



**State v Onacho (Criminal Case E063 of 2023)  
[2024] KEHC 1956 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1956 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL CASE E063 OF 2023  
TA ODERA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**STATE ..... PROSECUTOR**

**AND**

**JOSEPHAT NYANDWARO ONACHO ..... 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.
2. The accused was arraigned in court on 28.12.23. He pleaded not guilty to the charges.
3. On the plea day, Prosecution informed the court that accused is a flight risk as he was on the run and was arrested in recently at Kehancha. The court later ordered that the pre-bail report be availed.
4. On 22.12.23, detective Loveren Ouya of DCI Gucha who is the investigating officer herein filed an affidavit dated 22.12.23 in opposition to bond. She said that deceased was assaulted on 16.12.21 and accused herein took off to Tanzania immediately upon the death of deceased only to be arrested on 5.12.23 in Kehancha. She opposed release of accused on bond on the grounds that court that for the aforesaid reasons accused is a flight risk and has no place of abode.
5. A pre-bail report was filed by Mr. Cecil W. Ochieng a probation officer Kisii County on 7.2.24. The pre-bail report indicates that on social inquiry he found that the accused has strong community ties and that the local administration, his family and the community were ready to receive him back. He threatened to kill accused and commit other acts of revenge and the father to accused reported the same *vide* occurrence book no. 10/17/11/23 and said his son will not be safe at home. The officer found accused unsuitable for bond on account of his security.



6. Mr. Nyagacha for accused filed submissions dated 4.1.24. He submitted that no compelling reason has been established to deny in the case of *Joktan vs Mayende & 4 others* Bungoma High court criminal case no. 55 of 2009 compelling reasons were defined as follows; “and accordingly, the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the *Constitution*.”
7. In the case of *Republic v Francis Kimathi* [2017] eKLR it was held “There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Except, however, compelling reason should be a reason or reasons which is rousing, strong, interests attention, and brings conviction upon the court that the accused person should be denied bail. Flimsy reasons will not therefore do. Therefore, the standard is high for it draws from the constitutional philosophy that any restriction of rights and freedoms of persons must be sufficiently justified given the robust Bill of rights enshrined in the *Constitution*.”
8. Counsel also cited the bond /bail guidelines which provide that for factors to be considered in an application for bond which are:
  - 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.

Counsel argued that denying accused bond on the ground that the memories are still fresh would amount to convicting him before the case is heard. Further that section 123A of the CPC lists, nature or seriousness of the offence, the character, antecedents, associations, community ties of accused, defendant’s records of fulfilment of previous bond terms and the strength of evidence. He urged the a foregoing factors and grant accused bond.

### **Determination**

9. I have considered the application for bond and the pre-bail report
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. Paragraph 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 Mujabid 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 cases cited by defence and where the Court held as follows that the compelling reasons must be established before denying an accused bond and that in doing that the rights of accused must be safeguarded.

18. The Pre-bail report raised one issue:

a. Safety of accused.

The probation officer found that the situation at home was not conducive to the return of accused as the victim was still bitter with him and have issued threats of intent to kill accused revenge to his own father. It has emerged that the threats were reported to police vide occurrence book no. 10/17/11/23. Is this a flimsy reason as suggested by defence ?.

18. Section 123 A(2)(b) of the *Criminal Procedure Code* provides;

(2) person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(b) should be kept in custody for his own protection.

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(b) should be kept in custody for his own protection.

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Threat to life is a serious issue which cannot be ignored. The fact that the memories of the death of deceased were still fresh what not the only reason raised in the report as it was coupled with threats to the father to accused and his family. Right to life is fundamental and this court this the custodian of the rights of citizens and thus it has a duty to protect the rights of accused persons, complainants, witnesses or the community at large. I find that since the life of accused I will be endangered if he is released on bond at this juncture and thus this is a compelling reason to deny him bond.

19. In the upshot I proceed to deny accused bond for the foregoing reasons.

20. Hearing on 27.5.24 with Cr 3 /22 coming up for hearing on the same date.

**T.A ODERA**

**JUDGE**

**29.2.24**

**DELIVERED IN OPEN COURT AT KISII IN THE PRESENCE OF: - ACCUSED, KOIMA FOR PROSECUTION AND COURT ASSISTANT - OIGO**

