



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Nyamai & 10 others (Criminal Case E040 of 2022)
[2025] KEHC 519 (KLR) (Crim) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E040 OF 2022
K KIMONDO, J
JANUARY 28, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

**ANTHONY MBINDYO NYAMAI 1ST ACCUSED
FREDRICK MUNYUNZU MUSYOKI 2ND ACCUSED
WILFRED MUTISYA MUNYAO 3RD ACCUSED
FREDRICK MUASYA MUNYAO 4TH ACCUSED
ANTHONY MUTUA MUTISO 5TH ACCUSED
PAUL MUVENGEI ZACHARIA 6TH ACCUSED
FREDRICK MUTISO MUTUA 7TH ACCUSED
BENSON MWANZA MUNYAO 8TH ACCUSED
NOAH MUTISO MUVENGEI 9TH ACCUSED
JACKSON MUTINDA JOHN 10TH ACCUSED
FELIX MUSEMBI MUVENGEI 11TH ACCUSED**

RULING

1. This is a renewed notice of motion dated 20th December 2023 by the 5th accused person, Anthony Mutua Mutiso, praying for reinstatement of his bond cancelled by the High Court at Machakos (Muigai J) on 23rd June 2022.



2. He and his co-accused are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on 1st August 2020 at Kathuma Village, Misakwani Sub-Location, Mumbuni Location in Machakos Sub-County within Machakos County they jointly murdered Juliana Mwikali Nguui.
3. The applicant's case is that all the witnesses under the Witness Protection Programme have testified. That taking into account the projected length of the trial, it is in the interests of justice and there are no compelling reasons for his continued detention. The application is reinforced by his deposition and submissions made in court by his learned counsel, Mr. Uvyu.
4. The application is spiritedly opposed by the republic through the replying affidavit of Police Constable Caleb Kipkemoi sworn on 26th July 2024 and written submissions dated 28th October 2024. The objections are two-fold: That the court has already found "for a fact" that the applicant interfered with witnesses. Secondly, that the protected witness he interfered with, Nelson Nguui, has not yet testified.
5. The motion is also ardently contested by counsel representing the family of the victims through an affidavit sworn by Timothy Mutiso Nguui, a son of the deceased, sworn on 19th June 2024 as well as a set of submissions dated 29th October 2022. The key objections are that the trial was transferred to Nairobi for security reasons; that the 5th accused is a threat to the safety of the victims; and, that there are no solid guarantees that he will not interfere with any of the remaining witnesses.
6. On 31st October 2024, I heard further arguments from all the three learned counsel for the applicant, the republic and the family of the victim.
7. I will commence by highlighting the brief history of the prayers for bond. On 8th December 2020, the High Court at Machakos (Kemei J) declined bail on two main grounds: That there was "some tension in the village and that the situation is exacerbated by the fact that the witnesses and the accused persons are members of one family". Secondly, that it was prudent to first take the evidence of the vulnerable witnesses; or, to secure them under the Witness Protection Programme.
8. On 21st January 2021, Shadrack Mutie Muvengei (Originally charged as the 10th accused) was released on bail. Subsequently, and on 4th February 2021, officers from the Witness Protection Agency informed the learned judge that all vulnerable witnesses had been placed under the programme. The court thus granted bail to all the other accused persons.
9. I should add that on 24 January 2023, the High Court at Nairobi accepted the Nolle Prosequi dated 17th January 2023 terminating the trial of Shadrack Mutie Muvengei. On 25th January 2024, the substituted Information was then read out to the current eleven accused persons who maintained their innocence.
10. This trial opened before Muigai J on 1st December 2021 when Jackson Makau Nguui (PW1) testified. Matters then took a bad twist. Counsel for the victims claimed that the 5th accused was interfering with witnesses; and, that Nelson Nguui, a potential witness had deserted the programme and made contact with the 5th accused. PW1 died in his house following his testimony. The cause of death was inconclusive and under investigation.
11. A formal application dated 9th December 2021 to cancel the bond for the 5th accused was finally heard on 5th May 2022 and 15th June 2022. It is partly explained by the fact that the court conducted inquiry; ordered for certain investigation reports; and, some proceedings were held in camera.
12. By a considered ruling dated 23rd June 2022, the High Court at Machakos cancelled bail for the 5th accused. The primary reasons are found at paragraphs 50, 63-65 of the learned judge's decision-



