



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION- MILIMANI COURT
CRIMINAL CASE NO. E021 OF 2022

REPUBLIC.....

.....PROSECUTION

BERNARD KARIUKI MBAKI alia

SAMUEL MBAKI KARIUKIACCUSED

RULING ON BAIL BOND

1. The accused herein was charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the Penal Code Cap 63 Laws of Kenya. Particulars being that on 21st March, 2022 at Soweto River Bank Area in Kayole, Embakasi Sub-County, within Nairobi County he murdered **Mary Wambui Thiongo**

2. The Accused person was found unfit to plead in the 1st medical fitness Report and FIT TO PLEAD through 2nd medical fitness Report.

NOTICE OF MOTION

3. On 3rd October 2022 through his Advocate filed a Notice of Motion seeking the following orders. -
THAT the Court be pleased to release the Accused on bond/bail pending the hearing and determination of the matter.

1. THAT the Court be pleased to give directions in respect of the hearing of this matter: -

GROUNDINGS OF APPLICATION FOR ORDERS:-

1. **Article 49(1) (h)** of the Constitution of Kenya 2010, provides that an arrested person has the right to be released on bond or bail, on reasonable conditions pending a trial unless there are compelling reasons not to be released.

2. **Article 50 (2) (a) of the Constitution** of Kenya 2010, provides that every accused person has a

right to a fair trial which include the right to be presumed innocent until the contrary is proved.

3. **Article 39(1) of the Constitution** of Kenya 2010, provides that every person has the right to freedom of movement.

4. The Applicant is a respected member of the society, has

no previous criminal record he has a place of abode within the jurisdiction of this Court hence not a flight risk.

5. Applicant is ready and willing to comply and abide with

reasonable bond/bail terms set by the Court.

6. The Applicant will cooperate with the Investigation

Officer and will not interfere with witnesses.

7. The Applicant is a family man and wishes to rejoin his wife, children and other family members who are dependent on him while still attending Court to answer to the charges against him.

8. The Application is meritorious because bail/bond has been settled by the Court as a Constitutional right of an accused person.

SUPPORTING AFFIDAVIT OF BERNARD KARUIKI

MBAKI

1. THAT the advocate on record has explained to him that **Article 49(1) (h) of the Constitution of Kenya 2010**, endows the Court with the power to release him on bail/bond on reasonable terms.
2. THAT the advocate has also explained to him that he has the right to a fair trial and to be presumed innocent until proven, which right he is imploring on the Court to uphold; he has a constitutional right of movement hence his continued detention infringes his right; he has never been charged with any offence in any Court of law, hence he has no criminal record; he has a wife, young child and elderly grandmother who are solely dependent on him as the sole bread winner; he is not in a position to neither intend to interfere with the witnesses or the evidence to be adduced in Court in any way as he is a true believer of the due process of the law, and he believe, whatever the outcome, justice should be served.

APPLICANT'S SUBMISSIONS

1. The Applicant was arraigned in Court and pleaded **"Not**

Guilty" to the charges.

2. The Applicant filed a Notice of Motion Application dated 3rd

October 2022 seeking Bail/Bond.

4. The Prosecution filed an Affidavit to Oppose Bond sworn on

29th September 2022 by CPL. Lucy Wangui.

5. The office of Probation and Aftercare Service filed a Pre-Bail

report dated 20th May 2025 on 4th June 2025.

B. SUBMISSIONS

6. The right to bail is enshrined in **Article 49(1)(h)** of the Constitution of Kenya, 2010 and **Sections 123A** of the Criminal Procedure Code, **Chapter 75**, Laws of Kenya.

7. **Section 123A(1)** of the **Criminal Procedure Code** and

Section 4.9 of the Judiciary Bail and Bond Policy Guidelines outline various circumstances that Judicial Officers should consider when making a decision on Bail and Bond, including: -

- (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

8. The Supreme Court of Canada in the case of **Republic Antic 2017 BCC 27 [2017] 1 SCR 509** stated that:

“The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons. This right has

two aspects: a person charged with an offence has the right not to be denied bail without just cause, and the right to reasonable bail. Under the first aspect, a provision may not deny bail without "just cause" -there is just cause to deny bail only if the denial occurs in a narrow set of circumstances, and the denial is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to that system. The second aspect, the right to reasonable bail, relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the accused for the release period. It protects accused persons from conditions and forms of release that are unreasonable."

