on



bail. It has often been stated that the interference of witnesses of a case is tantamount to undermining with the criminal justice system. In this regard, I make a reference to the case Republic v Robert Kipkorir Tonui Bomet High Court Cr Case No E001 of 2020 as follows:-

“26. As the law stands, it is the duty of the court to give effect to the rights of victims expressed in section 10 of the Victim Protection Act No 17 of 2014, as follows:-

10 (1) A victim has a right to:-

- (a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
- (b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and
- (c) Have their property protected.

27. Interference with witnesses has another facet. It undermines the criminal justice system and dents the integrity of the criminal process. This would in turn interfere with the administration of justice or prejudice the trial. It is the duty of the court to preserve the integrity of the trial. In this regard, I am persuaded by the reasoning of Lesiit J in R v Fredrick Ole Leliman & 4 Others eKLR , Nairobi Criminal Case No 57 of 2016 (2016) where she succinctly stated that:-

“Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instances where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention.”

12. The Investigating Officer stated that the main witnesses of this case are the children of the marriage. It was also deponed that the children witnessed the accused assault the deceased when their deceased’s mother was alive and they were now fearful of the accused. article 53 of the Constitution provides under sub-article (2) thus:-

“A child’s best interest are of paramount importance in every matter concerning the child.”

13. In this matter, the court is called upon to strike the balance between the constitutional rights of the accused to be released on bond/bail and the rights of the children who are witnesses in this case and who are yet to testify in this matter.
14. Being conscious of the need to affect a balance between the two rights stated above, and having considered all the submissions without over or under appreciating any particular factor, I find and hold the only suitable words to use here is that detention of the accused is necessary in order to maintain confidence in the administration of justice. Indeed, it will be in the best interest of the children, who are witnesses in this case, that the application of the accused be declined.
15. It is because of the above finding that I decline to release the accused on bond or bail. The accused will however have the undoubted right to seek review of today’s order once the children of the marriage and their grandmother conclude with their testimony in this case.



16. Orders accordingly.

RULING DATED AND DELIVERED AT KIAMBU THIS 9TH DAY OF DECEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice

For DPP:- Kathambi/Kasyoka

For Accused:- Ms. Koki HB Mr. Kago

Accused : **ENK:- Present**

Mr. Njoroge for victim's family

COURT

RULING delivered virtually.

MARY KASANGO

JUDGE