- [50] Of importance to note is that the 12 Accused persons and victims and/or vulnerable witnesses are relatives and are 1 family, they consist of fathers, sons, cousins, step-brothers, in-laws etc. It is curious that each allegation by different and various parties is levelled at 5th Accused person only and not the other Accused persons by people of same family who know each other well.
- (63) The Bail/Bond terms were granted by the Trial Court after Officers from the Witness Protection Program confirmed to the Trial Court that the Vulnerable witnesses were safely housed in the Witness Protection Program. Since, then 1 witness, Nelson Ngui sneaked out of the Program contrary to MOU and compromised safety and security of other witnesses. After PW1 refused to withdraw the matter from Court and he testified in 2 criminal cases while in the Witness Protection Program, he died in unclear and yet to be determined circumstances as investigations are ongoing to determine the cause of death.
- (64) Clearly, these circumstances depict that the reason advanced to allow the Trial Court grant bail/bond to accused persons, that the vulnerable witnesses were/are safe in the Witness Protection Program is not borne out by the recent developments and is no longer viable. More so, there has been interference with witnesses and possibly evidence by dissuading witnesses not to testify and/or withdraw the matter from Court.
- (65) From the totality of evidence adduced and submissions made by respective Counsel, this Court is satisfied that 5th Accused person interfered with Nelson Ngui and Timothy Ngui both witnesses in this case waiting to testify in Court. The action by 5th Accused person was contrary to terms of bond/bail granted and orders of this Court. The 5th Accused person failed to observe bail /bond terms by interfering with witnesses and victims of crime especially as they are family members. [underlining added].
13. I should also add that the learned judge subsequently transferred the proceedings to the Criminal Division at Nairobi “for hearing out of jurisdiction for purposes of ensuring safety and security of vulnerable witnesses”.
14. I took over the proceedings on 30th September 2022 and I have heard another 10 witnesses.
15. The present application must thus be viewed through those lenses. It is truly speaking one for review of the initial order cancelling his bail above and the subsequent refusal to review it. In the earlier notice of motion dated 30th June 2022 the applicant sought review of the order of Muigai J on grounds that the learned judge arrived at an erroneous conclusion. In a considered ruling delivered on 19th December 2022, I found as follows-
- (25) The totality of all the averments by the applicant in both the supporting affidavit and further affidavit have raised the same arguments made before Muigai J. Learned counsel for the applicant argues that based on the materials before the court, the learned judge arrived at an erroneous conclusion. I am not so persuaded. I agree with the republic and counsel for the victim’s family that no new ground has been broken and no set of fresh facts have been advanced to attract review.
- (26) The upshot is that the trial court properly found that there were compelling reasons for denial of bail; and, rightly recalled the bond for the 5th accused. It follows as a corollary that the notice of motion dated 30th June 2022 is dismissed. In the interests of justice however, this trial shall be fast-tracked.
16. It bears repeating that the applicant and his co-accused are still presumed innocent. Under Article 49 (1) (h) of *the Constitution*, as read together with section 123A (1) of the Criminal Procedure Code,



the applicant is entitled to bail unless there be compelling circumstances. See generally, Michael Juma Oyamo & another v Republic, Court of Appeal at Nairobi, Criminal Appeal 113 of 2018 [2019] eKLR; Muraguri v Republic [1989] KLR 181; R v Fredrick Ole Leliman & 4 others.

17. In the present case, the 5th accused was granted bail but compromised its terms by interfering with at least one protected witness. His bond was thus cancelled and was to remain in remand until all the vulnerable witnesses testify. His subsequent application for review was dismissed for considered reasons above.
18. I have also kept in mind the context of the homicide which occurred within a close family setting. As observed by the trial court, the “accused persons and victims and/or vulnerable witnesses are relatives and are [one] family, they consist of fathers, sons, cousins, step-brothers, in-laws”. Like I observed earlier, this court has now heard a further 10 witnesses further shedding light on some of those allegations. I must emphasize that the accused are all deemed to be innocent.
19. I have also considered the fears expressed by the victims. Under section 10 and 30F of the Victims Protection Act 2014 they are entitled to protection from intimidation or harassment by any of the accused persons or persons acting on their behalf.
20. Finally, it is clear from the record that the witness named Nelson Ngui has not yet testified. This is the witness the High Court at Machakos found to have sneaked out of the Witness Protection Programme and made improper contacts with the 5th accused. It bears repeating that the 5th accused is still entitled to a fair trial.
21. But once it was established by the High Court at Machakos that he had the courage or propensity to interfere with such a protected witness, I readily find that his likelihood to interfere with any of the remaining witnesses is not farfetched.
22. For all of those reasons, the notice of motion dated 20th December 2023 is hereby dismissed.
It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2025.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

5th accused.

Mr. Uvyu & Mr. Mbulu for the 5th accused (applicant) instructed by M. M. Uvyu & Company Advocates.

Ms. Ogwenyo for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

