



**Kamau v Republic (Criminal Application E008 of 2023)
[2023] KECA 922 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 922 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E008 OF 2023
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
JULY 28, 2023**

BETWEEN

EVANS NJACHA KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

(An application for bail pending appeal from the ruling of the High Court in Kiambu (Kasango, J.) dated 9th February, 2023 in Kiambu HCCRA No. E041 of 2021)

RULING

1. We have before us an application dated February 24, 2023 in which the applicant seeks to be released on bail pending his appeal from the ruling and order of the High Court dated February 9, 2023 in which the court declined to grant him bail pending trial. The application is based on articles 1(1), 19, 20, 21, 22, 24(1), 25(c), 28, 49(1)(h), 50(2)(a), 159 and 164 of the Constitution of Kenya and Rules 1(2), 5(2) (a) of the Court of Appeal Rules. It is supported by an affidavit sworn by the applicant.
2. The applicant deposes that he has filed an appeal in this court against the ruling that denied him bail, which has overwhelming chance of success. He wishes to be granted reasonable bail terms and notes that this court has original jurisdiction over criminal and civil matters and therefore has the power to grant bail, pending appeal. That he is seeking release on bail to enable him attend to personal and domestic matters. Finally, he is ready and willing to abide by any terms or conditions that the court may impose for his release on bail.
3. The brief background to the application is that Evans Njacha Kamau “the applicant”, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge being that, the applicant on or about the August 8, 2021 at Elmark Estate in Juja sub-county within Kiambu County murdered one Esther Njigi Nyaga, “the deceased”. He pleaded not guilty to the charge and the trial commenced on March 7, 2022. By the time of filing the instant



application, the prosecution had called a total of 14 witnesses and was left with 3 to go. The applicant initially applied to be released on bail pending the hearing and determination of the case.

4. The trial court in a ruling delivered on December 9, 2021 declined to grant the application on the grounds that there were allegations by the State and the victim's family that there was a possibility of the applicant intimidating and interfering with the witnesses, in particular, the children of the marriage and the mother-in-law who had the custody of the children, were living in the family house. That the court was however amenable to reviewing its position once the above vulnerable witnesses being the mother and children of the deceased had testified.
5. After the 14 witnesses testified including the vulnerable ones, the applicant renewed his application for bail stating that the conditions which had led to the initial refusal were now water under the bridge. The trial court once again declined the review stating inter-alia, that the review could not be granted before the prosecution determines whether or not to recall the vulnerable witnesses who had already testified. This is the ruling that the applicant has proffered an appeal against and upon which the instant application is hoisted.
6. The grounds upon which the application is predicated are that, the applicant has been in remand custody since he took plea on August 25, 2021. That the initial application for bail was denied on grounds that the vulnerable witnesses had yet to testify hence, there was need to prevent any interference with the said witnesses. That the vulnerable witnesses having testified, it was not in order again for the trial court to shift goalposts and deny the applicant bail on the grounds that the prosecution may wish to recall the vulnerable witnesses to testify.
7. Further, this assertion was purely speculative and not grounded in law, and should not have been the basis for denial of bail to the applicant. That there was a need for the court to have precision, consistency and clarity in its decision. Further, in the supplementary affidavit dated March 27, 2023, the applicant deposes that a pre-bail report dated September 8, 2021, recommended that he may be granted bail on certain conditions. That the opposition to bail by the victim's family was spurred by ill motive noting that the same family had already approached the High Court in Civil Suit No. E028 of 2021 and obtained orders with regard to the applicant's property in his absence.
8. The application was opposed by the respondent who filed grounds of opposition dated March 31, 2023 and a replying affidavit of Magdalene Muthoni Nyaga the mother of the deceased dated March 20, 2023. However, the grounds of opposition are not provided for in our rules, we shall not revert to them.
9. In the replying affidavit, the respondent deposed that the children of the marriage were present in the house when the deceased was fatally stabbed by the applicant and were severely traumatized by the events. Hence, they have required and may continue to require psychological care and therapy to overcome the trauma. That Bernice Nyaguthii Njacha, one of the applicants' children who was a key witness for the prosecution testified in court and at the scene of the crime as PW1. That she was still traumatized by the events and to date she is unable to sleep without the lights on. That Mike Njenga Njacha, another of the children in order to overcome his trauma has been making drawings asking the police to arrest and jail his father forever.
10. Further, she deposed that she resided with Lucy Chepleti who was the house help to the couple at the time and who is yet to testify. She was fearful and apprehensive that if the applicant is freed on bail this witness may be reluctant to come forward and testify against the applicant. In addition, given that the trial Judge is on transfer from the station, it is legally possible that the applicant may make an application for the case to start afresh or recall witnesses for cross-examination before the new trial



Judge and in such a scenario, the prosecution may recall the vulnerable witnesses to testify afresh. Lastly, that the applicant when granted bail may escape from the jurisdiction of the court.

