



**Republic v Hussein & another (Criminal Case E006 of 2023)
[2023] KEHC 21236 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE E006 OF 2023
AK NDUNG’U, J
JULY 27, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ASHA NASIBO HUSSEIN 1ST ACCUSED

SARAH AMINA HUSSEIN 2ND ACCUSED

RULING

1. The Accused persons in this case, Asha Nasibo Hussein and Sarah Amina Hussein, are charged with murder contrary to sections 203 and 204 of the [Penal Code](#). It is alleged in the information dated May 26, 2023 that on the night of 7th and May 8, 2023 at Depatas Shopping Centre in Laikipia East Sub-county within Laikipia County jointly murdered Rodgers Mutethia.
2. On July 4, 2023, both Accused pleaded not guilty to the charge. The Republic has opposed bail by an affidavit filed on May 30, 2023 sworn by one of the Investigating Officers George Abura. The reasons advanced for opposing bail are-
 - i. That the Accused are a flight risk in that they were not at their last place of abode in Ngarengiro but rather they were traced and arrested at Nanyuki Bus Stage hence, the act of abandoning their last abode proved to be a flight risk.
 - ii. The 1st Accused has no known place of abode since she used to reside with the deceased herein.
 - iii. That they are likely to interfere with the prosecution witnesses as they are well known to them being family friends to both Accused persons and who are well aware of the said witnesses’ place of abode hence, there is fear of intimidation or interference with the witnesses.
 - iv. That they are charged with an offence that carries a death sentence hence there is a probability of the Accused absconding if released on bail.



3. Advocates on record for the for the Accused persons did not file a replying affidavit but argued the application for bail orally. Counsel for the 1st Accused asserted that the allegation that the 1st Accused tried to escape for reasons that she was found at Nanyuki Bus Stage was not true for she had gone to Nanyuki to attend the postmortem for the Deceased after being summoned by the OCS to be present as the next of kin. That she had not left her known place of abode and she had not moved to a new place. That the prosecution has failed to give compelling reasons for denial of bail. Furthermore, the prosecution has not proved intimidation or interference with the witnesses. Reliance was placed on the case of *R v Edwin Otiemo* (2021) eKLR where the court held that knowing a witness is not sufficient by itself to prove that an Accused would interfere with a witness.
4. Counsel further asserted that the family of the 1st Accused is willing to give her alternative accommodation in Nanyuki town. That she is a young mother with an elderly mother and that she will comply with the conditions that will be given by this court.
5. The 2nd Accused's counsel asserted that it is not true that the 2nd Accused was running away for she was in Nanyuki Town to attend the postmortem of the Deceased on the alleged date. That she is a young mother of three kids and she has a young child whom she had left home. She was thus likely to return home. On the issue of interference with the witnesses, the counsel argued that there was no prove of interference and that knowing witnesses does not mean that there will be interference as in most cases, Accused know the witnesses. That the 2nd Accused has a fixed place of abode and she is ready to comply with any conditions that this court may set.
6. The Republic through the prosecution counsel in response and while objecting to bail maintained that the Accused persons are a flight risk reason being that they were not at the postmortem but were found at Nanyuki Bus stage trying to run away to unknown place hence, the attempt to escape shows that they are a flight risk. Counsel maintained that the 1st Accused has no place of abode since she was residing with the Deceased. She used to work at Farmer's Bar but she no longer works there. Furthermore, the Accused are charged with an offence of murder which attracts a death sentence hence, this might be an incentive to abscond.
7. As to interference with witnesses, the State Counsel argued that the witnesses are family friends and there is apprehension that they might interfere either directly or through proxy.
8. I have considered the affidavit opposing bail and the respective submissions by counsels.
9. Bail pending trial is now a constitutional entitlement in all criminal offences. It will be denied only for compelling reason; and any conditions that the court might impose, again by constitutional edict, must be reasonable. Article 49(1) (h) of *the Constitution* of Kenya, 2010 provides that every Accused Person has a 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.”
10. “Compelling reason” is not defined in *the Constitution* or in any law that this court is aware of. The term is also not defined in Black's Law Dictionary, Tenth Edition. However, the term “Compelling need” is defined there as –
 - “A need so great that irreparable harm or injustice would result if not met.”



