



**Republic v Biwott (Criminal Case E023 of 2023)
[2024] KEHC 10131 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E023 OF 2023
RN NYAKUNDI, J
AUGUST 12, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

LILIAN BIWOTT ACCUSED

RULING

1. Before this court is a notice of motion dated 26th march, 2024 expressed to be brought under Art. 49(1h) of the Constitution, Section 66 and 125(1) of the Criminal Procedure Code. The applicant seeks leave of this court to be released on favorable bond terms pending the hearing and determination of the criminal proceedings. The applicant through her legal counsel Mr. Oduor, has urged the court to rely on the following grounds:
 - a. That the accused person has been in custody since the day she was arrested on account of the subject offence.
 - b. That the crucial witnesses in this matter have already testified
 - c. That the accused is a resident of Uasin Gishu County and has no intention of relocating or leaving the jurisdiction of this court.
 - d. That there are no compelling reasons as to why the accused should be denied bond.
2. In the same strength the application is supported by an affidavit of the applicant dated 26th March, 2024 reiterating the same grounds in the body of the motion.
3. In opposing the application, Ismael Kipkosgei on behalf of the victim filed a replying affidavit dated 17th Amy, 2024^v in which he invites this court not to exercise discretion under Art. 49(1h) of the Constitution to release the applicant/accused on bail. As part of the grounds averred in the affidavit, some of them have been spent for reasons that witnesses for the state have fully presented their side of



the story on the allegations against the accused. The only residual averments relate to the likelihood of hostility from friends and neighbors to the victims who are likely to retaliate in so far as the security of the accused person is concerned. The respondent also did assert that the circumstances which were applicable during the pre-bail report, have not changed to warrant review of bail.

4. In this respect it will be plausible to capture the content of the Social inquiry report on review of bond dated 22nd May, 2024. The non-responsive factors as tabulated by the probation officer include the victim impact statement and the Community based input as to the safety of the accused person in the event she is released on bail pending finalization of his trial. It is instructive to note that the local administration including the assistant chief on being interviewed, made the following observation: “That the situation on the ground is still hostile and should the accused be released on bond, she should be advised to relocate elsewhere given the tension between the two families.” This material forms the bedrock of the review application by the applicant.

The Decision

1. It follows therefore that even in review of bail, Art. 49(1h) of the [Constitution](#) as read with Section 123 and 123a of the [Criminal Procedure Code](#), apply mutatis mutandis. The guiding principles still remain settled as pronounced in the various case law of this country including the [Bail and Bond Policy guidelines of Kenya](#). This is what the [Constitution](#) postulates as compelling reasons:
 - i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty
 - ii. The strength of the prosecution case
 - iii. Character and antecedents of the accused person
 - iv. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond
 - v. Likelihood of interfering with witnesses
 - vi. The need to protect the victim or victims of the crime from the accused person
 - vii. The relationship between the accused person and potential witnesses
 - viii. Child offenders
 - ix. The accused person is a flight risk
 - x. Whether accused person is gainfully employed
 - xi. Public order, peace or security.
 - xii. Protection of the accused person

(See [R v Joktan Malende and 3 Others](#) Criminal Case No. 55 of 2009, [R -vs- Robert Zippor Nzilu Machakos](#) HCCR No. 1/2028 {2018} eKLR and [Michael Juma Oyamo & another v Republic](#) [2019] eKLR))

5. The main question raised in this application is whether from the facts presented by the applicant and the counter affidavits there is sufficient evidence to review the application with regard to bail under Art 49(1h) of the [Constitution](#). As earlier stated in the ruling of this court dated 11th December, 2023, the main function of bail is to ensure the presence of the accused person at the trial. It is the center piece of the right to bail. However, the court must look at the crystallization of other factors which are



