



**Republic v Hassan (Criminal Case E001 of 2024)
[2024] KEHC 10156 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CRIMINAL CASE E001 OF 2024
JN ONYIEGO, J
AUGUST 16, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

MOHAMED ISSACK HASSAN RESPONDENT

RULING

1. The applicant herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He pleaded not guilty to the charge and consequently made an application for bail pending trial. His application was however, opposed by the prosecution for the reason that the pre-bail report was not favourable and that he is a flight risk.
2. In opposing the application for bail, prosecution relied on the affidavit of PC Mohamed Said sworn on 27.06.2024 deponing that the applicant is a flight risk. That having been released from custody on 05-04-2024 pursuant to a custodial holding order pending investigation, the applicant disappeared and went into hiding somewhere in the Rift Valley. That he disappeared for a period of three months and police had to use extra personnel and resources to trace him in Mogotio area while hiding in one of his relative's house.
3. It was deponed that he did not have a known place of fixed abode. Additionally, that he was staying in a small house in Elwak town within Mandera County to avoid arrest and that the terrain in those areas was treacherous.
4. It was averred that due to the fact that the applicant faces a serious offence, he was likely to abscond court and disappear into the neighbouring countries. This court was therefore urged to disallow the application to ensure smooth proceedings of the case herein.
5. The court directed that a pre-bail report be filed before deciding on the application. Vide its report filed in court on 22-07-24, the probation officer supported the assertion by the prosecution that the



applicant is a flight risk and therefore, ought not be admitted to bail and/or bond. The report further stated that the applicant was not only a threat to the deceased's family but also had no family obligations hence a likely flight risk case considering that he was facing serious charges. This court was therefore urged not to allow the application.

6. The application was argued orally by both counsel. Learned prosecutor reiterated the content contained in the affidavit sworn by PC Mohamed Said sworn on 27.06.2024. On the other hand, Mr. Wethow, counsel for the applicant relied on article 49 (1) (h) of the [constitution](#) thus urging that bail and/ or bond should not be curtailed by factors such as the security of the victim' family or the community' hostility towards the accused.
7. Additionally, he contended that the applicant was a person who was well known within the community and had a fixed place of abode hence not a flight risk. Learned counsel submitted that the purpose of releasing an accused person on bail or bond was to enable him attend court. Consequently, counsel urged that the application be allowed.
8. Mr. Mutinda, counsel for the family associated himself with the prosecution's submissions thus urging the court that in as much as the accused person had a right to be admitted to bail/and or bond, there were compelling reasons to deny him that right. That the applicant during the time of carrying out investigations, was released on bail but instead disappeared and was only found hiding in a relative's house in the Rift Valley. That he was a flight risk hence not deserving of the prayers sought herein.
9. I have considered the application herein together with counsel's submissions. The only issue for determination is; whether the applicant ought to be admitted to bail and/ or bond.
10. The rationale behind release of an accused person on bail in Kenya is premised on the constitutional provision under Article 50(2)(a) of the [constitution](#) which stipulates that an accused person is presumed innocent until the contrary is proved.
11. In the same breadth, article 49(1)(h) of the [constitution](#) thus guarantee 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 not to be released." Therefore, the only issue in the matter before me is whether the prosecution has demonstrated compelling reason(s) as to why the applicant should not be released on bond or bail.
12. Section 123A (1) of the [Criminal Procedure Code](#) provides factors to be taken into consideration in determining an application for bail. Those factors are; the nature or seriousness of the offence; the character, antecedents, associations and community ties of the accused person; the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and, the strength of the evidence. According to Sub-Section (2) of the same Section, an accused person can only be denied bail if he has previously been granted bail and failed to surrender to custody or if it is necessary for him to be kept in custody for his own protection. [Also see [Waititu vs Republic](#) [2021] KESC 11 (KLR) and Kenyan Judiciary's Bail and Bond Policy Guidelines issued in March, 2015 at pages 16 to 19].
13. It is the prosecution's case that the affidavit by PC Mohamed Said together with the pre-bail report confirmed its fears that the applicant was a flight risk. In opposing the same, Counsel for the applicant on the other hand urged this court to allow the application as prayed.
14. It is trite that in granting bail, the trial court is called upon to exercise its discretion judiciously and not whimsically or capriciously. If there are compelling reasons to deny an accused person bail or bond, the court will have to state the specific reasons for such denial to avoid a situation of detention before trial. However, it should not be lost that the right to bond is not an absolute right.



15. The above notwithstanding, the primary consideration must always be the ability of the accused person to attend trial. As already mentioned, the only exception remains where compelling reasons are demonstrated. Ibrahim, J (as he then was) in *Republic vs Danson Mgunya & Another* [2010] eKLR described the right to bail as an “inalienable right” by holding that; “The result of the foregoing is that a murder suspect has a constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.” [Also see the case of *Republic vs Joktan Mayende & 3 Others* [2012] eKLR, *Mohamed Abdurrahman Said & Another vs Republic* [2012] eKLR, *Wilson Thirimba vs DPP* [2012] eKLR].
16. It therefore follows that a Court while exercising its discretion in dealing with a bail application must ‘consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release’. At the same time, the court must also balance “between the liberty interests of the accused person and the society interest in denying the accused person bail.
17. As already stated, it is important that the said compelling reasons must be demonstrated. In this case, the prosecution urged that during investigations, the applicant was admitted to bail but instead, he disappeared for a period of three months and police had to use extra personnel and resources to trace him in Mogotio area. That he is a flight risk capable of absconding court proceedings as he faced serious charges. It was emphasized that the applicant has no fixed place of abode and given that he has no family obligations, he was likely to abscond the proceedings herein.
18. After considering the averments contained in the affidavit sworn by the investigating officer together with the unfavorable pre-sentence report and circumstances under which he was arrested from his hideout, I hold the view that the applicant is a flight risk. In view of that conclusion, accused is likely to abscond if released on bail. Consequently, the application is hereby rejected and the prosecution is urged to fast track the matter to ensure speedy conclusion of the case.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 16TH DAY OF AUGUST 2024

J. N. ONYIEGO

JUDGE

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