



**Silatei v Republic (Criminal Appeal E003 of 2023)
[2024] KECA 1301 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1301 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL E003 OF 2023
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA
SEPTEMBER 20, 2024**

BETWEEN

ZACHARIA NG'ETICH SILATEI APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the Ruling and Order of the High Court of Kenya at Narok
(F. Gikonyo J.) delivered on 25th April 2023 in Narok HCCR No. E018 of 2022)*

JUDGMENT

1. Zacharia Ng'etich Silatei, the Appellant herein, was charged before the High Court of Kenya in Narok with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#), the particulars being that he murdered Judith Resiato Aka Judy Lesiato on 1st November 2022 at Kimogoro Village in Sogoo Sub Location within Narok County. On 13th December 2022, the charge was read to the Appellant and a plea of not guilty entered, whereupon the Appellant's counsel applied to have the Appellant admitted to bail or bond on reasonable terms pending the trial. The learned trial Judge ordered that a pre-bail report be filed and set the bail application for hearing.
2. The bail application came up for hearing on 16th March 2023, when the Prosecution Counsel opposed the bail application and relied on various affidavits by the Investigating Officer, the Chief of Melelu location where the appellant and the deceased resided as husband and wife, and by the deceased's brother. The bail application was opposed on the grounds of the nature of the offence, evidence collected so far by the Investigating Officer that the Appellant was a flight risk, and interference with the witnesses. The Appellant's counsel on his part relied on the Appellant's affidavit, and affidavits on support of the bail application by a resident and Assistant Chief of Sogoo sub-location to submit that the pre-bail report spoke highly of the Appellant and a chief from a different jurisdiction could not contradict the pre-bail report. The victim's counsel also opposed the bail application and argued that the Appellant had three daughters with the deceased who expressed their fears.



3. The learned trial Judge (F. Gikonyo J.) delivered the ruling on the bail application on 25th April 2023, in which he detailed the provisions on the right to bail and the nature of the compelling reasons that would disentitle an accused person from being granted bail. The learned judge in addressing the grounds raised by the prosecution to deny the Appellant bail found that the Appellant was not a flight risk, and merely stating that he fled the scene of the crime was not a compelling reason without cogent evidence that he was a flight risk. However, that the threat to the safety and security of the Appellant was a compelling reason to deny bail in the interest of the trial, the accused as well as the victims, and it would be imprudent to release the accused to go back to the same family he injured as there had been in Court visible tension between the families involved and their sympathizers.
4. Lastly, that there was a likelihood of the Appellant interfering with prosecution witnesses. On this last ground, the learned Judge held as follows:

“The prosecution claims that some of the witnesses are close relatives of the Accused. The vulnerable witnesses listed are the children of the accused and some employees who worked for the deceased some of who left employment for fear of confrontation with the accused.

The children of the deceased are victims of the crime about whom the court bears the duty to uphold and protect their rights as victims of crime under section 10 of the [Victim Protection Act](#) No. 17 of 2014... It is not far-fetched or unfounded that, the presence of the accused amidst such close members of his family, his children and who are witnesses against him, exposes them to vulnerabilities such as of harm, intimidation, harassment, fear, tampering, blackmail and abuse by the accused person. It is highly possible that such witnesses may resign to fear and may not give evidence to avert unpleasant repercussions.

It is therefore, appropriate that these victims should be free from harm,

intimidation, harassment, fear, tampering, blackmail and abuse by the accused person; a right under section 10 of the [Victims Protection Act](#). It is not also lost to the court that the safety of victims is to be taken into account in determining bond issues. The safety of the children of the deceased especially those who are witnesses against him in the case cannot be guaranteed when the accused is free to mingle with them.

An employee as is the case here is not in any better situation. Interference with such witnesses by the employer is real.

Consequently, I find that the prosecution had proved that the accused is likely to interfere with witnesses herein.

I note that the accused stated that he undertakes to keep off Sogoo and not interfere with witnesses. This Court takes the view that interference can occur at any stage of the matter and may be remotely or overtly done especially in this age of technology”

5. Aggrieved by the ruling, the Appellant filed the instant appeal on the following six (6) grounds set out in his Memorandum of Appeal dated 24th May 2023:
 1. The learned Judge erred and misdirected himself in declining to release the Appellant on bond or bail, thereby violating the Appellant’s fundamental rights and freedoms guarantees under Article 49 (1)(h) of the [Constitution](#)
 2. The learned Judge erred and misdirected himself in holding that the safety of the Appellant was a compelling reason to deny him bond or bail contrary to the evidence presented by the



Appellant and his witnesses on the issue at hand, and further considering that the Appellant has two homes at Narok and Sotik.