9. While the Applicant is charged with the murder of a ten-year-

old girl, the following circumstances are relevant for the Court's consideration:

- (i) The Applicant was first arraigned in Court on 14th April 2022, where the Prosecution informed the Court that the first mental assessment declared the Applicant unfit to plead.

- (ii) According to the mental assessment report dated 4th April 2022, the Applicant had poor attention, concentration, memory, and judgment, was not oriented in time. He had auditory hallucinations and had suicidal thoughts.
 - (iii) The doctor diagnosed the Applicant with Major Depressive Disorder and Alcohol Use Disorder and initiated outpatient treatment.
 - (iv) The second mental assessment report dated 17th May 2022 reveals that the Applicant suffered the loss of several family members, including the loss of his brother, in a span of one year, a fact corroborated by the Pre-Bail Report.
10. Although the Victim's family is opposed to the Applicant being granted Bail, the Victim's sister testified on 4th June 2025. The Victim's mother gave partial testimony on 4th June 2025 and is scheduled to continue testifying on 31st July 2025. These are the only Prosecution witnesses related to the Victim.
11. **Section 123A(2)** of the Criminal Procedure Code provides:

"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.

12. According to the Pre-Bail Report:

- (i) The Applicant has never been in conflict with the law,
- (ii) The Applicant's mother, a hospice caregiver, is supportive and willing to undertake that he attends Court until the matter comes to a logical conclusion;
- (iii) Despite being a Prosecution witness, the Applicant's father is willing to allow the Applicant to stay at his farm in Kangema (Murang'a County) if the Applicant is admitted to bail.

13. The Applicant requests the Court to grant him reasonable

Bail/Bond terms to enable him to continue his case out of custody.

PROSECUTION'S SUBMISSIONS OPPOSING BAIL APPLICATION

14. The accused has been charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. He subsequently made an application to be released on bond pending the hearing and determination of the case. The State opposes this application and relies on the affidavit in opposition of bond sworn on 29th September 2022 by **No. 64138 CPL Lucy Wangui**, who is the Investigating Officer in this case.
15. **Although Article 49(1) (h) of the Constitution** grants the accused a right to bond or bail, the right is not an absolute one. Where there are compelling reasons, this right may be restricted. The state will demonstrate compelling reasons why the applicant should not be granted bond. What constitutes compelling reasons has been comprehensively enumerated in the March 2015 Bail and Bond Policy guidelines, which guides judicial officers in the application of the laws on bail and bond. The guidelines provide, in paragraph 4.26, that the prosecution needs to satisfy the Court, on a balance

of probabilities, of the existence of compelling reasons that justify the denial of bail. Further, it should be noted that one of the objectives of these guidelines is to ensure that the rights of accused persons are balanced with the public interest, which includes the rights of the victim.

16. In the affidavit in opposition of bond sworn by the Investigating Officer, there are a number of compelling reasons raised, as to why the accused should not be released on Bond or Bail: -

1. The accused is likely to interfere with witnesses.
2. The accused is a flight risk and has no place of abode.
3. The accused had attempted to commit suicide.

17. Further in **Republic vs Barasa (Criminal Case E021 of 2022) (2023) KEHC 18289 (KLR) (19 April 2023)** (Ruling) the Court explained how witnesses may rescind to fear due to the presence of the accused in their midst by quoting the decision in **Republic Fredrick Ole Leliman & 4 others [2016] KLR** where it was held that

"It is not in dispute that all the accused persons hail from the same locality at the

potential witnesses, and this being the case, the danger of such witnesses being driven into a corner by the presence of the accused persons to soon after the ghastly death of the deceased person's is a real possibility....

Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety,"

B. THE ACCUSED IS A FLIGHT RISK AND HAS NO FIXED ABODE

18. The accused person after the commission of the offence fled the area and with the help of the accused person's father, Naftaly Mbaki Wageche,

they traced the accused in the house of John Wangechi at Kayole Junction where he had taken cover. The circumstances fully demonstrate that the accused person is a flight risk and therefore if he is released on bond, he will abscond from the jurisdiction of the Court and defeat justice.

19. The Court in **Republic vs. Shikuku Alias Ben [2022] KEHC 12139 (KLR)**, Justice L. Kimaru, (as he then was) denied the accused person bail and held that:-

"The explanation that he has given for his failure to surrender to the police after the incident that led to the death of the deceased does not curry favour with the Court, Nothing prevented the accused from surrendering himself to the police to secure his safety after the incident that led to the death of the deceased. The accused went underground for a period of two years during which period he was a fugitive from justice. This Court agrees with the prosecution that the accused's past conduct.

