



**Republic v Kyalo (Criminal Case E035 of 2023)
[2024] KEHC 16698 (KLR) (Crim) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E035 OF 2023
AM MUTETI, J
DECEMBER 20, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

EUNICE MWIKALI KYALO ACCUSED

RULING

1. The accused person has been charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code Cap 63 Laws of Kenya.
2. The particulars of the offence are that on 21st February 2023 jointly with others not before court, at Mathare Bondeni area, Starehe Sub-County, within Nairobi County murdered Patrick Muliungi Muingi.
3. The accused persons pleaded not guilty to the offence and has since been in custody awaiting trial.
4. On the 28th October 2024 the accused person through Mr. Polycarp Agoi Advocate made an oral application for bail before this court. Counsel for the applicant moved the court under Article 49 (1) (h) of the Constitution of Kenya and Section 123 of the Criminal Procedure Code.
5. Counsel argued that the accused person has a constitutional right to be released on bail awaiting trial unless the prosecution establishes that there exist compelling reasons to justify the denial of bail.
6. According to the applicant, the duty of establishing the existence of compelling reasons rests upon the shoulders of the prosecution and unless the prosecution is able to persuade the court that there exist such reasons, the court should be inclined to grant bail to the accused as a matter of course.



7. Counsel submitted that the accused is a first offender and has no history of failing to obey court orders thus the court should be inclined to grant bail.
8. It was further argued that the accused person is not a flight risk and that she is willing to abide by any conditions that this court may impose.
9. The applicant is also said to be a casual laborer who has no capacity to interfere with the witnesses thus the court should be inclined to consider her plea for bail favorably.
10. The applicant is also said to be a person who has a fixed abode and is willing to provide details to the court.
11. It was also argued that the accused person was also a victim of the attack visited on her together with the deceased who is said to have been in her company at the time of the incident leading to his death.
12. The applicant has also indicated willingness to provide sureties who will ensure that she attends court without fail as and when required to do so.
13. Further, counsel submitted that the applicant is willing to be reporting to the police from time to time if the court so directs.
14. Counsel urged this court to consider granting the applicant a reasonable bond with an alternative of reasonable cash bail.
15. The application is opposed by the prosecution who have filed an affidavit sworn by No. 50105 SGT Titus Muniyalo of DCI Starehe. The deponent has deposed that he is the Investigating officer in the case and he is apprehensive that if the accused person is released on bail, she is likely to interfere with the tracing and apprehension of other suspects who are said to be at large.
16. Further, the Investigating officer avers that the applicant is likely to cooperate with the suspects at large and flee the court's jurisdiction. It is further argued that the accused person is already aware of the prosecution's case and that may cause her to seek to interfere with the witnesses.
17. The Investigating officer has also deposed that following the arrest of the applicant she gave him false information. In his view, the misinformation must have been calculated at ensuring that the true identity of the accused would remain unknown thus this court should treat that very conduct as being sufficient enough to disentitle her the right to bail.
18. The Investigation officer believes that the applicant is likely to abscond because according to him she does not have a fixed abode thus in the event of her being released on bail it will be difficult to locate her should she abscond.
19. MS. Njoroge appearing for the prosecution submitted that the applicant is a flight risk for she has no known abode. Counsel further argued that the applicant has no known source of income and therefore she is not likely to continue residing in Nairobi thus making it difficult to trace her should she abscond.
20. Counsel further argued that the prosecution has a strong case against the applicant and that may as well be an incentive for the applicant to abscond.
21. The prosecution urged this court to consider imposing very stringent terms should the court be inclined to grant bail.
22. Counsel relied on the case of R. Vs. Margaret Kimeu (2013) eKLR where the accused person was denied bail on the basis of the strength of the prosecution's case.



