



REPUBLIC OF KENYA



**Republic v Gakuya & 12 others (Anti-Corruption Case 35 of 2018) [2018] KEMC 102 (KLR)  
(Anti-Corruption and Economic Crimes) (23 August 2018) (Ruling)**

*Republic v James Mwangi Gakuya & 12 others [2018] eKLR*

Neutral citation: [2018] KEMC 102 (KLR)

**REPUBLIC OF KENYA  
IN THE ANTI-CORRUPTION MAGISTRATE'S COURT  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION CASE 35 OF 2018**

**F KOMBO, SPM**

**AUGUST 23, 2018**

**BETWEEN**

**REPUBLIC ..... COMPLAINANT**

**AND**

**JAMES MWANGI GAKUYA ..... 1<sup>ST</sup> ACCUSED**  
**LEAH WAITHERA GUCHU ..... 2<sup>ND</sup> ACCUSED**  
**CLEOPHAS OMARIBA OYARO ..... 3<sup>RD</sup> ACCUSED**  
**RICHARD MWANGI CHUCHU ..... 4<sup>TH</sup> ACCUSED**  
**FLORENCE NYAMBURA NJERI ..... 5<sup>TH</sup> ACCUSED**  
**AGNES NJERI MUTHONI ..... 6<sup>TH</sup> ACCUSED**  
**JULIUS MAINA NJOKA ..... 7<sup>TH</sup> ACCUSED**  
**PATRIVCK WARUINGI GAKUYA T/A MABAKS ENTERPRISES .... 8<sup>TH</sup>  
ACCUSED**  
**TERESIA MUTHONI MACHARIA ..... 9<sup>TH</sup> ACCUSED**  
**STACY WAMBUI NJOKI ..... 10<sup>TH</sup> ACCUSED**  
**PATRICK WARUINGI GAKUYA ..... 11<sup>TH</sup> ACCUSED**  
**SALOME NDUATA KIMAMUI ..... 12<sup>TH</sup> ACCUSED**  
**TRESMU INVESTMENTS LIMITED ..... 13<sup>TH</sup> ACCUSED**



## RULING

1. Thirteen Accused persons have today been presented before this Court charged with a total of 27 counts preferred under various provisions of our Penal laws.
2. During plea however, only the 1st, -9th and 11th-13th Accused persons were present or represented in court. The 9th and 10th Accused persons who are charged on behalf of the business known as Hunyu Bush Clearing and Nurseries were absent.
3. In relation to this, the court has been informed that the 9th and 10th Accused persons were not aware of today's appearance in Court and Summonses Requiring Attendance, have been sought on behalf of the State in this regard. There is no objection against these Summonses.
4. Upon plea, Mr Dunstan Omari, Advocate who appears together with Mr Njenga, Mr Wambui, Ms Masaki and Mr Hagai Baston on behalf of the Accused applied that the accused be granted release on reasonable bail terms.
5. The State however, through Mr Owiti, who appears alongside Ms Omolo, Ms Kanyuira, and Ms Oloo, has strongly objected to release of all the accused persons on bail.
6. According to Mr Owiti, while Article 49(1) (h) of *the Constitution* provides the right to bail, it also warrants its denial where compelling reasons are demonstrated.
7. He contends that the state has through an Affidavit sworn today 23/8/2018 by Mr Wako Jatani, a Forensic Investigator at the Ethics and Anti-Corruption Commission (EACC) presented the court with such a basis as to enable it to grant his request that all the accused persons be denied bail and be committed to custody.
8. A quick perusal of the affidavit highlights the following as the key grounds upon which the application is based;
  - Public interest.
  - Character
  - A likelihood to abscond
  - A likelihood to interfere with witnesses.
  - Seriousness of the charges preferred.
9. In relation to public interest, the court has been referred to the colossal sums involved in the charge sheet, and the interest and legitimate expectation that the public have in these cases, being economic crimes.
10. In relation to character, the court is informed that as against the 1st accused, he has on several occasions during the investigation of this matter ignored requests and summonses requiring appearance before EACC investigators.
11. No evidence however, is provided to buttress this allegation.
12. It is further submitted that the accused persons are likely to abscond due to the serious nature of the offences preferred against them which attract a severe punishment in the event of conviction.



