



**Republic v Mburu & another (Criminal Case E061 of 2023)
[2024] KEHC 4412 (KLR) (Crim) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E061 OF 2023
LN MUTENDE, J
APRIL 30, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

SOLOMON GATHUKU MBURU 1ST ACCUSED

SHEPHARD KIMANI WAIRIMU 2ND ACCUSED

RULING

1. Solomon Gathuku Mburu, the 1st accused, and, Shephard Kimani Wairimu, the 2nd accused, are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on 23rd August 2023 at Kamae area in Kahawa West Location within Nairobi County jointly with others not before court murdered Mathew Nyandoro (Deceased)
2. Having denied the information presented by the Director of Public Prosecutions they seek to be released on bail/bond pending trial.
3. The State through No. 86625 Sergeant Esha Buyu swore an affidavit where he deposed that after the act that resulted into the death of deceased on 23rd August, 2023 the 1st accused together with his accomplice fled until he was traced on 4th September, 2023 which makes him a flight risk.
4. That the accused are well known to key prosecution witnesses who live with them in the same area of Kamae that they are likely to intimidate; and, that the prosecution has overwhelming and irrefutable evidence that points to the accused guilt.
5. An accused person’s right to bail/bond pending trial is a constitutional right that is provided for by Article 49(1) (h) of *the Constitution* which stipulate that:



An arrested 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.

6. The stated constitutional right can only be limited by law or where it is proved that compelling reasons exist that require the accused being incarcerated during trial. Section 123 A of the Criminal Procedure Code (CPC) provides that:

(1) Subject to Article 49(1)(h) of *the Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

- (a) The nature or 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;

(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 and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
- (b) Should be kept in custody for his own protection.

7. The Judiciary Bail and Bond Policy Guidelines, 2015, provides that:

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“(a) (a) The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

- a. That the accused person is likely to fail to attend court proceedings; or
- b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
- c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
- d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e. That the accused person is likely to interfere with witnesses or evidence; or
- f. That the accused person is likely to endanger national security; or



g. That it is in the public interest to detain the accused person in custody.”

8. Bond/bail is opposed on the grounds that the accused are a flight risk and they are likely to interfere with witnesses.
9. The accused herein are painstakingly imagined to be likely to escape so as not to take part in the trial. The State was duly bound to prove the allegation. Other than the allegation as averred by the Investigating Officer the fact of the 1st accused having been found at his house at the point of arrest is not disapproved. A person who flees would not stay at his house.
10. The question of purported interference with witnesses was also not proved as it has not been shown that there was an attempt to interfere with the witnesses.
11. In order to reach an informed decision this court sought the input of the probation services. The reports filed captured views of the victims as required by the law. The secondary victims were apprehensive that there were other suspects at large hence some of them lived in fear. They also needed to be given more time to grieve prior to the question of bail being addressed.
12. The issue of the victims grieving is understandable but it is a moral question not a legal one because in as much as empathy would be called into question the legal question of presumption of innocence until proven guilty must be addressed in the interest of justice. An accused cannot be incarcerated because other suspects are lingering out there. His case must be heard and determined.
13. On the allegation that the accused will interfere with witnesses, no cogent evidence of purported interference has been put forth for consideration hence it remains an assumption.
14. The upshot of the above is that no forceful or convincing reasons have been put forth requiring the accused to be denied bail. Therefore, I grant each accused bond of Ksh. 800,000/- with a
15. Surety in a similar sum on condition that they do not go back to the place of the incident. In the event that they violate the order, the State will be at liberty to apply for cancellation of the Bond.
16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 30TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Accused -1

Accused -2

No appearance for the Accused



Ms. Ogweni for ODPP

Court Assistant – Habiba/ Fatuma/Hadija

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