

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL CASE NO. E012 OF 2023

REPUBLIC.....

.....PROSECUTOR

VERSUS

JENNIFFER NYAMBURA NGARI)
THOMAS NDIANGUI MUREITHI)
NELSON NGATIA NGARI)
MICHAEL KARANI GICHANGA).....

.....ACCUSED

BAIL PENDING TRIAL

1. The 4th accused is charged jointly with others with the offence of **murder** contrary to **Section 203 as read with Section 204 of the Penal Code.** The particulars were that on the 5th day of June 2023 at Githira area in Laikipia Central Sub-county within Laikipia County jointly murdered DAVID MAINA WACHERE.

2. Subject to Article 49(1)(h) of the 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 offence;
- (b). The character, antecedents, associations and community ties of the accused person;
- (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.

3. In bringing clarity and certainty in the determination of the question whether or not to grant bail, **The Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25** sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a). The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

- a. That the accused person is likely to fail to attend court proceedings; or
- b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
- c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

- d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e. That the accused person is likely to interfere with witnesses or evidence; or
- f. That the accused person is likely to endanger national security; or
- g. That it is in the public interest to detain the accused person in custody.

5. Thus, in constitutional and statutory context, the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail.

6. What the compelling reasons are, however, depends on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily

a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. 7. The central consideration for the court in addressing the issue of bail is whether the Accused will avail himself for trial and whether or not a free and fair trial can be achieved notwithstanding the release of the accused on bond.

7. I associate myself with the view expressed by Muriithi, J in **Kelly Kases Bunjika vs. Republic [2017] eKLR** that:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

8. The determination whether or not a free and fair trial is possible brings into focus the circumstances of the Accused and those of potential witnesses. If it is demonstrated that the Accused is likely to interfere with witnesses, this is a proper

basis for denial of bail as it goes to the root of administration of justice in the matter. The burden is on the prosecution to prove such circumstances as would render a free and fair trial impossible if the accused is so released.

9. Even where bail is granted, the terms imposed ought not be punitive and the same should be for the purposes of ensuring the attendance of the accused at the trial. The terms should not necessarily be pegged on the sentence that might apply should there be a conviction.

10. Ultimately, it is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this.

11. The court in ***S vs. Nyaruviro & Another*** (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC

262 (31 August 2017), comprehensively summarized the grounds to be established for bail to be denied. It was stated;

“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question...the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her

arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In S v Nichas 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in S v Hudson 1980 (4) SA 145 (D) 146 in the following terms; "The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country. "In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also Aitken v AG 1992 (2) ZLR 249 and Norman Mapfumo vs. The State HH 63/2008... The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the

fulcrum of the application, this factor must be considered together with other factors in the case.”

12. In the instant matter, one of the grounds that has been established is that the Accused may not stand his or her trial or appear to receive sentence. This is informed by his past conduct. After the crime was committed, the Accused disappeared from his usual place of abode and it took intelligence and efforts to bait him as a witness and that is how he re-appeared and was arrested.

13. If he could act that way when he was facing no charges, am persuaded that the likelihood to abscond now that capital charges have been framed against him is real. He is a flight risk. This is a compelling reason enough to curtail his constitutional right to bail. Bail is denied.

14. In the interest of justice, the trial shall be expedited to avoid a long incarceration of the 4th Accused during the pendency of the trial.

Dated signed and delivered virtually this 2nd day of December 2025



A.K. NDUNG'U

JUDGE