13. It is submitted as against all the accused persons, the 1st Accused being an elected Member of Parliament, and others allegedly playing various senior roles within the Embakasi Constituency Fund, that the clout they wield as against the junior employees who will likely be lined up as witnesses, and the local citizenry, is highly likely to lead to interference with witnesses with great prejudice to the case.
14. Based on the foregoing grounds, Mr Owiti contends that a case is made for denial of bail against the accused persons. He urges me not to be swayed by arguments about presumption of innocence or assurances that the accused are likely to attend trial.
15. According to him there is good authority to submit that bail can be denied without interference with the right to be presumed innocent. He also admits that the important issue is not just a likelihood that the accused will attend court, but the integrity of the trial process itself needs to be protected.
16. Mr Dunstan Omari, Mr Njenga, Ms Masaki and Mr Wambui all vehemently oppose the ground set forth by the state.
17. Mr Omari in his submission urges that the court need not reinvent the wheel, as all the matters raised were adequately considered by the High Court in the recent case of *Rodgers Nzioka and 10 Others v Republic* where bail was granted, having been initially denied by this court. Mr Omari further pours cold water on the suggestion that the accused persons may abscond, stating that all the accused persons, except the 1st who was arrested yesterday from an official function, presented themselves voluntarily today morning before the EACC Investigators as required. He submits that they did this notwithstanding the fact that notifications to appear were received through short text messages yesterday at 10 pm.
18. He urges the court not to accept the invitation on behalf of the State to move outside the law, but instead to strictly adhere to it and *the Constitution*.
19. In his submission, Mr Njenga referred to article 161 of *the Constitution*, reminding the court that it is an independent arbiter in this matter, and also urged the court to consider that the accused have a legitimate expectation to a fair trial and the presumption of innocence. It is his further submission that no material is presented before the court to enable it to determine the allegations contained in the affidavit in support of the objection by the state.
20. Mr Wambui in his submission reiterated that the right to bail is intimately connected to the right to a fair trial which under article 25(c) of *the constitution* cannot be limited. According to him therefore it is to be sufficiently demonstrated, before the court is moved to deny bail.
21. In her submission Ms Masaki referred the court to the decision in *Christopher Ndarathi Murungaru v KACC & Ano*. [2005] Eklr in which the notion ‘public interest’ and what it entails was exhaustively discussed.
22. I was referred to other decisions in the course of submissions on the above issues which I have duly considered alongside the submissions.
23. I find myself in agreement with submission by the defence that the issues and authorities raised in court today in opposition to bail against the accused persons are no different from the ones that were raised in *Rodgers Nzioka* and which were exhaustively considered.
24. In the said decision, the right to bail is recognised as an important pillar in our justice system. It is further recognised that *the Constitution* is the highest symbol of organized public expression, and therefore no higher ‘public interest’ may supersede that expressed by the people in *the Constitution*.



25. It is trite law that article 49(1) (h) of *the Constitution* of Kenya 2010 grants that all persons accused before the court should be granted bail unless reasons of a compelling nature are advanced.
26. The only question then before the court is whether the grounds advanced meet the high threshold set out in *the Constitution* for denial of bail.
27. The affidavit sworn by Wako Jatani sets out a number of allegations against the accused persons. It does not however carry by way of annexure or otherwise, any specific material to buttress those allegations.
28. The likelihood that none of such material in fact exists is discernible in the language employed in it, such as in paragraph 12 which indicates a 'high likelihood' of absconding. Paragraph 14 equally talks about the accused persons being 'highly likely' to interfere with witnesses.
29. Paragraph 13 which refers to national security is scant in detail or specificity and does not explain in what way release of the accused on bail poses a threat to national security.
30. In *Rodgers Nzioka* the Court in its discussion at pages 17-22 emphasised the need for 'material evidence' to be placed before the court in support of any allegation that an accused person is likely to interfere with witnesses, or is likely to pose a threat to national security, and I would add, is likely to abscond.
31. The principle then is that it is woefully insufficient to generally allege the above matters absent any factual basis.
32. In this case, no objection is made to the submission by the defence that virtually all the accused persons, except the 1st accused were not arrested but voluntarily presented themselves before the EACC for processing. There is equally no suggestion that the 1st accused, in spite of his arrest, deliberately withheld cooperation with the EACC investigators.
33. As to public interest, I am wholly guided by the dictum of the court in the *Chris Murungaru Case*. I reiterate that no public interest is higher than that which the people have expressed in *the Constitution*.
34. The question of bail is a constitutionally provided matter and through *the Constitution*, the people have clearly expressed themselves on the matter.
35. They have indeed expressed that the right to bail is not inalienable, and in appropriate conditions could be deprived.
36. I do consider that the charges before the court are grave. I also consider that they have not yet been proved. I consider too that the presumption of innocence is a universal right and no Court can easily trifle with it. I consider that the constitutional public interest in having individuals who commit crimes, especially grave ones, subjected to a trial and punishment, can be addressed in ways other than denial of bail.
37. In the end I conclude and find that the material placed before the Court does not suffice to displace the constitutional protection guaranteed all Kenyan citizens in conflict with the law, under Article 49(1) (h) of *the Constitution* of Kenya 2010.
38. I find that I have basis to grant each of the Accused persons Bail as warranted both by *the Constitution*, and Sections 123 and 123A of the Criminal Procedure Code.
39. As Such I make the following Orders;
  1. The 1st Accused may be released upon executing a Bail Bond of ksh. 5 Million And upon availing a surety for the same amount to be approved by this Court.



In the alternative, the 1st Accused may be released upon depositing a Cash Bail of ksh two million.

2. The 2nd and 3rd Accused may be released upon executing a Bail Bond of Ksh 3 Million and upon availing a surety for the same amount to be approved by this Court.

In the alternative, the said 2nd and 3rd Accused may be released on depositing a Cash Bail of ksh 1.5 Million.

3. The 4th, 5th, 6th, 7th, 11th and 12th Accused may each be released upon Executing a Bail Bond of ksh two Million And upon availing a surety for the same amount to be approved by this Court

In the alternative, the said 4th, 5th, 6th, 7th, 11th and 12th Accused may be released on depositing a Cash Bail of ksh 750,000/-

4. In addition to meeting the foregoing terms, each Accused person who holds a Passport or any other travel document to deposit it in Court. Those who do not hold to avail evidence to that effect to be cross checked with relevant agencies.
5. Accused persons who are public servants who do not hold constitutional offices are hereby barred from accessing their offices without the written authority of their respective departments or agencies, copy of which shall be deposited in Court and with the Investigator in this case, as part of these conditions in that eventuality.

**FELIX KOMBO**

**SENIOR PRINCIPAL MAGISTRATE**

**DELIVERED IN OPEN COURT THIS 23RD DAY OF AUGUST 2018**