3. The learned Judge erred in holding that the Appellant would interfere with witnesses remotely without any evidence of such interference from time of the occurrence of the alleged act up to and including the time of delivery of the Ruling by the Honourable Judge.
 4. The learned Judge erred in wholly accepting the prosecuting submissions, on the identity of the witnesses whereas no list of witnesses and statements were availed before Court to support the existence of such witnesses.
 5. The learned Judge erred in disregarding the Appellant's commitment to keep off the scene of alleged acts and to stay away from the location until the trial is concluded, in view of the Appellant's two homes in Narok and Sotik.
 6. The learned Judge erred in law and as a result arrived at a wrong decision by failing to take into consideration the well-established legal principles relating to bond and bail, and therefore arriving at the wrong conclusion of denying bond to the Appellant.
6. We heard this Appeal on this Court's virtual Platform on 30th April 2024 and the Appellant was present appearing virtually from Narok Prison, and he was also represented by learned Counsel, Mr. Kibet. Learned Counsel, Mr. Duncan Ondimu, Senior Principal Prosecution Counsel appeared for the Respondent, and learned Counsel, Mr. Harrison Kinyanjui appeared for the victims. Mr. Kibet and Mr. Ondimu highlighted their respective written submissions dated 24th October 2023 and 29th October 2023, while Mr. Kinyanjui indicated he had not filed written submissions and would support the position taken by Mr. Ondimu.
7. Mr. Kibet submitted that the Constitution is explicit in Article 49 (1) (h) that unless there is some compelling reason, an accused person, be it a citizen or foreigner, ought to be released on bail, as a matter of right, pending the hearing and determination of his/ her case, and that it was the law that all offences were bailable. Reference was made to the case of Republic vs Nuseiba Mohamed Haji Osman [2018] eKLR where this Court pronounced itself on the applicable constitutional and statutory principle. Further, that the reason fronted by the trial Judge denying the Appellant bail pending his trial fell short of the required threshold of a compelling reason since the prosecution did not present cogent evidence on attempts by the Appellant to interfere with the witnesses, and the Appellant's children were not witnesses having been in school during the incident and none recorded a statement.
 8. In addition, the Appellant in a sworn affidavit undertook to keep off the scene of the crime in Sogoo completely and to relocate to Sotik where he had another home. Reliance was placed on the decision of this Court in Michale Jume Oramo & Another vs Republic [2019] eKLR on the definition of the phrase "compelling reasons". Counsel surmised that the trial Judge accordingly erred in law and fact in refusing to admit the Appellant to bail and bond on reasonable terms based on speculations.
 9. Mr. Ondimu's position was that the trial Court considered compelling reasons as adduced by the prosecution and reliance was placed on the decision by the Supreme Court of Kenya in the case Waititu v Republic [2021] KESC (KLR) that the Court of Appeal should not interfere with exercise of discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice. The learned counsel submitted that the Appellant has not demonstrated that the exercise of discretion by the learned trial Judge was not judicious and how the learned Judge erred.



10. Counsel further submitted the main issue was whether there are compelling reasons to warrant the Appellant to remain in custody pending hearing and determination of the case. In this respect, the counsel pointed out that the charges the Appellant was facing, attracted a maximum of death sentence; the evidence gathered during investigations heavily implicated the Appellant in the murder of the victim; based on the seriousness of the offence, the Appellant was a flight risk and his character and antecedents as laid down increased the chances of him absconding, as he ran away from the scene and attempted to commit suicide; some of the key witnesses in the case were close relatives and hence vulnerable to the likelihood of interference; and there was clear tension in the area of the commission of the offence and it was in the Appellant's own interest to remain in custody. In conclusion, Mr. Ondimu urged that it was in the interest of justice that this Court confirms the decision of the Trial Court and denies the Appellant bail /bond.
11. Mr. Kinyanjui's brief oral submissions were that the victims were members of the Appellant's family and the reports showed that they had been threatened. Therefore, that it would be prudent that the said victims, being vulnerable, testify first before the bail for the Appellant is considered.
12. The constitutional right to bail in Article 49(1)(h) of the *Constitution* has not been disputed by the parties. However, bail is not an absolute right and can be denied where there are compelling reasons for an accused person not to be released. The main issue in this appeal is whether there were such compelling reasons to justify the denial of this right to the Appellant. The Appellant has challenged the compelling reasons relied upon by the trial Court, namely that of his own safety, and that of his interference with witnesses. As regards the Appellant's safety, the trial Judge noted that the averments in the affidavits relied upon by the prosecution to oppose the granting of bail that were made by the Chief Melelo Location, the Investigating Officer and the deceased's brother that it was not safe to release the appellant were confirmed by the trial Court when it observed incidences of near violence in the court room when the application for bail came up for hearing.
13. We are however not convinced this is a compelling reason since main determination that can justify the denial of bail is where an accused person is unlikely to attend the trial, or in any manner negatively interfere with the conduct of the trial. The issue of the Appellant's safety is one for the security forces to ensure, and in any event we note that the Appellant had in his affidavit undertaken not to visit Sogoo, the area that was perceived to contain elements of threats to his safety.
14. This finding notwithstanding, we are persuaded that there is a real likelihood of interference with witnesses, given that the deceased was the Appellant's wife, and the statements on record shows that the main witnesses are the Appellant's employees who were present at his Sogoo home at the time of the murder. This in our view is cogent evidence that the appellant is related to potential witnesses and stands in a position of influence vis-à-vis these witnesses, and likely to influence them either to decline to testify or alter their testimony. For this reason, we find that the trial Judge did not err in denying the Appellant bail pending trial.
15. We accordingly find no merit in this appeal, and it is hereby dismissed. The appellant is however at liberty to renew his application for bail or bond pending trial, once all the witnesses who have a relationship with him that is likely to make them vulnerable to interference have testified.
16. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR.

