



**Republic v Kimathi & another (Criminal Case E011 of 2023)
[2024] KEHC 368 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE E011 OF 2023
LW GITARI, J
JANUARY 25, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

KELVIN KIMATHI 1ST ACCUSED

HENRY KIMATHI MUREA 2ND ACCUSED

RULING

1. Kelvin Kimathi and Henry Kimathi Murea, the accused persons herein, are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (cap 63 of the Laws of Kenya).
2. As per the information dated 12th May, 2023, it alleged that on 9th February, 2023 at about 2300 hours at Mioponi Market, Mwanyani location, Tharaka South Sub County within Tharaka Nithi County, the aforementioned accused persons jointly with other not before the court unlawfully murdered one Gerald Muthuri Kithure (the “deceased”).
3. Both accused persons denied the charge and presently before this court is their joint application to be released on reasonable bail/bond terms pending trial.
4. The application is contained in the Notice of Motion dated 27th July, 2023 which is expressed to be brought under the provisions of articles 50(2)(a), 49(1)(h), 25(a) and (c) and 165(6), (7) of the Constitution of Kenya, 2010.
5. The application is premised in the grounds inter alia that: the pending trial may take a long time before it is concluded. That there are no compelling reasons to warrant continued holding of the Applicants in remand. That the grant of bail/bond is a constitutional right and all offences are bailable. That the



Applicants are not a flight risk and will attend court during trial and will not act in any manner that may either compromise or affect the trial.

6. In response to the application, the Respondent relied on the affidavit sworn on 3rd August, 2023 by C.I. Otmar Mangwana. According to Mr. Mangawana, the accused persons assaulted the deceased on 9th February, 2023 and consequently, the deceased was taken to Marimanti Level 4 Hospital where his condition deteriorated and he was referred to Meru Level 5 Hospital Intensive Care Unit but the unit was full. That the deceased was then referred to Othaya Hospital Nyeri for further but he unfortunately succumbed to his injuries on 14th February, 2023.
7. Mr. Mangawana further deposed that when the accused persons got information that the deceased had passed on and that the police were looking for them, they left the village to an unknown place and the efforts made by the police to trace them were futile. That the police then engaged the services of a specialized team from the Regional Crime Research and Intelligence Bureau whose specialized tracking system was able to trace the accused persons despite them using unregistered phone numbers. That on 28th April, 2023, the Crime Research and Intelligence Bureau led the police to Nairobi industrial area where the 2nd Accused Person was arrested and he led them to the whereabouts of the 1st Accused person who was also arrested. Given this background, it is the Respondent's case that the accused persons cannot be trusted to adhere to bond terms and are a flight risk as they do not have any social responsibility.

Analysis

8. I have considered the Notice of Motion Application dated 27th July, 2023, the Replying Affidavit sworn on 3rd August, 2023 and the submissions by the parties.
9. Article 49(1)(h) of *the Constitution* provides that:-

“ An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”
10. From the above constitutional provision, it is clear that bail is a constitutional right where one is awaiting trial. The right to bail is provided under article 49(1) of *the Constitution* is however not absolute and it is at the discretion of the court.
11. The general considerations in determining whether or not to grant bail are now contained in the Bail and Bond Policy Guidelines and section 123A of the *Criminal Procedure Code*. They include:
 - a. The nature of the offence;
 - b. Strength of prosecution case;
 - c. Character of the accused and antecedents;
 - d. Failure by the accused to observe previous bail or bond terms;
 - e. Witness interference;
 - f. Protection of the victim;
 - g. Relationship between the accused and the potential witness(es);
 - h. Whether the accused is a child offender;



- i. Whether the accused is a flight risk;
 - j. If the accused is gainfully employed;
 - k. Public order;
 - l. Peace Security;
 - m. Whether there is need for the protection of the accused.
12. It is therefore clear that the court may limit the right to bail/bond pending trial owing to certain compelling facts among them, if the accused is a flight risk, and if he is likely to interfere with witnesses and additionally, if his own life is at risk such that the victim's family may revenge against such accused.
 13. In the application that is presently before this Court, the pre-bail assessment reports on record, dated 18th July, 2023, paints the accused persons as a flight risk and likely to interfere with the witnesses. The reports disclose that the accused went at large immediately after the alleged offence was committed and even tried to evade arrest by changing their mobile phone numbers. It has further come out from the reports that the 1st Applicant is related to the family of the deceased by marriage and that the family is apprehensive that the accused will not only be a threat to them but are also likely to abscond if released on bail.
 14. It is my humble view that in cases such as this, justice is better served in if both parties that is, the victim and the accused, get justice. Justice for the victim in this case can only be served if the accused persons go through a fair hearing and trial and witnesses are enabled to attend court to give their evidence in respect to this case. If the accused persons are likely to abscond, then this Court will be doing an injustice to the victim of the offence if it releases them on bond only for him to make the trial impossible.
 15. On the other hand, justice for the accused persons means that they should be assured of a fair hearing and trial. To this end, I am mindful to the provisions of article 50 of *the Constitution* which deals with fair hearing and specifically the fact that the accused remain innocent until proven guilty as evidence is yet to be placed before this Court yet on their culpability.
 16. However, on the strength of the pre-bail reports on record, it is my view that at this stage, the accused persons are not suitable for release on bail/bond pending trial.

Conclusion

17. From the foregoing analysis, I find that the present application for the release of the accused on bail/ bond terms is unmerited.

I dismiss the application.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF JANUARY 2024.

L.W. GITARI

JUDGE

