



**Prosecutor v Muthee (Criminal Case E084 of 2022)  
[2023] KEHC 297 (KLR) (Crim) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 297 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E084 OF 2022  
DO OGEMBO, J  
JANUARY 26, 2023**

**BETWEEN**

**PROSECUTOR ..... REPUBLIC**

**AND**

**THOMAS MBUGUA MUTHEE ..... ACCUSED**

**RULING**

1. The applicant Thomas Mbugua Muthee (the accused), has applied to this court to be released on bail pending the hearing of his case. The prosecution side has however opposed the application for bail. Ms Kigira, for the state has submitted that the applicant is a flight risk who will abscond if released on bond. That the offence was committed on November 11, 2022 at the residence of the applicant in Onyanka Estate. That the applicant fled and left the body in the house and it was not until November 16, 2022 that his phone was traced in Malaba in Uganda. That the police traced him on November 18, 2022 and arrested him in Uganda while withdrawing money from a Ugandan M-pesa. That he was found with East Africa Community passport, proving that he is a flight risk.
2. It was submitted that the applicant already absconded and used his passport to cross to Uganda. That it is important that the ends of justice are met as article 24 overrides the right to bail under article 49.
3. Secondly, it was submitted that the applicant were in a domestic relationship and the prosecution witnesses are neighbours and relatives of the deceased. That in the circumstances, there is likelihood that the applicant will interfere with the witnesses for self preservation.
4. And lastly, that the court ought to balance the rights of the applicant and the need to allow the witnesses to testify without fear or intimidation from the accused.



5. Mr Ojienda, for the applicant, has strenuously opposed the objections of the prosecution and submitted that the fact that the applicant was arrested in Uganda at pre-arrest period is not sufficient. That no proof has been shown that he even had a visa or how he crossed to Uganda or that his passport was stamped for exit. And that in cases where Kenya has extradition treaties, he could still be brought back to stand trial. Counsel relied on several decided cases including;-
  - i. *Stephen Mwangi Mwaura v Republic* (2021)eKLR, on the issue on flight risk.
  - ii. *Republic v Richard David Alden* (2016)eKLR on the issue of flight risk and interference with witnesses.
  - iii. *Lavender Akinyi and 5 others v Republic* (2019)eKLR, also on the issue of flight risk.
  - iv. *DCIO, West Pokot v Fred Komu Nguru* (2021)eKLR on issue of flight risk to neighbouring Uganda.
  - v. *Republic v Hamad Mohamed* and *Masoor, v Republic*, the Iranian case.
  - vi. *Joseph Irungu and Jackline Maribe v Republic* (2018)eKLR, also on the issues of flight risk and likelihood of interference with witnesses.
6. Counsel opined that merely stating that the witnesses are neighbours is not sufficient to show likelihood of interference. The court was urged to find that no compelling reasons have been proved to justify the accused the right to bail.
7. I have considered the submissions made by the 2 sides on this oral application for bail made by the applicant accused. I have also considered the authorities that counsel for the applicant has relied on in support of this application. Article 49(1)(h) of the *Constitution* provides;-
 

“An arrested person has the right  
To be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”
8. The above constitutional provision guarantees the right to bail to all persons accused, irrespective of the nature of the charges that they face. The right, however is not absolute. The same may be limited or denied should it be shown by the prosecution the existence of any compelling reason. These in simple terms, are reasons that are good and strong enough to justify a denial of the right to bail. The bail and bond policy guidelines, a product of the national council on the administration of justice, gives a general guide on what could constitute compelling reasons. At paragraph 4.9, some of the factors for consideration are the following;
  - i. Nature of the charge or offence and the seriousness of the punishment in cases of conviction.
  - ii. Strength of the prosecutions case.
  - iii. Character and antedecents of the accused.
  - iv. Failure of accused to observe bail terms in previous cases.
  - v. Likelihood of interference with prosecution witnesses.
  - vi. Need to protect the victims of the crime.



