



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mutwiri (Criminal Case 79 of 2019)
[2023] KEHC 194 (KLR) (Crim) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 79 OF 2019
DO OGEMBO, J
JANUARY 25, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ELIUD MUTWIRI ACCUSED

RULING

1. The accused/applicant, had moved this court by way of a notice of motion application dated 5.4.2022. The application seeks that this court do order the release of the applicant on bail on reasonable terms. Attached to the application is an affidavit sworn by the applicant sworn on 5.4.2022 in support of the application. At the hearing of the said application, Ms Muhia for the applicant submitted that under article 49 of the *Constitution*, an accused person has a right to bail on reasonable terms. That the applicant was arrested in November 2019 and the prosecution has never been ready to proceed with the case. It was further submitted that the applicant is not a flight risk and is ready to abide by any conditions that the court could set. It was also denied that he would interfere with witnesses. Also that he has a place of abode in Isiolo.
2. The prosecution opposed this application. Ms Kimani for the state submitted that under article 49(1) (h), bail is not an absolute right and that the same may be limited should there be shown compelling reasons. It was submitted that the applicant is likely to interfere with prosecution witnesses. That the deceased and applicant, brothers, had lived and worked together at the family kiosk. That on the material date, the applicant had threatened the deceased in the presence of their mother, who is a witness. That the key witnesses are the mother, and neighbours, and the applicant is likely to intimidate the witnesses whom he knows well should he be released on bail. It was even stated that the witnesses are reluctant to appear, a situation that will only worsen.



3. It was further submitted that the applicant is a flight risk. That immediately after the incident on 13.1.2019, the applicant went into hiding and was only arrested on November 23, 2019, almost a year later. That this confirms that he is likely to disappear again if released on bail.
4. It was also submitted that the applicant has no fixed place of abode, nor any gainful employment. And lastly, that the prosecution has a strong case.
5. I have considered this application and the submissions made to it by the 2 opposing sides. Under article 49(1)(h), the right to bail is availed to all arrested and accused persons irrespective of the nature of the charges that they face. The right however, is not absolute and may be denied should there be shown the existence of compelling reasons i.e reasons that are strong and good enough as to justify a denial of the right.
6. The synchronized Bail-bond Policy Guidelines, 2015, gives a guide as to what could constitute compelling reasons. At paragraph 4.9, some of the factors for consideration are listed as follows:-That nature of the charges and the seriousness of the punishment in case of a conviction.The strength of the prosecution's case.Character and antecedents of the accused.The failure of the accused to observe bond terms in previous cases.Likelihood of interference with witnesses.Need to protect the victims.Relationship between the accused and potential witnesses.Whether the accused is a flight risk.Whether accused is gainfully employed.Public order, peace or security.Protection of the accused himself.
7. The list above is no doubt not exhaustive. In our case, the prosecution has raised several grounds as compelling reasons. I shall deal with them as follows:-

- i. Likelihood of interference with witnesses.

Under this ground, the prosecution established that the main prosecution witnesses are the mother and neighbours of the applicant, well known to him. That the witnesses have been reluctant to appear in court and if released, the situation would only get worse.

From the submissions of the prosecution, I am convinced that the prosecution has managed to prove the existence of a close familial relationship between the applicant and some of the witnesses. I say so because if released, the applicant would possibly go to his home, the same home where the mother, a witness, resides. In the circumstances, the possibility of interference or intimidating such a witness is real. And the same position would obtain with regard to the other witnesses, relatives and neighbours of the applicant.

- ii. The applicant is a flight risk

It must be declared from the onset that the purpose of bail is to enable the accused person conduct his case while out of remand custody. It is not a licence or opportunity availed to an accused person to avoid facing his accuser in court. It therefore follows that the prime consideration for grant of the right to bail is whether the accused, if released on bond, would turn up for his trial.



8. In the case of *Republic v Richard David Alden* [2016] eKLR, the Hon Justice Lesiit, dealing with the same subject held;

“I agree that a paramount issue for determination, in considering an application for bail is whether the accused person will avail himself for trial if admitted to bail.”

9. The court, in determining whether or not an accused person is likely to abscond if released on bail, the court must consider the circumstances of each case on its own merit. In our case, it was submitted by the prosecution, and not disputed by the defence, that immediately after the incident (death) on 19.1.2019, the applicant went underground. And that it was not until November 23, 2019, almost a year later that the applicant was traced and arrested. What does this portray about the character of the applicant? It shows and proves that should he be released on bond, there is a very high likelihood that the applicant may not surrender himself in court for his trial.
10. The prosecution raised additional objections to the release of the applicant on bail. First, that he has no place of abode. No proof of this was shown as in the same submissions, counsel for the state confirmed that the applicant has a home in Meru. Secondly, that he has no gainful employment, a factor which cannot on its own amount to a compelling reason. And lastly, that the prosecution has a strong case against the applicant. On this, it is only sufficient to state that the case of the prosecution against the applicant is yet to commence and applicant is presumed innocent till such time that the contrary is proved, it at all.
11. From the foregoing, this court is convinced that the prosecution has proved at least 2 compelling reasons which justifies the grant of the right to bail to the accused/applicant i.e that if released, he is likely to interfere with prosecution witnesses and also that he is a flight risk, likely to abscond if released on bail. I accordingly therefore find the application of the applicant dated 5.4.2022 lacking in merit. I dismiss the same wholly, and order that the applicant be remanded in custody till this case is determined. It is so ordered.

RULING READ OUT IN OPEN COURT IN THE PRESENCE OF THE ACCUSED (NAIROBI REMAND), MS MUHIA FOR ACCUSED AND MS NJOROGE FOR THE REPUBLIC.

HON DO OGEMBO

JUDGE

JANUARY 25, 2023.