11. Parties filed written submissions. The applicant reiterated what he had set out in the supporting affidavit and submitted further that by virtue of the presumption of innocence, he had a right to bail under article 49 of the Constitution. He relied on the case of Gerald Macharia Gitbuka v Republic Criminal Appeal No. 119 of 2004 to submit that he should not be punished before the due process is exhausted. Thus, he should be granted bail as he prosecutes the appeal. The applicant further relied on the case of Republic v Joseph Kuria Irungu & another [2018] eKLR for the proposition.
12. The victims' submissions reiterated the depositions in the replying affidavit hence no need to rehash the same save to mention that the victims allege that the relationship between the applicant, the witnesses and the likelihood of interference, is a major consideration in granting bail to the applicant. That the applicant had not demonstrated any exceptional circumstances and reasons to warrant the grant of the application. Further, that there is no irreparable injury that the applicant will suffer as the trial court has expedited the hearing of his case with the prosecution's case expected to be concluded on the 8th and May 9, 2023. In essence, the trial court had indeed upheld the applicant's right to have the trial begin and concluded without unreasonable delay under article 50(1)(e) of the Constitution.
13. We have carefully considered the application, submissions by counsel and the various authorities cited. Article 49(1)(h) of the Constitution provides that an arrested person has the right "to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released". It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the trial court that there are compelling grounds to warrant its denial to an accused person. What amounts to compelling reasons has not been defined in the Constitution or in any written law. The Judiciary has however come up with Bail Policy Guidelines to fill the gap and to guide the courts in determining applications for bail. Section 4.9 of the Bail Policy Guidelines lists what constitutes compelling reasons as being:
 - i. The nature of the charge or offence and the seriousness of the punishment to be meted out if the accused is found guilty.
 - ii. The strength of the prosecution case.
 - iii. The character and antecedents of the accused person.
 - iv. The failure of the accused person to observe bail or bond terms.
 - v. The likelihood of interfering with witnesses.
 - vi. The need to protect the victim or victims of the crime.
 - vii. The relationship between the accused person and the potential witnesses.
 - viii. The best interest of child offenders.
 - ix. The accused person being a flight risk.
 - x. Whether the accused person is gainfully employed.
 - xi. Public order, peace and security.
 - xii. Protection of the accused persons.



14. Further, section 123 A(1) of the *Criminal Procedure Code* which is to be read with section 123 thereof provides as follows:

“123A(1) Subject to article 49(1)(h) of the *Constitution* 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 and 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 fulfillment of obligations under previous grants of bail; and
- d. the strength of the evidence of having committed the offence.”

Sub-section (2) thereof stipulates that 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.”

15. This court has had occasion to pronounce itself on all these constitutional and statutory principles regarding bail in *Republic v Nuseiba Mohammed Haji Osman* [2018] eKLR where the court stated, inter alia:

“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”

16. The impugned ruling is clear on the reasons as to why the learned Judge refused in the first place to grant bail. However, the trial court at the tail- end of the ruling stated:

“The accused will however have the undoubted right to seek review of today’s order once the children of the marriage and their grandmother conclude with their testimony in this case.”

The learned Judge after the vulnerable witnesses had testified and the application for review renewed stated and rightly so in our view that:

“When an application for review of bail is made, the applicant bears the burden to prove that the circumstances that led to the earlier order had changed.”

17. However, what we are unable to understand is the reasons for the denial of bail in her subsequent ruling as the trial court seems to have failed to appreciate that the circumstances had changed based on its own set conditions. It is apparent that the first application for bail was declined on the basis that vulnerable witnesses had not testified. This meant that once these witnesses testified then the applicant would be eligible for bail. The applicant submits that a total of 14 witnesses have since testified and only 3 are remaining.



18. Of essence is that the vulnerable witnesses have testified. The fact that the trial court put a condition precedent for the doing or not doing of the act precluded it from changing the goalposts when the condition precedent had been met. We are satisfied that the subsequent change in the conditions for the grant of bail by the trial court was unwarranted. The fear that the case may start de-novo and the vulnerable witnesses recalled is neither here nor there. It is purely speculative and cannot be the basis upon which to deny the applicant bail. What if he elects not to have the case start de-novo?
19. On the allegation that the applicant is a flight risk being known to the Kenya Revenue Authorities' personnel is similarly, neither here nor there. Apart from the mere assertion, there is no evidence on record to prove such an allegation. The respondent has not provided this Court with evidence that the applicant will flee the jurisdiction of this Court given that he has deposed that he is willing to surrender his passport and abide by the terms and conditions that this Court may impose in granting bail. In ensuring that an applicant attends court when required to do so, it is the duty of the court to carefully consider the case and put in place terms and conditions of bail that will ensure that this goal is achieved.
20. In conclusion, we allow the application. The applicant may be released on bail on the following terms:
1. Upon deposit into the trial court of cash bail in the sum of Kshs. 5 Million or bond of 10 million and two sureties in the same amount.
 2. The appellant must deposit with the trial court all his travel documents.
 3. The matrimonial house where the children and his mother-in-law reside is out of bounds to the applicant.
 4. The applicant shall not contact or intimidate, whether directly or indirectly any of the witnesses in the case, whether they have already testified or not.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