- vii. Relationship between the accused and potential witnesses.
  - viii. Whether the accused is a flight risk.
  - ix. Whether accused is gainfully employed.
  - x. Public order, peace or security.
  - xi. Protection of the accused person.
9. Of course the above list is in no way exhaustive. The court therefore must decide on whether a compelling reason has been proved on a case by case basis depending on the circumstances of each case. The prosecution has opposed the release of the accused on bail, first on the ground that the accused is a flight risk, one who is likely to abscond if released on bail submissions have been made to the effect that immediately after the incident on November 11, 2022, the accused fled the scene, leaving the body of the deceased in his house and that his phone was only traced on November 16, 2022 at Malaba border town. And that he was then traced and arrested on November 18, 2022 while withdrawing money from an Mpesa outlet on the Ugandan side of Malaba. He had, at the time of his arrest, his East African Community passport. That these factors confirm that he is a flight risk.
  10. The defence have conceded that indeed the accused was arrested from the Ugandan side of Malaba town, but that this is not sufficient proof that he is a flight risk.
  11. From the onset, it must be restated that the primary purpose of bail is to secure the attendance of the accused to court at the appointed time. It is not a licence for the accused to run away from facing his accusers in court. And courts have held thus in numerous cases. The Hon Justice EC Mwita in the case of *Republic v Godfrey Madegwa and 6 others* (2016)eKLR, accordingly held that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. It is the same holding in *Watoro v Republic* (1991)KLR 220, quoted in the case of *Lavener Akinyi & others v Republic* (2019)eKLR, relied on by the defence i.e that the paramount consideration in bail application is whether the accused will turn up for his trial. Similarly, the court in Ahmed Abolfathi Mohamed (2013)eKLR, the court declined bail on grounds that the accused was a flight risk and also in view of the charges that they faced. Justice Lesiit, ruling in the case of *Republic v Richard David Alden* (2016)eKLR, cited by the applicant, agreed with the findings of Achode J in the Abolfathi case. There is a whole string of cases in agreement with the holding that where it can be shown that the accused would abscond, then the right to bail may be denied.
  12. In our present case, whereas evidence is yet to be taken, the prosecution has submitted on various material facts and evidence which the accused has not denied. That this incident occurred at the residence of the accused. That immediately after the incident the accused disappeared without trace. He was only traced days later in far off Malaba border town on the Ugandan side. That he was arrested while in the process of withdrawing money at an M-Pesa outlet on Ugandan side of Malaba town. He had his East African Community passport with him. These to me are clear actions of one who was hell bent on escaping from the jurisdiction of the court, and to avoid arrest and possible prosecution for the crime of murder. And this is a pointer to the fact that should he be released on bail, he is likely to abscond and run away from the jurisdiction of this court, never to turn up for his trial.
  13. The second ground of objection raised is that if released on bail, the accused is likely to interfere with prosecution witnesses. It was submitted by the prosecution, again not denied by the defence, that the witnesses are well known to the accused. That they are in fact neighbours staying with the applicant in his only known place of abode. The defence have objected to this on grounds no evidence of interference or perceived interference has been shown. Indeed this is the holding in the case cited



by the defence, *Republic v Richard david Alden* (2016)eKLR, i.e that the prosecution is under a duty to demonstrate actual or perceived interference. I totally align myself with this general holding. The present case, is however distinguishable. Here we have the accused and the potential witnesses living as neighbours in circumstances that would obviously lead to interaction between the accused and the witnesses. I sincerely do not find or see any order or condition that this court could issue in the circumstances to prevent such natural interactions. in the case of *Republic v Joseph Kuria Irungu & another* (2018)eKLR, cited by the defence, the Hon Justice Wakiaga, dealing with this issue in respect of accused 1 had this to say; while relying on the decision of the Hon Ochieng J in *Republic v Mohamed Mohamed Omar and others*, (Nairobi) Criminal case No 14/2010;

“I would only add that the potential witnesses in Murder case is similarly susceptible to humanity. He knows that it is the evidence he tenders that might lead to trial court to convict the accused person. He also knows that if he did not testify, there were chances that this would lead to acquittal of the accused. Therefore, he is fully aware that if the accused could ensure that he (the witness) did not testify, he might be tempted to do so, in order to enhance self preservation.”

14. In the case, the court went on to deny the 1<sup>st</sup> accused bond on grounds of likelihood of interfering with prosecution witnesses. I am convinced that is the same situation herein. It can only be emphasized that the court is under a duty to protect the integrity of evidence of the prosecution.
15. Lastly, on the ground that the accused has no place of abode, I find this objection superfluous and in direct contradiction with the prosecution’s own submissions that this incident occurred at the known residence of the accused. This objection therefore fails. I so find.
16. The sum total is that I am convinced that the prosecution has proved the existence of compelling reasons good enough to justify the denial of the right to bond/bail. I accordingly dismiss the accused’s application for bail and order that the accused be remanded in custody till this case is determined. It is so ordered.

**HON. D. O. OGEMBO**

**JUDGE**

**26<sup>TH</sup> JANUARY, 2023.**

Court:

Ruling read out in open court in the presence of the accused, Mr. Ojienda for the accused and Ms. Kigira and Ms. Dela for the state

HON. D. O. OGEMBO

JUDGE

26<sup>TH</sup> JANUARY, 2023.

Mr. Ojienda:

We may take a hearing date. He needs to see a psychiatrist.

Ms. Kigira:

He was certified fit to plead. That is why he took plea. The prison facility has a section for inmates with mental infirmities. No medical document has been tabled with regard to the history of the accused. We therefore object to the application.



Mr. Ojienda:

From the record, he could not plead due to his mental state. We shall need an order for continuous review.

Court:

I order that the Officer in Charge, Nairobi Remand Facility do present the accused to the Medical Officer, Nairobi Remand for examination and possible referral to Mathare Mental Referral Hospital for examination and possible treatment. Hearing 15<sup>th</sup>/16<sup>th</sup>/20<sup>th</sup> March 2023.

