



**Mwenda v Republic (Miscellaneous Criminal Case E032 of 2023)
[2023] KEHC 21192 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CRIMINAL CASE E032 OF 2023
EM MURIITHI, J
JULY 27, 2023**

BETWEEN

PETER MWENDA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This a ruling on an application for bail pending trial before the Tigania Principal magistrate Case no. E148 of 2023 on charges of grievous harm contrary to section 234 of the Penal Code. Bail has been withheld by the trial court in the circumstances set out in the trial court record set out below. The DPP has opposed the application supporting the view of the court to hold the accused until the complainant has testified, and offered that the trial court may be directed to hear the evidence of the complainant on priority basis and to consider his bail application thereafter.
2. This court has jurisdiction under the supervisory jurisdiction of article 165 (6) and (7) of the Constitution generally and also under section 123 (3) of the Criminal Procedure Code which provides as follows:

“(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”
3. The court has considered that the further hearing of the trial is set for October 4, 2023 when at the earliest the issue of bail for the accused may be reconsidered by the trial court.

On the record

4. Upon plea on the first court appearance on 13/3/2023, the trial court directed the Prosecutor to furnish copies of charge sheet, witness statements and documentary exhibits on accused to enable him



to prepare for the matter and that a Probation Officers' Pre-bail report be compiled for accused before issue of bond is addressed.

5. The trial court by further orders made on 30/3/2023 set the trial for hearing on 31/5/2023 and directed that "the accused bond to be dealt with after the complainant has testified as he was in great terror of accused and protested when accused took plea in court stating that it took long than necessary to arrest him."
6. On 13/4/2023, when the Pre-bail report was expected to have been filed but had not been filed, the trial court directed that "the accused shall be given bond after the complainant has testified in court for court to determine any threat if any against complainant."
7. On the date set for hearing 31/5/2023, the record shows that the matter was taken before the Senior Principal Magistrate and the complainant Salesio Kiragu is shown as informing the court that "I am the complainant and the accused has been threatening me." When the matter is referred to the proper court No. 3 for trial on the same date, the prosecution counsel seeks adjournment to take instructions from her superior at Meru headquarters in view of alleged out of court meetings on the matter of which she had not been involved. The full record of proceedings of the trial court on 31/5/2023 is set out below:

" 31/5/23

Before Hon. R. Ongira SRM.

Matere for state

Cc Faith

Accused present

Ms Mutile present for accused person,

Pros: I have 5 witnesses, Ms. Murile – I am ready to proceed

R. Ongira SRM

31/5/2023

Prosecutor

I am aware there have been meetings pertaining to this matter, which I have not been involved in and I am not saying meetings that are to sabotage the case or to push the case but for me to discharge my duties independently and professionally and for justice to be done as a prosecutor and an officer of the court and I am not to be involved I don't think that is proper. When I discharge my duties, I should not do my duty according to what the defence, Investigating Officer or what the court wants. I have been seeking directions from county head and she has agreed with me that I recuse myself and she has directed me to have file forwarded to her then she will give proper directions in the matter on the way forward. I am looking at the seriousness of the offence that involves a permanent injury and it's not a matter that I can toss or close my eye and I need my conscious to be clear. We have constitutional provisions on fair hearing, we have our own ethics, and I need to do better. I am requesting for time to forward file to Meru and I would not want to make hasty decisions. That is all.

Ms Mutile

I have heard the prosecutor sentiments and I needed time to prepare more.

R. Ongira SRM



31/5/2023”

Court

The prosecutor has sought an adjournment stating that she needs to forward matter to her superior for review. The court notes that there were 5 prosecution witnesses before court who were ready to testify. The defence has stated that it needs to prepare more. This matter be mentioned on 08/6/2023.

As stated earlier accused shall only be afforded bond after the complainant has testified. Matter is fixed for hearing on 04/10/2023. Given the sentiments of the prosecution the file to be under key and lock.

R. Ongira SRM

31/5/2023

Determination

8. The court granted the application for adjournment by the prosecution setting the matter for hearing on 4/1/2023, which is four months down the line, denied the accused bail without hearing the application and making a curious order that “the file be under key and lock”. The accused may be forgiven to think that he has already been convicted and only awaits sentence!
9. While this court accepts that consideration of bail may be deferred to await the taking of key prosecution witnesses in cases of likelihood of interference with witnesses, it cannot be correct to defer for long period the commencement of hearing of a case so that the consideration and grant of bail for an accused is hampered. The witnesses in this case were available, but the court adjourned trial without considering the issue of bail; and while interference with witnesses is a ground for denial of bail, there is no indication on the record that the alleged threats on the complainant were established before considering the same as a ground compelling refusal of bail.

Orders

10. In balancing the rights of the accused to bail and of the victim through the prosecution to effective prosecution of the offence, the court will direct that the trial commences on priority basis as the witnesses are readily available; and or the accused’s bail be considered immediately.
11. The court directs that the matter be mentioned before the trial court within seven (7) days for the hearing of the complainant’s testimony and/or for consideration of the issue of the accused’s bail.
12. Mention before the trial court on 3/8/2023.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. Otieno C. for the Petitioners.

Mr. Masila Principal Prosecution Counsel for the Respondents.

