



**Republic v Ondari (Criminal Appeal E043 of 2024)  
[2025] KEHC 5326 (KLR) (Crim) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5326 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E043 OF 2024**

**AM MUTETI, J  
APRIL 29, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JAMES ONSASE ONDARI ..... ACCUSED**

**RULING**

1. The accused person James Onsaie Ondari is charged that on the night of 16<sup>th</sup> June 2024 at around 21:00Hrs at Stone City within Newlight area in Soweto within Njiru sub-county with Nairobi murdered Judy Mutinda Mutiso.
2. The accused person pleaded not guilty to the charge of murder and through Mr. Agwata Advocate sought to be released on bail pending trial. The accused persons argument is that bail is a constitutional right and that the same should not be denied unless there are compelling reasons as per the provisions of Article 49 (1) (h) of the *Constitution* of Kenya.
3. Counsel for the accused submitted that as at the time the prosecution filed an affidavit to oppose bond, the accused and deceased’s children were with the accused person’s sister thus the contention by the prosecution then that the accused would be able to interfere with the witnesses if he was to be released on bail at this stage.
4. Counsel for the accused however at the time of canvassing the bail application he submitted that the children of the deceased had already changed custody and that they were now under the care of the victim’s family thus according to him the threat of interference had dissipated and the accused should not be released on bail pending the hearing.



5. The accused person undertook through counsel not to interfere with the witnesses and went further to state that he is ready to comply with any conditions that this court may deem fit and just to grant. Counsel cited the celebrated case of *Danson Mgunya & another v Republic* 2010 eKLR to stress that bail should not be denied without the prosecution establishing compelling reasons to justify the denial.
6. According to the defence the prosecution through the affidavit of No 83843 CPL Lawrence Kitisia had not discharged the burden placed on them under Article 49 (1) (h).
7. The prosecution opposed the application and placed reliance on the affidavit of No 83843 CPL Lawrence Kitisia sworn on 29<sup>th</sup> July 2024.
8. Ms. Njoroge prosecution counsel in opposing the application submitted that the minors who were the key witnesses were yet to testify and that they were traumatized by the death of the mother thus in her view it would not be proper to release the accused person on bail at this stage.
9. Ms. Njoroge pleaded with this court to consider rejecting the bail application at this stage until such time that the minor witnesses will have testified.
10. The prosecution further submitted that there are neighbors who are yet to testify thus the court should not be inclined to grant bail at this stage.
11. The court is alive to the constitutional dictate to this court that whenever the court is called up to consider a question in respect to the bill of Rights, the court should interpret the Bill of Rights in a manner that upholds the spirit, purport and object of the Bill of Rights. The court is also called upon to ensure that in applying a provision in the Bill of Rights that it develops the law to the extent that it does give effect to a right or fundamental freedom in line with Article 20 (3) (a) and 20 (4) (b) of the *Constitution*.
12. The court must therefore bear in mind that the law does not envisage a mechanistic interpretation but a purposeful one.
13. The court must balance the rights of an individual with the rights of the wider society.
14. Article 19 (2) of the *Constitution* decrees that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice.
15. The interests of the proper administration of justice must therefore remain central whenever a court is called upon to uphold the individuals right to bail.
16. The court must remember that the social justice demands that those that commit or are accused of committing crimes should be subjected to a fair trial and that the parties in the trial must have their respective interests taken into account in the decisions that the court makes in the course of a trial.
17. It is not denied that the accused in this matter was cohabiting with the deceased at the time of the incident.
18. It is also not denied that a minor who happened to have been present at the time of the incident is lined up to testify as well as immediate neighbors of the accused.
19. The prosecution has argued that they are apprehensive that the minor as well as the neighbors may be interfered with should the accused person be released on bail at this stage.
20. The court has considered the case of *Davison Mgunya & Another* 2010 eKLR that the defence has cited plus a host of other decisions on the issue of Bail.



21. The courts have held time without number where compelling reasons are established the court should not be minded to grant Bail.
22. The issue of possible interference with prosecution of witnesses is a matter that this court cannot overlook.
23. The issue becomes more grave when one of the witnesses is a minor who is a child of the deceased. The issue of trauma cannot be ignored as submitted by the prosecution.
24. In my view, since the minor is yet to testify, it would be in the best interests of the minor to have her testify to avoid a situation of possible interference.
25. Under Section 8 of the *Children's Act* No 29 of 2022 the best interest's of the child remain a primary consideration.
26. It would be fair in the circumstances to hold the accused person in custody until such time that the minor will have testified to avoid secondary trauma to her which might psychologically interfere with her capacity to testify.
27. The issue of Bail can therefore await the occasion of the minor's testimony and that of her immediate neighbors.
28. It is the view of this court that the interest of justice will be best served if the accused person's release on bail is considered after the minor and their immediate neighbors testify.
29. In the end the court declined to order the release of the accused on Bail at this stage and directs that the prosecution must ensure that all things remaining constant, on the 6<sup>th</sup> and 7<sup>th</sup> of October 2025 the minor and the immediate neighbors are called to testify. The court shall accord the witnesses priority leaving when they appear.
30. The defence shall remain at liberty to revisit the issue of Bail thereafter.
31. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL 2025.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Agwata for the Accused

Ms Njoroge for the State