A note following that definition states –

“Generally, courts decide whether a compelling need is present based on the unique facts of each case.”

11. Compelling reason therefore, in this court’s view, is a reason that must militate against granting the Accused bail, such as proven likelihood of him/her not attending court, interference with witnesses, harm to witnesses or to himself/herself, and the like. The important word here is proven. It is not just a matter for the discretion of the court. He who seeks to deny an Accused Person his constitutional right to bail pending trial must therefore place evidence before the court as would establish, on balance, the compelling reason urged. It is not enough to merely allege without evidence.
12. Flight risk and likelihood of interference with witnesses, if proved on balance, are compelling reasons to deny an Accused Person bail, one because he/she will not turn up for the trial as and when required, and two, because interference with witnesses will be subversion of justice.
13. In the present case, have those allegations been proved on balance? The prosecution has maintained that the Accused are a flight risk on three grounds-
 - i. That at on May 15, 2023, the Accused were arrested at Nanyuki Bus stage trying to move to unknown location.
 - ii. That the 1st Accused has no known permanent place of abode.
 - iii. That the case against them carries a sentence of death which might be an incentive for them to run away.
14. The perceived seriousness of the offence and the sentence in my view can never be a compelling reason to deny an Accused Person the constitutional right to bail. Though the [Judiciary Bond and Bail Policy 2015](#) lists the seriousness of the offence as a tenet for consideration, court must not lose sight of the fact that Article 49(i)(h) grants an Accused the right to bail irrespective of the seriousness and the nature of the offence. In *R v Mwangi* [2016] eKLR the court held that: -

“Bail cannot be refused simply because the accused has been charged with a very serious offence but the seriousness of the offence can be taken into consideration as a factor in determining if one of the grounds for refusing bail exists.”
15. As for the first reason, the prosecution did not prove that indeed the Accused Persons were not present during postmortem. It was indeed stated by 1st Accused counsel and the State counsel that the 1st Accused was living with the deceased. 1st Accused counsel stated that she was summoned by the OCS to attend postmortem as the next of kin. The State Counsel did not substantiate the allegations that the Accused Persons were not present during postmortem. Furthermore, being at a bus station does not imply that the Accused Persons were trying to run away as no bus tickets have been produced to show that indeed, there was intention to board a bus and leave the jurisdiction of this court.
16. As to the second reason, the State Counsel stated that the 1st Accused has no place of abode since she was residing with the Deceased herein. That she used to work at Farmer’s Bar but she no longer works there. Counsel for the 1st Accused told this court that her family that lives in Nanyuki Town are willing to accommodate her. She further informed the court that the 1st Accused is a young mother and has an elderly mother. It is obvious the child depends on her. The court has not been told that the Investigating Officer has investigated these claims and found them untrue.



17. As for the allegation of likelihood to interference with prosecution witnesses, it is alleged that the witnesses are family friends. I did not have the advantage of reading the witness statement since none was supplied to this court to verify the allegations by the prosecution that indeed the witnesses are family friends. Furthermore, none of the witness has come forward to voice their fear of alleged interference by the Accused. In the case of *Antony Ngirita v R* 2016 EKLR the honourable judge relied on the case of *Panju v Republic* [1973] EA 282 where the court held that evidence to such alleged interference must be availed.
18. From the foregoing, I do not find any compelling reason proved to warrant denial of the Accused Persons constitutional right to bail. I, in the premises, admit each of the Accused Persons to bail in the terms Personal bond of 300,000 with 2 sureties of a like sum.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 27TH DAY OF JULY 2023

A.K.NDUNG’U

JUDGE