ANALYSIS & DETERMINATION

1. Bail is a constitutional right enshrined in **Article 49(1)(h) of the Constitution**. The test the Court is required to use to deny bail in appropriate cases is similarly stated in **Article 49(1)(h)**: it is only upon the showing of compelling reasons by the Prosecution that the Court will deny bail. **Section 123 & 123A of the CPC** and **Bail & Bond Policy Guidelines of 2015** provide guidance on consideration of bail & bond Application.
2. **Article 49(1)(h) of the Constitution** grants bail for all offences, the gravity of the offences notwithstanding. That the presumption of innocence is enshrined in Article 50(2) of the Constitution. Section 123 of the Criminal Procedure Code allows the accused person to request for bail, and the court to grant it.
Courts have previously held that where there is more than speculative apprehension that an Accused Person could inflict genuine fear and anxiety in potential witnesses, the Courts ought to consider that as a factor in denying bail.

3. Republic vs Danson Mgunya & Anor (MSA)HCCR26 of 2008

'liberty of each person is preciousWe must interpret the Constitution in enhancing the rights and freedoms granted and enshrined, rather than in any manner that curtails them. Each case must be decided in its own circumstances touch and context.'

4. R v Joseph Wambua Mutunga & 3 Others [2010] eKLR

Where the Accused person has been provided as required by law with Witness statements and therefore, knows the identities and nature of evidence that these witnesses will adduce at trial, there is real likelihood that the Accused person would contact the witnesses and could inflict genuine fear and anxiety to potential prosecution witnesses.

5. Determination of bail applications entails balancing the rights of an accused person and the interests of justice and the rights of others. When bail is denied,

Court should provide mitigation measures to fast-track the hearing.

6. In the instant case; the Investigating Officer from DCI Kayole filed Affidavit to oppose bond on 3/10/2022 and opposed grant of bail and bond to the Accused person as some of the witnesses, the Prosecution intend to call are deceased's siblings, neighbors and the accused persons relatives who are well known to the Accused person. The family of deceased 10-year-old child and Accused person lived in rentals located in Soweto Riverbank Kioi within Kayole estate. The release of Accused person before the said witnesses testify is likely to instill fear, intimidate and /or interfere with the Prosecution of the case.
7. The Pre-bail Report filed on 4/6/2025 gave detailed family history of the Accused person, from a blended family and sole child alive of his father and mother, estranged relationship with the father, whom he came to live with as adult. His mother is supportive of her son but his father objects to release on bail/bond as his son's life will be in danger of possible retaliation. The accused person underwent formal

education took up mechanical course and thereafter carried out various odd jobs and he is a family man.

8. The victim family, the Community oppose his release on bail/bond terms as family is traumatized as the murder took place at their doorstep and there is likelihood of intimidation and threat.
9. The recommendation is that grant of bail and bond be with held for now and maybe renewed later.
10. The Trial Record confirms that some family members of the victim and father to Accused testified but mother of the child could not complete her testimony broke down and proceedings halted to another hearing date.
11. The Accused person's Advocate on record brought to the attention of the Court that the Accused was diagnosed and treated for mental health ailment as confirmed by 1st mental assessment report and later 2nd mental report he was declared fit to plead. It was confirmed he had suicidal tendencies.

12. Therefore, from the totality of evidence on record, although one is presumed innocent until proved guilty and the main reason is to ensure the Accused person attends Court, in the instant case there is need to protect witnesses as they are in proximity to the Accused family and it is a compelling reason.

DISPOSITION

- 13. There is need to protect the witnesses especially mother of the deceased who stood down due to grief among other witnesses that were/are to testify before review of bail and bond application is review is filed heard and determined.**
- 14. The legal provisions do not limit the number of times request for bail or bond may be renewed thereafter as was stated in Republic vs Ahmad Abolafathi Mohammad & Anor 2013 eKLR.**

**RULING DELIVERED SIGNED DATED IN OPEN COURT
ON 9/12 2025 IN CRIMINAL DIVISION NAIROBI
VIRTUALLY/PHYSICALLY.**

**M.W.MUIGAI
JUDGE**

ORIGINAL