



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION - MILIMANI COURT
CRIMINAL CASE E012 OF 2024

REPUBLIC-VS-JAMES KINYUA MAINA
JOHNSON MUNENE MAINA
KELVIN MWANGI MAINA
DENNIS ACHIKA OMARIBA

RULING.

1. The accused persons face the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the charges sheet read:-
2. **JAMES KINYUA MAINA, JOHNSON MUNENE MAINA, KELVIN MWANGI MAINA** alias **BROWNY DENNIS ACHIKA OMARIBA**: *On the day of 2nd January 2024 at 06000hrs at Mama Cynthia bar*

*within Mathare Kiboro area in Starehe Subcounty within County jointly murdered **MARY WANGARI NJERI** alias **MARYMELLA**.*

3. All Accused persons pleaded NOT GUILTY to the charge.
4. The 2nd accused filed the Notice of Motion dated 24/7/2025 seeking release on reasonable bond terms or cash bail pending trial.
5. The application was supported by the affidavit of **JOHNSON MUNENE** sworn on even date.

GROUND OF THE 2TH ACCUSED APPLICATION

6. The application is brought on the grounds that the 2nd accused / applicant is a breadwinner with and was catering needs of 3 children and his wife. That continued incarceration threatens the disintegration of his family and will negatively impact the children.
7. That his wife is unemployed and the children have been in and out of school due to lack of finances.
8. The Accused person undertakes to attend court when required and also has a fixed abode within the Republic of Kenya. That the accused is not a flight risk and he will not interfere the witnesses nor the applicant will endanger the safety of public.

9. That no prejudice will be suffered if he is released on bail or bond.
10. The accused reiterates the grounds of the application in his supporting affidavit. He depones that he will not travel outside of the country and that he does not have capacity to interfere with witnesses in the case.
11. The 1st, 3rd & 4th Accused persons also seek bail on reasonable terms as per the affidavits sworn by accused in contesting compelling reasons raised by the prosecution in the affidavit of **P.C FELIX KIPKOECH MUTAI** of Starehe Directorate of Criminal investigations.

1ST & 4TH ACCUSED AFFIDAVITS

12. The 1st accused **JAMES KINYUA MAINA's** case is that the prosecution has not proved compelling grounds within Constitutional standards and that the accused has not committed any offence during his lifetime. That his children are school going and their education would be curtailed, further, his incarceration will jeopardize his life as a family man and breadwinner. That the 1st accused has a fixed

abode and undertakes to attend trial and he is ready to abide with all conditions set by the court.

13. Lastly that he is not familiar with the prosecution witnesses and he does not capacity to influence persons in the case.

14. The 4th accused, **DENNIS ACHIKA OMARIBA**, he also deposed that he has a fixed abode and the he undertakes to attend trial faithfully without fail. That he is a truthful person and is willing and ready to abide by court rules.

15. He is also not familiar with prosecution witnesses and does not have capacity to influence them. The application was canvassed through written submissions as filed by accused advocates on record.

16. The prosecution did not file submissions.

WRITTEN SUBMISSIONS

ACCUSED WRITTEN SUBMISSIONS

17. The 1st accused filed submissions on 30/9/2025 and refers court to his constitutional right pursuant to **Articles 49 (1) (h) and Article 50 (2) (a) of the Constitution, the Kenya Judiciary Bail and Bond Policy Guidelines March 2015 and Section**

123 (A) Criminal Procedure Code. The accused also refers to the case of **Fredrick Ole Ielman & 4 Others (2016) eKLR .**

18. He urges that PC Felix Kipkoech does not disclose any compelling reason listed under the cited provisions. That the accused does not have any record or criminal history on record and that the accused understands the nature of the offence he has been charged with.
19. The Bail Report dated 22/7/2025 filed by the Probation officers established that the 1st accused lived as street urchin together with the deceased.
20. That the main compelling reason is that he will interfere with intimidate and/or influence the prosecution witnesses and that his own security is not guaranteed.
21. However, the prosecution has not produced in-depth evidence on how the 1st accused person will intimidate or interfere with prosecution witnesses.

2ND ACCUSED WRITTEN SUBMISSIONS.

The 2nd accused framed the issues for determination as *whether the application for bail should be allowed.*

22. The Accused relies on the Judiciary Bail and Bond Guidelines. He urges that bail should not be refused unless there and sufficient ground for believing that the accused will fail to observe bail conditions. That submissions of determining his guilt must be distinguished from his application for bail and that the court should not be influenced by statements of witnesses or evidence that has not come to the accused attention.
23. That the affidavit filed in opposition does not disclose compelling reason and the allegations raised are hypothetical. There is no evidence that he attempted to escape arrest. Further that the statement of PC Felix Kipkoech Mutai that the accused will influence witnesses cannot be believed without the deponent being subjected to cross examination.
24. The accused relies in the cases of ***Doris Wambui Iguku & 2 Others -Vs- Republic (2022) eKLR, Republic-Vs-Mbiti Munguti 2020 eKLR , Republic -Vs- Kenneth Wathugi Karuma 2016 eKLR*** to buttress his application and prays to be released on reasonable bond terms.

