

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.E036 OF 2023

REPUBLIC----- PROSECUTION

VERSUS

FAITH NYABUTI-----1ST ACCUSED

ERICK NGÁNGÁ NDUNGÚ alias “NGASH” ----- 2ND ACCUSED

RULING ON BAIL

1. The two accused persons are charged with murder contrary to Section 203 as read together with 204 of the Penal Code.
2. It is alleged that on the 14th April 2023 at Obama Area in Kayole in Njiru Sub County within Nairobi County they jointly murdered Richard Ondieki Akombe Alias Baba Moraa.
3. The two accused persons were arraigned before the court for trial on the 20th June 2023 and so far the court has heard four witnesses.
4. The court called for and received pre-bail reports from the Probation Department in respect of both accused persons.
5. The reports are dated the 13th and 14th August 2025.
6. In respect of Faith Nyabuti the probation officer has indicated that the community header where the accused resided is opposed to her release on bail citing community hostility towards her and as such the court is urged to consider the safety and security of the accused.
7. This court heard the testimony of the PW2 the brother to the deceased and he was visibly angry with the two accused persons. The witness was

overcome emotion at some point thus the probation officers report does not come as a surprise to this court.

8. The community hostility towards the two accused persons was discernible from the two witnesses PW1 and PW2.
9. The report of the probation officer in respect of the 2nd accused is also not favorable.
10. The probation officer has brought out two aspects that this court cannot ignore in determining whether or not to grant bail.
11. The officer indicates that there is concern within the community that if the accused persons are released on bail there is the risk of flight and lynching by irate members of the public.
12. In determining whether or not to grant bail the court considers the possibility or likelihood of return of the accused to court to face trial as the primary and most important factor. See **Danson Mgunya Vs. Republic (2010) eKLR**.
13. The court must therefore be satisfied that the accused person is not a flight risk.
14. It is important to highlight the fact that the right to bail though a constitutionally guaranteed right it is not absolute. The same may be limited on the ground that there are compelling reasons to deny bail.
15. The security of an accused person is an important consideration and cannot be ignored. It is indeed a compelling reason to deny bail.
16. The risk of flight too is yet another compelling reason that the court must consider. In **Patius Gichobi Njagi & 2 others V Republic, [2013] eKLR**, where it stated as follows:
“.... where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend

trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the state must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case of *Jaffer v Republic*, 1973 EA 39, the court cannot be called upon to speculate.”

17. The probation officers reports put this matter of their safety beyond speculation and the court having observed the demeanor of the witnesses, there is no doubt that emotions are still very high out there.
18. I must state at this juncture that the overarching consideration in determining whether or not to admit an accused person to bond or bail pending trial is whether if released, the accused will turn up for his trial or will abscond. Other factors the court ought to consider are set out in section 123 A of the Criminal Procedure Code and the Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 and include the following:
 - a)Whether the accused is likely to commit, or abet the commission of a serious offence;
 - b)Whether the accused is likely to endanger the safety of victims, members of the public or national security;
 - c)Whether the accused is likely to interfere with witnesses, investigations or evidence;
 - d)Whether it is in the public interest to detain the accused person in custody.”(emphasis mine)
19. In this case the two accused persons are at the risk of attack by irate members of the public and it would be dangerous to release them at this stage of the trial considering the evidence so far received and the

undeniable fact that the deceased's family is still very bitter with both accused persons.

20. For the safety of the two and in ensuring that justice is not only done but seen to be done for all the parties including the Victims, and in order to protect the interests of justice, this court considers that the two accused are unfit for admission to bail.
21. In **Republic v DKN [2021] KEHC 3549 (KLR)** the court held that the prosecution's reasons as to why the accused ought to be denied bail was that his life was in danger as the public were baying for his blood save for the fact that the police were able to whisk him away after shooting in the air. As such, the applicant's life would be in danger if released on bail/bond. This was held to be a reason which can warrant denial of bond/bail on an accused person.
22. The two accused persons in this matter appear to be in a similar situation considering the probation officers reports. The court would be acting unreasonably if it were to set free a man who is at the risk of lynching and expect him to return to court for trial. The release could as well be an invitation to them to abscond since they now know that the public is against them and their journey to and from the courts for trial could easily provide an opportunity for attack by the public.
23. The safety of an accused person is critical to the successful conclusion of a trial. The court must do everything to ensure that all accused persons remain safe for they are innocent until proved otherwise. The public out there must however be reminded that no matter the gravity of the charge that one faces, no one should condemn them before the court concludes the hearing and makes a finding as to their guilt or otherwise in terms of Article 50(2) of the Constitution.

24. As I have already pointed out, Section 123(2)(b) of the Criminal Procedure Code and paragraph 4.9 of the Bail and Bond Policy Guidelines recognizes safety/protection of the accused as a compelling reason.
25. Since the applicants did not controvert the reports by the probation as to the risk on their lives, this court is therefore left with no other option than to deny the applicants' bail.
26. The court acknowledges that the right to bail should not be unjustifiably limited but for the reasons highlighted it is in the interests of justice that I arrive at the conclusion that they must remain in custody till the matter is heard and determined. It is in the public interest to do so considering the stage at which the proceedings have reached thus requiring an act of delicate balancing to avoid a scenario that may undermine further progress in the matter.
27. The court directs the prosecution to ensure that witnesses are availed without fail and as when this matter comes up for trial.
28. It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 10TH
day of NOVEMBER 2025.**

**A. M. MUTETI
JUDGE**

In the presence of:

Court Assistant: Habiba

Ms Dela for Accused

Ms Kwamboka for 1st Accused

Ms Kadenge for 2nd Accused

Accused 1 & 2 present

***Nairobi High Court Criminal Case No. E 036 of 2023- Rep -vs- Faith
Nyabuti & Ano.***

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