



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Odhiambo & another (Criminal Case E009 of 2023)
[2023] KEHC 22843 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE E009 OF 2023
RL KORIR, J
SEPTEMBER 27, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SYLVIA ATIENO ODHIAMBO 1ST ACCUSED

ISAAC MARAGA 2ND ACCUSED

RULING

1. Sylvia Atieno Odhiambo is the 1st Accused in Criminal Case No. E009 of 2023. She is charged alongside Isaac Maraga with the murder of one Mary Anne Wangare. The offence is stated to have been committed on the month of April 2023 at Chebirir Village, Chepalungu Sub-County within Bomet County.
2. The Accused first took plea on 22nd May 2023 and denied the charge. Her counsel prayed for a pre-bail report to be filed in court. Subsequently her case was consolidated with that of her co-accused and they took fresh plea on 13th June 2023.
3. The 1st Accused has asked this court to grant her bond pending trial. The oral application was made by learned defence counsel Mr.Leteipa. In urging the application, Counsel submitted that the application was premised on article 49 (i) (h) of the Constitution and that there was no compelling reason to deny the 1st Accused bond. Counsel further cited section 123 of the [Criminal Procedure Code](#) as granting the Accused the right to bail. He urged that the primary reason for bail was to secure the Accused's attendance at trial.
4. The application was opposed by the state. Mr.Njeru the learned Prosecution Counsel submitted that the 1st accused was a flight risk. He submitted that she had taken flight and disappeared after the commission of the offence and it had taken concerted effort to trace and arrest her in Nakuru County.



Counsel urged the court to be persuaded by the pre-bail probation officer's report which indicated that the DCI was still conducting investigations with a view of arraigning more suspects.

5. The starting point in an application of this nature is article 49(i) (h) of the Constitution which stipulates:-

“An arrested person has the right to be released on bond or bail, on reasonable condition, pending a charge or trial, unless there are compelling reasons not to be released.”

6. The Constitution in its wisdom left the determination of what constitutes “compelling reasons” to the court on a case by case basis. Towards this end Courts while exercising discretion are guided by section 123A of the *Criminal Procedure Code* which Provides:-

1. Subject to article 49(i) (h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular-
 - a. The nature or seriousness of the offence;
 - b. The character, antecedents, associations and community ties of the accused person;
 - c. The defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
 - d. The strength of the evidence of his having committed the offence;
2. A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person-
 - a. Has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - b. Should be kept in custody for his own protection.

7. The Judiciary Bail and Bond Guidelines also lists the criteria for the grant of bail/bond at Paragraph 3.1 (a) as follows: -

..... Every accused person shall be presumed innocent (article 50(2) of the Constitution). This is the primary rationale for the requirement of the Constitution that an arrested person has the right to be released on bail or bond.

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible.....”

8. Additionally, the Bail and Bond Policy Guidelines, at Paragraph 4.9 states that:-

In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.....

9. In this case the State has opposed the grant of bail for reason that the Accused was likely to abscond trial. In his submissions, Mr.Njeru the learned Prosecution Counsel stated that the Accused had run away after the incident and was only traced to Nakuru from where she was arrested after being tracked down. He urged the court to find that she was a flight risk and was likely to abscond trial. Counsel



drew the attention of the court to the pre-bail Probation Officer's report which was not in favour of the accused's release on bail.

10. I have considered the Application. It was clear from the submissions of the State that the reason for opposing the application was the likelihood of the Accused absconding trial. That might very well be the case. However, denial of bail was not a casual matter as it goes to the accused's right to liberty. The right having been granted by the Constitution means that the State Prosecutor must convince the court that there was a proper basis for denial. I agree with Ibrahim J, (as he then was) in the case of Republic v. Danson Mgunya and another (2010) eKLR, where his Lordship stated:-

“In our Constitution it is stated expressly, positively and unequivocally that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial. This means an accused must be released on bail or bail on reasonable conditions. The only exception or fetter to this right is that there must be “compelling reasons not to be released.” The court must therefore exercise its discretion with this in mind- “existence of compelling reasons.”

I do hold that if the prosecutor objects to the release of the Accused from detention during the pendency of a trial, then at first instance, the burden should be on the prosecution and not the accused person to prove or at least demonstrate the existence of the “compelling reasons.....” (Emphasis mine)

11. I have looked at the pre-bail report. The Probation Officer stated that the victim's family and the deceased's family were unknown to each other. He mentioned nothing concerning possible interference with witnesses or likely obstruction of justice. He only observed that the 1st Accused was arrested from her home town which is Nakuru where she resides with her husband and children. This revelation defeats the submission that she was on the run and would abscond trial. If the fear of absconding trial was real, then the learned Prosecutor would have availed affidavit evidence to that effect. I am therefore not persuaded that the Accused will abscond trial if granted bail. On the contrary I am persuaded that the panacea for such fear is to impose stringent conditions to ensure the Accused's attendance at her trial.
12. I also dismiss the Probation Officer's suggestion that this court should defer bail as investigations were on going. That suggestion to my mind was the preserve of the Investigators. There was no indication that the Probation officer interviewed the Investigation officer and received information to that effect. It is notable that the same probation officer filed in this court a report in respect of the 2nd Accused recommending his release on bond and did not raise the issue of on going investigations.
13. In the end, I grant the Accused bail on the following stringent conditions: -
- i. She shall pay cash bail of five hundred thousand (Kshs 500,000/=) and provide one surety of similar amount
 - ii. In the alternative she shall execute a personal bond of Five hundred thousand (kshs 500,000/=) and provide 2 sureties of similar amount.
 - iii. She shall attend court for monthly mentions of her case until further orders of the court or commencement of her trial whichever occurs first.
 - iv. She shall not interfere with investigations or witnesses or impede the trial in any way.
- Orders accordingly.



**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 27TH DAY OF SEPTEMBER,
2023**

.....

R. LAGAT-KORIR

JUDGE

**Ruling delivered in the presence of Mr. Njeru for the State, Mr. Barusei holding brief Mr. Odundo
for the 1st Accused and the 2nd Accused and Siele (Court Assistant)**

