



**Republic v Mukabana (Criminal Case E023 of 2024)
[2024] KEHC 16002 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL CASE E023 OF 2024
FN MUCHEMI, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

LINEOUS OUKO MUKABANA ACCUSED

RULING

Brief Facts

1. The accused person faces a charge of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offences are that on the 4th day of October 2024 at Watalaam Area in Ruiru Sub county, Kiambu county murdered one Patrick Ochieng Olale. On 30th October 2024, the accused person pleaded of not guilty to the charge.
2. The prosecution filed an Affidavit of Compelling Reasons which they labelled as an Affidavit in Opposition to Bond dated 29th October 2024 sworn by CPL Gabriel Ndungu who is the investigating officer in this case. He deposes that the accused person’s permanent place of abode is not known and that the incident occurred at the accused person’s rented house at Watalaam Area. The prosecution are apprehensive that the accused person may move from there to an unknown destination thus making tracing him a difficult task. The deponent states that he does not know the accused person’s family background or rural home and hence he will not be able to trace him if he absconds. Therefore, the deponent argues that if the accused person is released on bail he is likely to abscond.
3. In opposition to the Affidavit in opposition of Bond, the accused person filed an application dated 4th November 2024 and states that he was arrested on 27th September 2024 and has been since in police custody since then without being charged with any offence until 30th September 2024. The accused person states that bail is a constitutional right accorded to all accused persons regardless of the crime one has been charged with.



4. The accused person further states that if he is released on bond, he will attend court when required and shall not leave the jurisdiction of the court without seeking its permission.
5. The accused person states that he is a father of one daughter and his continued incarceration is depriving him of his time with his child. He said that his permanent place of abode is at Wataalam and his rural home is in Ebushtinji sub location in Butere. Additionally, the accused person avers that he has no intention of leaving the court's jurisdiction since his place of work is Chalbi Industries located within Ruiru.
6. The accused person states that he risks losing his job if he continues to being committed longer than he already has. He further states that he has cooperated with the investigating officers and that he appeared in court at all times that he was required to do so.
7. A pre bail report dated 11th November 2024 was filed on 12th November 2024. The report indicated that the accused person hails from Ebushtinji location in Butere Sub County of Kakamega County. Before his arrest he says that he was employed as a plant operator at Chalbi Industries located in Kimbo near the Recce General Service Unit Camp. The report indicated that the accused person had no prior criminal record. The report further indicated that the victim's community expressed anger and frustration over the incident and as such, the safety of the accused person is uncertain should he be released on bond. Furthermore, the area Chief said that the accused person was part of a group of friends who are likely to be called as witnesses in this case. Thus releasing the accused person on bail may cause interference of the witnesses and jeopardize his safety.
8. Parties put in written submissions.

The Prosecution's Submissions.

9. The prosecution relies on Article 49(1)(h) of *the Constitution*, Section 123A of the Criminal Procedure Code, para 4.9 of the Bail and Bond Policy Guidelines and the case of Michael Juma Oyamo & Another vs Republic [2019] eKLR and submits that the accused should not be released on bail as there exists compelling reasons for the denial of bail. The prosecution submits that the accused person does not have a fixed place of abode as his permanent place of abode is not known. The prosecution further argues that the incident occurred at the house of the accused person located at Wataalam area within Ruiru which is a rented house. It is feared that the accused has no fixed abode. He is therefore likely to move from the rented home to an unknown destination. The prosecution further submits that the accused person's family background and rural home are unknown. As such, the prosecution is apprehensive that if the accused person is released on bond or bail, he is likely to abscond and will hardly be traced.

The Accused's Submissions.

10. The accused person relies on Article 49(1)(h) of *the Constitution*, Section 123A of the Criminal Procedure Code and the cases of Republic vs Sabit Mamuor Deng & Another [2020] eKLR and Republic vs John Kahindi Karisa & 2 Others [2010] eKLR and submits that the prosecution has not provided any compelling reasons to warrant denial of bail or bond. The accused person further submits that he produced a letter from the assistant chief dated 4th November 2024 showing that his rural home is in Ebushtinji sub location in Butere where he can easily be traced if needed. However, he says he is ready to honour the terms of bail including attending court when required to do so.
11. The accused person argues that there are less restrictive means of ensuring his attendance to court other than the denial of bail or bond as cited in the case of Republic vs Robert Zippor Nzilu [2018] eKLR.



The accused person further submits that the mere averment of not knowing his rural home is not a compelling ground to deny his bail.

The Law

Whether the reasons for opposing bail are merited in terms of Article 49(1)(h) of *the Constitution*.

12. Article 49(1)(h) of *the Constitution* provides that:-

An accused 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.

13. It follows that the right to bail is not absolute and where there are compelling reasons, that right may be restricted. Nevertheless, since *the Constitution* expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail.

14. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail thus:-

“the following procedures should apply to the bail hearing:

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

15. In *Republic vs Fredrick Ole Leliman & 4 Others* [2016]eKLR the court held that:-

“The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of *Ng'ang'a vs Republic* 1985 KLR 451 where Chesoni J, as he then was thus:-

“The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (Cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-



- a. The accused will fail to turn up at his trial or to surrender to custody;
- b. The accused may commit further offences; or
- c. He or she will obstruct the course of justice

The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- a. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
- b. The strength of the prosecution case;
- c. The character and antecedents of the accused;
- d. The likelihood of the accused interfering with prosecution witnesses.”

16. The issue that arises is whether the reasons adduced by the prosecution are compelling reasons such that the court should not grant bail pending trial. The prosecution has argued that the accused person is a flight risk as he does not have a fixed place of abode and further that his rural home is unknown.
17. In the case of *R vs Joktan Mayende & 3 Others (2012) eKLR*, the court in considering the scope of Article 49(1)(h) stated as follows:-

The phrase “compelling reasons” denote that the reasons are forceful and convincing as to make the court feel strongly that the accused should not be released on bond. Bail should therefore not be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by *the Constitution*.

18. The accused person produced a letter by his area Assistant Chief dated 4th November 2024 showing that he hails from Ebushitinji sub location in Butere Sub County. The pre-bail report confirms that the accused person hails from the said area. This was after the probation office conducted an interview with the Chief of Ebushitinji Sub-location. In my view, the accused person has adduced credible evidence that he has a rural home situated in Ebushitinji Sub-location of Kakamega County. As such, it cannot be said that he has no fixed abode.
19. The pre-bail report indicates that the accused person’s safety is uncertain and that he is likely to interfere with witnesses if released on bail but save for allegations, no evidence was presented to support such allegations.
20. The prosecution in my view, has failed to present any cogent evidence to support the allegations in the affidavit of compelling reasons. Having carefully considered the grounds relied on, it is my view that the reasons given do not pass the test set out under Article 49(1)(h) of *the Constitution*.

Conclusion

21. I am of the considered opinion that the prosecution has not proved on a balance of probabilities that there are compelling reasons to warrant the denial of bail. I therefore find that the accused person is deserving of grant of bail pending trial.
22. In conclusion, I hereby order that the accused person’s bail application is allowed in the following terms: -



- a. That the accused shall be released on bail pending trial of KSh.2,000,000/= with one surety of alike amount and will not leave the jurisdiction of this court without its permission.

23. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

