



**Republic v Konza (Criminal Case E050 of 2023)
[2024] KEHC 1402 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E050 OF 2023
TA ODERA, J
JANUARY 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID BASWETI KONZA 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 12.3.2023 at Metembe-Location in Marani Sub-County, within Kisii County murdered Bosire Oigo.
2. He was arraigned in Court on 27.10.2023 and pleaded not guilty to the charges.
3. Mr. Wesonga for the Accused Person applied for bond with an option of cash bail on reasonable bond terms.
4. Mr. Ochengo for the State opposed the application. He submitted that the Applicant was a brother to the deceased and the witnesses are his family members. There was therefore a likelihood that he would interfere with the witnesses if released.

Determination

5. I have considered the application, the submissions in opposition and the pre-bail report.
6. The pre-bail report recommends that the Accused Person is suitable for bond since his family is ready to receive him and that he has a permanent abode in Kegogi and therefore not a flight risk. In addition, the animosity between the Applicant's and deceased's families had subsided and that the deceased's family is not opposed to bond save that justice should be done.



7. I note that the Prosecution submitted that the Applicant is a brother to the deceased. However, the pre-bail report states that the Applicant and deceased had no relationship and were only village mates.
8. 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.
9. 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.
10. 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;
11. 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.
12. 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.
13. 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.
14. 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
15. 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...”
16. The main issue raised by the Prosecution was that there is a likelihood that the Applicant would interfere with the witnesses. In support of this, the Prosecution submitted that the Applicant was a brother of the deceased and the witnesses being family members, he was likely to interfere with them. The Prosecution further submitted that the Investigating Officer would swear an affidavit on the same. However, as at the time of retiring to write this Ruling, the same was not on record.
17. As espoused elsewhere in this Ruling, the pre-bail report states that the Applicant and the deceased while the Prosecution submitted that they were brothers. The Court is therefore unable to make any conclusive finding as relates the same.
18. I am persuaded by the holding in *Republic v Dwight Sagaray & 4 Others* [2013] eKLR, where it was held “As I have held before, interference with prosecution witnesses is in my view a compelling reason not to admit an accused person to bail as such interference goes to the root of the trial and is an affront to the administration of justice. For the prosecution to succeed in persuading the court on this criterion however, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others.
- I agree with the holding in *Panju vs Republic* [1973] E.A. 284, where the court in dismissing the prosecutor's fear of interference with witnesses, stated that before any one can say there would be interference with vital witnesses, at least some facts should be led to the court, otherwise it is asking the court to speculate.”
19. Applying the same rationale to the instant suit, it behooved the Prosecution to establish that the Applicant was likely to interfere with witnesses or provide proof that there was indeed interference with witnesses. The same has not been established.



20. Having failed to establish the same, I am inclined to admit the Applicant to bond on the following terms: The Accused Person is admitted to bond of KShs. 500,000/= with one surety in the like sum.
21. The Accused Person is advised not to interfere with the witnesses in default of which the bond terms shall be revoked.
22. 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