4TH ACCUSED WRITTEN SUBMISSIONS

25. The 4th accused frames the issue for determination as ***whether the 4th accused should be released favourable on bail terms.*** He also urges that the affidavit of PC. Felix does not disclose any compelling reasons on why he accused should be denied bail. That the accused is well behaved and the Pre-bail report indicates that he is reserved and that he has no criminal history on record. He understands the nature of the offence he is charged with. Lastly that the 4th accused has a good relationship with his family members who also do not have a criminogenic history.

PREBAIL REPORTS .

THE VICTIM STATEMENT .

26. The victim statement is that the deceased was 37 years old and she was survived by 3 children one is deceased while the other is in form 3 and juniors secondary .She had separated from her husband .Her mother was reached , she has gone through

emotional turmoil , the deceased would provide for her and the children.

27. The victim fear that the witnesses will interfere with witnesses and that they are flight risks.

THE ACCUSED BACKGROUND AND PREBAIL REPORTS

28. The 1st accused **James Kinyua** is 38 years and hails from Laikipia and later moved to Mathare within Kibiro area where he was collecting scrap metal . He was married to Jane Muthoni and they were blessed with one child aged 6 years .The wife left with the child .The accused was attending Maximum Miracle centre , he also suffers from Tuberculosis and epilepsy though no disability is reported .

29. He used to drink *changaa* and smoke cigarettes and bhang , he also chews khat chew khat .He understands the seriousness of the charges .His sister was contacted but she could not be reached .

30. The report also indicates that 1st accused is a street urchin within Kibiro area and that he was almost lynched by the mob at the time of the offence.

31. The probation officer is of the view that bail should be denied due to his safety and that he does not have a place of abode .
32. **Johnson Munene Njeri** - A2 in the case is 42 years old and hails from Kirinyaga in Kirinyaga West. He is a resident of Mathare area is also a driver plying Githurai - Nairobi route. He was married and has 3 children. No family member was available to verify his family details despite several attempts to reach them through contacts provided.
33. The accused_resided at the bar where the offence occurred
34. The accused is known in the community as per interviews of chief village elder and nyumba kumi. The accused relates well and he is not a threat and is release is likely to cause meaningless change in the community's peace and stability. The are not aware of his origin and home .
35. The probation officer is recommends bail on stringent terms commensurate to the charges , it is noted that the PC Kipkoech did not raise serious concern of his release

36. **The Kelvin Mwangi Maina** - A3 in the case is aged 47 years old , his father is deceased he has 2 children who left with his estranged wife after the arrest. The accused moved to Huruma within Nairobi where he was a butcher and then he relocated to Mathare where he worked at Mama Kamende club and then at Mama Cynthia bar where he sold changaa at the time of the offence.
37. He does not have history of absconding bail or criminal record , the accused is also a social drinker but this will not affect his attendance and compliance to bond terms The accused has good community ties and relations as per statements of the chief village elder and nyumba kumi elders . That he has a fixed abode at his rural home in Kisii and also has a family depending on him thus there is minimal chances of him being a flight . Bail can be allowed on appropriate terms.
38. **Dennis Achika Omariba** , A4 in the case is a hawker at Eastleigh area and has 2 children aged 22 years and working at a car wash and a 9 year old in grade 3. His family acknowledges the gravity of the offence and supports his application on principle of

presumption of innocence. The family land is still in their grand- father name.

39. He is a social drinker which will not affect his Court attendance, he also does not have history of crime. He is also known in the local community within Mathare Kiboro area, the area chief noted that he is reserved person and he still cannot comprehend what led him to the predicament .The 4th accused is not a threat and his release will is not likely to change peace and stability of the area .

ANALYSIS & DETERMINATION.

40. I have considered the applications for bail brought under the provisions of **Article 49 1 h of the Constitution** and the Accused persons Affidavits filed in support of their case together with Counsel submissions and the Pre bail Reports.

41. The accused persons are entitled to be released on bail pending trial unless compelling reasons exist in the case.

42. **Article 49(1) (h)** provides that : 1. 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.

43. The burden of proof is on the prosecution to prove inter alia grounds that are strong, compelling, convincing, forceful such that grounds to oppose the application should not be flimsy or speculative. In the case of **Republic -Vs- Harrison Njue Njogu Criminal Case No 9 of 2015** where the court held that compelling reason would be such a reason that is forcefully convincing to persuade the court to believe that something is true

44. In the case of **Victor Kiprono Ngeno -Vs- Office of the Director of Public Prosecutions [2021] eKLR** the court held that such an exercise of discretion requires a holistic approach and the court must, in close circumspection, take to account the circumstances of the case and the accused person individually.

45. The main factor is whether the accused persons will turn up for trial if he released, put differently whether they will comply with conditions of bail or whether the criminal trial will be affected.

46. The list of considerations for bail and bond are outlined by **Section 123 of CPC** and include inter alia nature of the offence, character and antecedents of the accused likelihood of witness interference, public safety. Which must be proved to exist with much persuasion before curtailing fundamental freedom and socio-economic rights of the Accused persons.