Determination

23. I have considered the rival submissions of counsel in this matter as well as the affidavit sworn by the Investigating officer.
24. An accused person has the right to be released on bail pending trial by dint of the provisions of Article 49 (1) (h) of the Constitution of Kenya. The right to bail can only be curtailed where the prosecution establishes the existence of compelling reasons justifying the denial of bail.
25. The prosecution should present evidence to support their opposition to bail and such evidence should be persuasive enough to cause the court to decline the grant of bail.
26. It is not enough for the prosecution to present a set of facts that present a feeble possibility of the accused person absconding in the event that the court grants bail. The allegation that an accused person is a flight risk must be substantiated in order for the court to consider denying the accused his right to bail.
27. It is not enough for the prosecution to argue that because an accused person is unemployed or has no known source of income that he is obviously a flight risk. Similarly, where the prosecution alleges that the accused has no fixed abode evidence must be presented to show the effort made by the investigator to establish the accused person's abode.
28. The fact that one has been a tenant and that the tenancy has since elapsed is not compelling enough to declare one to be a person of no fixed abode.
29. For counsel for the prosecution to posit that since an accused person has no known source of income, he or she should be denied bail, this court finds that accepting such a proposition from counsel for the prosecution is tantamount to criminalizing the status of being unemployed and by extension it would mean that those who have no means of livelihood cannot benefit from the provisions of Article 49 of the Constitution.
30. If the courts were to accept such reasons as grounds for denial of bail, given the economic situation in the country and the attendant unemployment crisis, majority of our population would have to remain in custody as their cases are heard. That would be a sad day for Kenya.
31. The court therefore rejects the argument that since the accused person is unemployed she should not be considered for the grant of bail.
32. On the issue of the accused person not having a fixed abode, I find and hold that the prosecution has not furnished this court with information sufficient enough to demonstrate the effort made by the investigator if at all to uncover the accused person's background.
33. The accused person must be from some location within the boundaries of this country and since the accused has undertaken to provide details of where she will be residing once released on bail, it would be a great travesty of justice if this court were to deny the accused bail pending trial. That argument by the prosecution must fail.
34. Further, regarding the submission that the prosecution has strong case against the accused person, this court takes the view that given that the prosecution is yet to lead evidence in the trial, it would be speculative for the court to accept the submission by the prosecution regarding the strength of its case before the evidence is tendered and tested through cross-examination.
35. I hasten to add that this court will have to await the hearing of the prosecutions' case for it to determine whether or not the prosecution has the kind of case that it claims to have.



36. On interference with witnesses, the prosecution has not presented any evidence in this regard. All that the investigator has stated is that there is the likelihood that the accused person is likely to interfere with the tracing and arrest of other persons wanted for prosecution in connection with this matter. However, the investigator has not demonstrated that the accused person has been in communication with the alleged suspects and worse still the identity of those suspects has not been disclosed to the court. The ground therefore is to say the least speculative.
37. Liberty is precious. A court should not take away the liberty of a person on flimsy and unsubstantiated grounds. The holding of a person in custody pending trial has great implications that may as well affect their right to mount a credible defense to the criminal charge. Such an eventuality would obviously put an accused person at the risk of a wrongful conviction due to inability to mount a credible defense owing to their detention pending trial.
38. In *Republic Vs. Danson Mgunya & Another* [2010] eKLR, Ibrahim J (as he then was) held:-

In our Constitution it is stated expressly, positively and unequivocally that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial. This means an accused must be released on bail or bail on reasonable conditions. The only exception or fetter to this right is that there must be “compelling reasons not to be released”. The court must therefore exercise its discretion with this in mind – “existence of compelling reasons.” I do hold that if the prosecutor objects to the release of the Accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused person to prove or at least demonstrate the existence of the “compelling reasons”. This is the correct procedure as stated by Justice J. Katsala in the Malawi case when he stated:

..... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to release from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order.”
I am persuaded by the aforesaid interpretation and principles of law.

39. The prosecution in this case has failed to discharge the burden of proof of existence of compelling reasons to persuade the court to deny bail. I am not inclined to agree with the prosecution that the accused person is a flight risk for I do not find any material to justify such finding. In line with the principles set out in the above quoted decision, I find and hold that there are no compelling reasons to deny the accused person bail. Consequently, the accused person shall be released on bail on the following terms:-
- a. The accused person shall execute a bond of Kshs. 500,000 plus two sureties of similar amount
 - b. The accused person shall provide details of her permanent residence where she shall reside during the period that the matter shall be pending.
 - c. The accused person shall not leave the locality of her fixed abode without the leave of this court or the investigating officer.
 - d. The accused person shall provide her permanent telephone contact and contacts of the two sureties



- e. The accused shall appear for mention before for mention before this court virtually once every month until otherwise ordered by the court.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Present for the Appellant

Ms Njoroge for the state

Agoi Polycarp for the Accused

