



**Republic v Mutemi alias Kim (Criminal Case E026 of 2023)  
[2024] KEHC 3144 (KLR) (Crim) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3144 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E026 OF 2023  
DR KAVEDZA, J  
MARCH 20, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPHAT KIMANTHI MUTEMI ALIAS KIM ..... ACCUSED**

**RULING**

1. The accused was charged with the offence of murder contrary to section 203 as read with 204 (Cap 63) Laws of Kenya. The particulars of the offence are that on 2<sup>nd</sup> April 2023 within Kwa Maji Area in Umoja, in Kamukunji Sub County, within Nairobi County murdered Erick Kimunya alias Kaba. The accused took plea and pleaded not guilty to the offence of murder. He has now approached this court seeking to be released on reasonable bail/bond terms pending his trial.
2. In response, CPL Judith Muthomi filed an affidavit to oppose bond. The averments made were that after the commission of the offence, the accused fled from the scene of crime. The prosecution witnesses in this case are well-known to the accused two of them being his colleagues. There was a high likelihood that if released, he would threaten, intimidate, coerce, interfere, or influence the said witnesses. In addition, the accused's life is in danger from members of the public. It is therefore in his best interest that he be denied bail/bond for his safety. She urged the court to dismiss the application for bail/bond pending the hearing and determination of the case.
3. In his written submissions, the accused asserted that the right to bail should only be restricted in the presence of compelling reasons. He contended that the prosecution, in their affidavit, failed to furnish compelling reasons for denying bail or bond. He insisted that the allegations made by the prosecution were baseless and unsupported by evidence. He implored the court to grant him reasonable terms for bail or bond.



4. The prosecution argued that there is a likelihood of the accused interfering with prosecution witnesses and that he poses a flight risk. Ultimately, they asserted that detaining the accused pending the hearing and determination of his trial is necessary for his safety.
5. Having considered the application, the response thereto, and the applicable law, the issue for determination is whether there are compelling reasons to deny the accused reasonable bail/bond terms.
6. Article 49(1) (h) of *the Constitution* guarantees the right of an arrested person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released. The onus of proof in bail applications in respect of compelling reasons is borne by the state under section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The right for an accused person to be released on bail is not absolute.
7. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of *the Constitution*, the courts are to be guided by the provisions of section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides:
 

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

  - (a) Nature or seriousness of the offence;
  - (b) The character, antecedents, associations, and community of the accused person;
  - (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;
  - (d) The strength of the evidence of his having committed the offence:
  - (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;
    - (a) Has previously been granted bail and has failed to surrender to custody if released on bail, it is likely that he would fail to surrender to custody;
    - (b) Should be kept in custody for his own good.
8. *The constitution* specifically requires under Article 49 (h) of *the Constitution* that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the *Criminal Procedure Code*, Article 49 (h) of *the Constitution* places the burden of proof on the state to demonstrate compelling reasons. It is therefore upon the prosecution to prove that there are compelling reasons why the accused should not be released on bail.
9. In opposition to the application for bail/bond, the investigating officer CPL Muthomi claimed that there was a likelihood that the accused would interfere with witnesses. She claimed that two of the prosecution witnesses are known to the accused and there was a reasonable apprehension of coercion, intimidation, and interference. On his part, the accused undertook not to interfere with prosecution witnesses. The prosecution also claimed that the accused should remain in custody for his safety.
10. From the record, no evidence was placed on the alleged interference of the prosecution witness. In addition, the allegation that the accused safety was in danger was not proved. In the absence of such



evidence, his averments made by the prosecution are speculative. I therefore reject his averments for that very reason.

11. The probation office has provided a pre bail report which is favourable to the accused being released on bail pending trial. In that report it reflects that the accused has a fixed abode, has no prior criminal record and the community where he comes from, including the deceased family, do not object to his release on bail.
12. After taking all the foregoing matters into account, I find on the evidence and the applicable law that there are no compelling reasons to deny bail/bond to the accused.
13. In the premises, the application of the accused succeeds, and is hereby granted bond in the sum of Kshs. 500,000 with a surety of a similar amount to be approved by the Deputy Registrar of this court. In the alternative he is granted a cash bail of Kshs. 300,000. In the interim period, the accused will be remanded in custody until he complies with the terms of his release on bail.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Ms. Tumaini for the Respondent

Joy Court Assistant