at the core of the exercise of discretion by the session judge. In the instant case, the probation officer's report and the counter affidavit evidence by the representative of the victim family is non-responsive on the issues surrounding the safety and security of the accused person in the event she is released on bail. This court takes cognizance of the Bill of Rights provisions as they relate to bail being Art. 25, 27, 28 and 29 of the Constitution. I am also alive of the fact of the provisions of Art 50(2a) of the Constitution which states that every accused person has a right to a fair trial which includes the right to be presumed innocent until the contrary is proved. Therefore, for this court even with the evidence by the Prosecution, the accused is still presumed innocent until the contrary is proved by the state. As I have mentioned elsewhere in this ruling, the criteria of the variety of factors to be weighed presents a competing interest cluster which must be balanced against the guaranteed right to bail under Art. 49(1h) of the Constitution. Notwithstanding that position, none of the principles or guidelines is stated above now christened by the Constitution as compelling reasons can be said to carry more weight than the other in justifying continuous detention of the accused or granting him/her bail. To be free indeed pending the hearing and determination of his/her criminal case. It is also true that bail pending trial is not normally granted ex-debito justitiae. Where the offence is in question to be proved by the state is a capital offence. I dare say also in our criminal justice system, there is nothing magical in the word murder charge under Section 203 of the Penal Code. But one must remember that the right to life is protected and guaranteed in Art 26 of the Constitution. The duty is on the court entertaining the initial application or the review application for bail to ensure that in exercising discretion, to decline or grant bail, such a decision is well supported by the evidence disclosed in the application.

6. The general position of the law on review jurisdiction is more crystalized in the realm of civil law than in the criminal branch. The preview of various decisions on what influences review jurisdiction of the court remains to be within the following bounds.
7. Republic vs. Diana Suleiman Said & another [2014] eKLR that is persuasive, where the court delivered itself thus:

“With respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused's refusal to attend court while on bail, when sureties withdraw or for other reasons. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.

8. Applying the law laid down in the aforesaid decision to the facts of the case at hand, I am of the opinion that in the present case, while the applicant is advancing a strong case under Art. 49(1h) of the Constitution. There are issues raised in the affidavit filed by the Mr. Ismael Kipkosgei on behalf of the victim pointing out that the safety and security of the accused is likely to be at jeopardy given the manner in which the victim family have been traumatized to the alleged charge. It is further observed by the Probation officer, the threat to the security of the accused may not be underestimated as per the remarks made by the community and local administration led by the Assistant chief. This therefore



brings into focus the criterion on the gravity of the offence and the manner in which it has impacted the victim family and from their interpretation of the law and justice within the four corners of the homestead at a glance they can act with vengeance against the accused. Can this court take it as being farfetched and the possibility of occurrence during the pendency of the criminal charge in the event the accused is released on bail? In my view, the answer is in the negative.

9. This application in pari materia can be construed within the confines of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The threshold to be made by the applicant is to demonstrate that there is a mistake or manifest mistake or error apparent in the face of the record in the primary ruling dated 11th December, 2023. In the second instance, it is for the applicant to demonstrate that there is discovery and new and important evidence which after exercise of due diligence was not within the applicant's knowledge or could not be produced by her at the time when the order was passed on denial of bail. In addition, the burden on the part of the applicant is also to meet the criteria of sufficient or compelling reasons. In making decisions of this nature, the court must underscore that the administration criminal justice is multifaceted and multi-sectoral within the adversarial system. In this respect, no proceedings should be conducted likely to produce a disparity between the prosecution, the victim and the defence. The principle of equality of arms is not incorporated as such in the Criminal Procedure Code but it is widely acknowledged to be an element of an overall right to a fair trial. It is specifically entrenched in Art. 50 of our constitution. What are the principles of equality of arms implies that the actors in the administration of criminal justice should have equal access to evidence, oppose interlocutory application like bail to the accused person's implicit in the victim impact statement and the community concerns is an important issue which cannot be wished away in situations where the right to life and security of an accused person is concerned? For one generally on account of the victim impact statement and the probation officer's report, in their broad scope none has been counted by a replying affidavit.
10. In this case, I agree with the defence counsel that witnesses for the state have since testified as against the accused person. However, it is also true that the equality of arms in an adversarial structure of criminal proceedings is based on the notion of the trial as a contest between the parte and with the advent of the victims' role in the administration of justice, no party can be procedurally placed on the higher fulcrum of advantage. The main dilemma is whether the safety and security of the accused person is an entirely telling story which the court should ignore to review the initial bond of the accused person. That disclosure from the sources of the victim and disinformation which in a large measure needed to be responded to by the accused person in order to establish the guarantees on a dignity, security and the right to life are not threatened. In fact, the scope of the victim's personal interest in the criminal proceedings though on the face of it is limited but is essential to the procedural fairness of the process. Evidently they are not busy bodies for the prosecution for they carry the heavier burden/obligation as between the state and the accused person.
11. In my judgment, I am of the considered view, that the threshold of review of bond has not been met by the applicant and the same is therefore denied.

DATED AND SIGNED AT ELDORET THIS 12TH DAY OF AUGUST, 2024

In the Presence of

Mr. Oduor for the Accused

Mr Korir for the family

R. NYAKUNDI

JUDGE