47. Further, conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused persons

48. Considering the case in its entirety the Pre bail reports and the compelling reasons raised, the issues for determination as ***whether the accused are flight risks, the chances of witness interference and lastly peace and security of the accused.***

Whether the accused are flight risks.

49. This ground should be considered with the fact that the severity of the offence of murder and the death penalty comes with temptation of absconding.

50. The accused shall not be seen to take steps to flee the jurisdiction of the court or evade trial. They

should also be traced and have a known place of abode . The 1st accused was a street urchin at the time of arrest, no family background was ascertained since his sister was not reached to verify them. The children are with the estranged wife and there is no detail of their residence. The accused will go back to his life within Mathare where he does not have a fixed abode and relatives to stand surety.

51. The main purpose of the Pre-bail report is to give a detailed information and guidance on the accused eligibility for bond.

52. The 2nd accused is alleged to have taken flight after committing the offence and he was traced at later stages when others were arrested. This must be proved beyond doubt. The 2nd accused also comes from Kirinyaga and he was living Mathare. Again, no one confirmed his family background and his relatives could not be reached. He resided at the bar where the crime occurred hence no record of a fixed abode can be placed.

53. The 3rd accused is said to have a fixed abode in Kisii and that he has a family depending on him. His cousin will stand surety and he will reside in Nairobi

with his brother. He therefore has family support and can avail competent sureties to guarantee his attendance and that he does not take flight .

54. The 4th accused is also a resident of Nairobi and has family land though still registered in the grandfather's land. The family support his application and understand the gravity of the offence. I find that the 3rd and 4th accused personal circumstances do not create persuasion that they are likely to be flight risk and that stringent terms and supervision can be ordered in the interest of justice.

55. On the other hand, A1 and A2 lack confirmed family background detail and also they do not have a fixed and known abode. It would be difficult to guarantee attendance and compliance. These loopholes considered with the gravity of the offence and the conclusion is that it is easier for the two accused to abscond.

56. In the case of **Priscilla Jemutai Kolongei -Vs- Republic Criminal Application No. 319 of 2002** (unreported) Justice Msagha Mboghohi held that :

“However, the nature of the charge or offence and the seriousness of the

punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.” See page 3.

Chances of witness interference.

57. The burden of proof is discharged where the facts demonstrate likelihood of influencing intimidating or contact with witnesses to dissuade testimony.
58. In the case of **Republic -Vs- Jacque 2008 N LTD 184** cited in **R -Vs- Harun Mburu Nguchi case No 38 of 2020**, the Canadian court indicated the standard of proof as beyond mere convenience. That bail is only denied for suspects who pose substantial likelihood of interference with administration of justice and witnesses .That

59. “R. V. MORALES, 1992 CanLII 53 (SCC), [1992] 3 S.C.R. 711 the Supreme Court of Canada on conducting bail reviews at page 736 and 737. That :-

"Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a substantial likelihood of committing an offence or interfering with the administration of justice and only where this substantial likelihood endangers the protection or safety of the public. Moreover, detention is justified only when it is necessary for public safety. It is not justified where detention would merely be convenient or advantageous. Such grounds are sufficiently narrow to fulfill the first requirement of just cause under Section 11(e)."

60. The agreed facts of this case from the charges and Pre-bail report are that the offence occurred at Mathare Kibiro area. The 3rd accused worked at the bar and also resided at the place. I find that the accused are in close proximity of eyewitnesses of the

case and that there is substantial threat of interference and influence of witnesses.

Threat of peace and security.

61. The Area Chief and Local Administration indicate that the accused persons are known in the area community and that there is little effect on peace and stability if they are released.

62. The 1st accused was however subjected to mob justice and was saved, to this extent the accused security will not be guaranteed.

63. Further, the offence occurred at Mathare at Kiboro area where the accused resided at the time of the offence.

64. In **Republic vs Muneer Harron Ismail & 4 others, H.C. Criminal Revision No. 51 of 2009**, Warsame J. stated as follows:

“In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the

individual will endanger public security, safety and the overall interest of the wider public”

65. Security of the accused if he is released is also one of the considerations listed under **Section 123 A of the Criminal Procedure Code.**

66. I find that the threatened security of the 2nd -4th accused has not been proved beyond doubt. On the other hand, the 1st accused has no fixed abode and his life was threatened at time of arrest. The offence occurred.

DISPOSITION

67. In the upshot, I find that compelling grounds exist to limit the right to bail and that there is likelihood of witness interference by all accused persons. 1st and 2nd accused persons from Pre-bail Reports do not have a fixed abode and are also likely to abscond.

68. The Bail & Bond Review to be renewed when circumstances change and in the meantime expedition of trial is prioritized.

**RULING DELIVERED DATED & SIGNED IN OPEN
COURT CRIMINAL DIVISION AT NAIROBI THIS
30/10/2025.**

**M.W.MUIGAI
JUDGE**

ORIGINAL