



**Republic v Nyaseti (Criminal Case E045 of 2023)
[2024] KEHC 1355 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E045 OF 2023**

**TA ODERA, J
JANUARY 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

BENARD GWARO NYASETI ACCUSED

RULING

1. The Accused Person has been charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that at on 27.9.2023 at Ikumah sub-location in Marani Sub-County, within Kisii County, jointly with others not before Court murdered Mary Kwamboka Nyaoga.
2. He was arraigned in Court on 19.10.2023 and pleaded not guilty to the charges.
3. Mr. Kaburi for the Accused Person prayed for reasonable bond terms.
4. Mr. Ochengo for the State opposed the application. He submitted that the Investigating Officer was aware that the tension was too high and the Accused Person was at risk of being lynched by the public.
5. On 16.11.2023, Mr. Nyandoro for the Accused Person informed the Court that they were negotiating a plea bargain.
6. Mr. Ochengo for the Respondent informed the Court that they were amenable to a plea bargain agreement and that the probation report had been filed.
7. I further note that the Investigating Officer, Cpl. Zebedayo Wawire filed an affidavit in opposition to the prayer for the Accused Person's release on bond and/or bail.



Determination

8. I have considered the application, the submissions in opposition, the Probation Report and the Investigating Officer's Affidavit in connection with this matter.
9. The Probation Report recommends that the Accused Person is not suitable for bond because his life will be in danger once released on bond/bail as tension is still high at home .
10. 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.
11. Section 3 of the Bail and Bond Policy Guidelines sets out the general principles that shall guide the process of bail and bond decision-making. They are as follows: -
 - a. The right of accused person to be presumed innocent.
 - b. Accused Person's right to liberty.
 - c. Accused's obligation to attend trial.
 - d. Right to reasonable bail and bond terms.
 - e. Bail determination must balance the rights of the accused persons and the interest of justice.
 - f. Consideration for the rights of victims.
12. Indeed, the primary consideration is whether the accused person will appear for trial if granted bail. (Section 4.9 of the Bail and Bond Policy Guidelines) Also see Republic v Danford Kabage Mwangi (2016) eKLR;
13. The following factors, which are by no means exhaustive, should be considered: -
 - a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
 - b. The strength of the prosecution case.
 - c. Character and antecedents of the accused person.
 - d. The failure of the accused person to observe bail or bond terms.
 - e. Likelihood of interfering with witnesses.
 - f. The need to protect the victim(s) of the crime.
 - g. The relationship between the accused person and potential witnesses.
 - h. Child offenders.
 - i. The accused person is a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security.
 - l. Protection of the accused person.



14. Indeed, Section 123A of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, provides for the considerations that a Court should have in mind when considering an application for bail or bond. They are:
 - 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 his having committed the offence.
15. These conditions were restated in the cases of Republic v Daniel Ndegwa Wachira [2015] where Justice Mativo (as he then was) referred to the case of the Supreme Court in Nigeria in Alhaji Mujahid Dukubo-Asari vs Federal Republic of Nigeria SC 20A/2006; the Court of Appeal case of Michael Juma Oyamo & Another v Republic [2019] eKLR pronounced itself as such; and the case of Mkirani v Republic (Criminal Appeal E010 of 2021) [2021] KEHC 300 (KLR) (3 December 2021) (Ruling) where Justice Mativo (as he then was) referred to the case of the Supreme Court of India in Krishnan v The People {SCZ 19 of 2011}, {2011} ZMSC 17 which Court laid out similar conditions to be considered in an application for bail pending the hearing of an appeal.
16. In all these, the common denominator is that it is for the prosecution to establish the existence of these compelling reasons. See Paragraphs 23 and 28 of the Court of Appeal case of Michael Juma Oyamo & Another v Republic [2019] eKLR
17. I agree with the finding in the case of Oscar Edwin Okimaru v Republic [2021] eKLR, where the Court held as follows:
 - “ 20. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release...”
18. From the Prosecution's submissions, the Investigating Officer's affidavit and the probation report, both indicate that the Accused Person's life will be in danger should he be released on bond or bail.
19. Notably, the Accused Person did not dispute the same either personally or through his counsel. I note from the Probation Report that the deceased was the Accused Person's employer and aunt. It further indicates that the distance from the Accused Person's home and the victim's house is quite short. The danger to the Accused Person's life is therefore not remote.
20. Whilst the state has an obligation to protect all its citizenry, it would be foolhardy for this Court, nay, any court, to release an accused person where there is real evidence that the life of the said accused person would be in danger. It is a matter of general knowledge that sometimes law enforcement may not arrive at the scene in time to stop any adverse action to a suspect's life. Indeed, it is general knowledge that several lives have been lost to mob justice. In the circumstances, I find that the Prosecution has established a compelling reason to warrant this Court to decline the Accused Persons' application for bond at this stage of these proceedings.
21. I am persuaded by the decision in State v Amos Nyakundi Ondieki & 6 Others [2021] eKLR, where the Court faced with a similar issue, declined to admit the accused person and stated that where the accused persons' lives were in danger and where they had not offered any alternative abode, then the court would be inclined to decline to dismiss the accused person on bond.



22. In the case of Rotich v Republic (Criminal Case E007 of 2022) [2022] KEHC 616 (14 June 2022) (Ruling), the Court held as follows: -

“ 12. Of course the ire is expected subside (sic) after some time but for now the risk to the Applicant’s life is a compelling reason for denying him bond.”

23. In the same vein, I am convinced that the Accused Person’s life is currently at risk as at now. The situation may change with time and should that happen, it will be handled as it arises.

24. In the meantime, the Accused Person’s application is dismissed. He shall be remanded in custody pending trial.

25. In the interests of justice, it is only fair that the matter proceeds on priority basis.

26. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 30TH DAY OF JANUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Mr. Ochengo for the State

Mr. Nyandoro for the Accused Person/Applicant

Court Assistant- Alex Oigo

