



REPUBLIC OF KENYA



**Republic v Issa (Criminal Case E085 of 2022)
[2023] KEHC 3757 (KLR) (Crim) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE E085 OF 2022**

K KIMONDO, J

APRIL 27, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

MAHADH FARAH ALIAS ISSA ACCUSED

RULING

1. The accused seeks review of the refusal of bail made on December 30, 2022. The prayer is contained in the Notice of Motion dated January 12, 2023 and his annexed deposition.
2. He avers that circumstances have since changed. The most fundamental one is his failing health in custody; and, lack of proper medical attention. He is suffering from chronic asthma and has been in and out of the prison dispensary. He has also attended clinic at Kenyatta National Hospital but the problem has persisted. He says he is in dire need of specialized medical care outside the prison. A letter dated January 6, 2023 from the prisons medical facility is annexed marked MH2.
3. He also fears contracting Covid-19 “which would probably end [his] life”. Furthermore, he “struggles to breath which is worsened by constant fainting, chest pain and pneumonia”.
4. The applicant also relies on the attached circular Memo from the Hon Chief Justice dated December 7, 2022 directing courts to continually decongest the prisons through, among, other measures, a process of reviewing the bond/bail terms of accused persons in remand. The accused undertakes to comply with any conditions for his release and to attend all court sessions.
5. Lastly, he challenges the contents of earlier affidavits sworn by the investigation officer or the victim’s relative which had created the impression that he made threats to witnesses after the death of the deceased. He made reference to the subsequent pre-bail report dated March 7, 2023 which shows that



- the fights with the deceased were “prior to the commission of the crime” and had been earlier reported to the police.
6. The application is contested by both the Republic and counsel for the victims. There is a replying affidavit by Allan Ochieno, the investigating officer, sworn on April 18, 2023. There is also a further deposition by Hassan Abdifatah, a son of the deceased sworn on even date. In a synopsis, they all contend that there are no fresh facts or circumstances to warrant revision of the impugned order.
 7. It is a truism that the accused is deemed innocent at this stage. Under Article 49 (1) (h) of the Constitution, he would be entitled to bail pending trial unless there are compelling circumstances. See also *Muraguri v Republic* [1989] KLR 181.
 8. In paragraphs 15 to 19 of the impugned ruling, I found that the following four conditions amounted to strong and compelling reasons for denial of bail-
 - (15) Firstly, the homicide occurred on September 11, 2022. The accused was only arrested on December 4, 2022 as deposed at paragraphs 5 and 6 of the affidavit of the investigating officer. Although the accused claims he surrendered to the police after the incident, there is a dearth of evidence about it and the timelines do not fully support his assertions.
 - (16) Secondly, I cannot close my eyes to the serious allegations that the accused may be a Somali national. I say that very guardedly noting that he holds a Kenyan Identity Card; and, that the issue remains contested. The allegations that he is the same person who faced a murder charge before the Banadir Regional Court has not been proved for now. But it is also a worrying matter.
 - (17) Granted all those circumstances, I find that the likelihood to abscond is high. Paraphrased, the attendance of the accused at his trial has been cast into doubt.
 - (18) Thirdly, from the two depositions by Hassan Abdifatah, a son of the deceased in this case, it appears that the accused has made serious threats to him or members of the family of the victim. The Victims Protection Act 2014 now requires that the views of the victim’s family be considered at this stage. I have concluded that the security of such witnesses would be jeopardized by the release of the accused.
 - (19) Fourthly, the accused faces the grave charge of murder. The Director of Public Prosecutions informs the High Court that on the September 11, 2022 at Maida Apartments, Eastleigh Area, Starehe Sub-County within Nairobi County he murdered Abdifatha Hassan Baare alias Mrefu.
 9. The key question now is whether there are sufficient grounds urged for review. Regarding the medical condition of the accused, I have no doubt that he suffers from a chronic illness and that due to his age and conditions in custody, the situation can be dire. However, that fact is not new and was urged at the first bail hearing as is clear from the record and paragraph 5 of the impugned ruling.
 10. Furthermore, the attached report from the prison medical facility does not state that the accused cannot get medical attention in prison or at the referral hospital at Kenyatta. In fact, the accused admits that he has since attended a clinic at the Kenyatta National & Referral Hospital. What the report recommends is that “any assistance accorded to him will reverse the emotional stress and physiological distress being part of the perpetuating factors to the disease progression on the already compromised body organs”.



11. I agree that the earlier affidavits sworn by Hassan Abdifatah, a son of the deceased, on December 22, 2022; and, a further affidavit by the same deponent on December 28, 2022 did not bear accurate timelines of the threats made to him or members of the family of the victim. From the subsequent pre-bail report it is clear that “prior to the commission of the crime, the accused had been in physical fights with the deceased and had sustained injuries” which had been reported to the police.
12. But I have kept in mind that there were other serious reasons why bail was denied. They are clear in paragraphs 15, 16 and 17 of the impugned ruling and which I have set out verbatim above. For instance, there were allegations that the accused may be a Somali national. I stated in the ruling that that he holds a Kenyan Identity Card; and, that the issue remains contested. But the pre-bail report now concludes on pages 3 and 5 that “no fixed abode was ascertained” and that “the probation office was also not successful in pinning the actual home of the accused’ in either Garsen or Nairobi.
13. That obviously reinforces the view taken earlier that owing to the nature of the charge, the likelihood to abscond is high and the attendance of the accused at his trial has been thrown into doubt. Learned counsel, Mr. Kanyoko, submitted that this can be ameliorated by an order for the accused to report regularly to the investigating officer. Granted all the circumstances in this case, I am not fully persuaded by that argument.
14. The upshot is that no sufficient grounds have been laid for review of the order made on December 30, 2022. The Notice of Motion dated January 12, 2023 is hereby dismissed.
15. In the interests of justice, and as ordered earlier, I will now grant hearing dates for the main trial as early as May 2023.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2023.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

The accused.

Mr. Kanyoko for the accused instructed by Kanyoko & Company Advocates.

Ms. Kigira for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. Akello watching brief for the victim’s family instructed by Sheikh & Shariff Advocates.

Mr. E. Ombuna, Court Assistant.

