



**Republic v Longurokou (Criminal Case E009 of 2022)  
[2023] KEHC 22585 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22585 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL CASE E009 OF 2022  
AC MRIMA, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**NGURAKEL LONGUROKOU ..... ACCUSED**

**RULING**

**Introduction And Background**

1. This ruling relates to the accused's oral application for bail pending trial. The application was presented by learned counsel Mr Ndinyo for the accused.
2. The application was vehemently opposed.
3. The accused submitted that he was constitutionally-entitled to bail pending trial since he was innocent until proved otherwise. He recalled that the averments made by the investigating officer were not proved and amounted to heresay. He, in particular, contended that he has a fixed abode, there is no hostility against him in the village and that he is not a flight risk.
4. Counsel referred to several decisions in support of the application.
5. On its part, the prosecution relied on an affidavit sworn by No 7xx3 Sgt Ignatius Okinda, the investigating officer, on July 8, 2022.
6. In the disposition, the investigator deposed that the accused was a flight-risk and that he is likely to flee to Uganda given the overwhelming evidence against him including eye-witnesses. He reiterated that the accused had no fixed abode and also decreed that the life of the accused is at risk upon release since the villagers are still hostile. Counsel urged this court not to admit the accused into bail pending trial.



7. Citing Constitution, learned prosecutor Mr Makori argued that the right to bail pending trial was not absolute. He urged this court to really consider the rights of all parties and to strike a balance by disallowing the application.
8. It is on the basis of the foregoing that this court is called upon to determine the bail and bond application.

**Analysis:**

9. The foundation of bail or bond in Kenya is the Constitution and the Criminal Procedure Code, cap 75 of the Laws of Kenya (hereinafter referred to as ‘the CPC’).

10. Article 49(1)(h) of the Constitution states as follows: -

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

11. Section 123(A) of the CPC sets out exceptions to the right to bail or bond. The provision was brought on board with a view to align the CPC with the Constitution. It provides that: -

- (1) Subject to article 49 (1) (h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all relevant circumstances and in particular -
  - a) the nature of 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 as 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.

12. The rationale behind bail or bond in Kenya is premised on the constitutional imperative under article 50(2)(a) of the Constitution that an accused is presumed innocent until the contrary is proved.

13. In bail or bond applications, therefore, the primary consideration must always be the ability of the accused to attend trial. The only exception remains where compelling reasons are demonstrated. Ibrahim, J (as he then was) in Republic v Danson Mgunya & another [2010] eKLR described the right to bail as an “inalienable right” by holding that;

The result of the foregoing is that a murder suspect has a constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.



14. Therefore, in granting bail or bond, the trial court is called upon to exercise its discretion and, if there are no compelling reasons to deny an accused bail or bond, the trial court should exercise its discretion in favour of the accused.
15. Both the [Constitution](#) and the CPC do not define what ‘compelling reasons’ are.
16. But what does the term ‘compelling reasons’ mean?
17. The term has been used in other jurisdictions to mean ‘exceptional circumstances’ or ‘unusual’ and ‘extraordinary circumstances’. Having gone through various statutes, scholarly writings and decisions within and outside our jurisdiction, it appears that the term ‘compelling reasons’ (or as the case may be) is not settled and may include a rubric of circumstances.
18. The 10<sup>th</sup> Edition, [Black’s Law Dictionary](#) defines ‘extraordinary’ as “beyond what is usual, customary, regular or common”. It also defines ‘a circumstance’ as “an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event”. The dictionary goes ahead to define “extraordinary circumstance” as “a highly unusual set of facts that are not commonly associated with a particular thing or event.”
19. In Kenya, courts have, as well, dealt with the issue. In [Republic v Joktan Mayende & 3 others](#) (2012) eKLR, [Mohamed Abdurrahman Said & Another v Republic](#) (2012) eKLR, [Wilson Thirimba v DPP](#) (2012) eKLR, among others, the courts reverted to the meaning of the word ‘compelling’ as defined in the [Concise Oxford Dictionary](#), 9<sup>th</sup> Edition which is defined as ‘rousing, strong, interest, attention, conviction or admiration’.
20. Admitting the challenge in the term ‘exceptional circumstances’, the Constitutional Court of South Africa in [Liesching and others v S](#) (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (29 August 2018) quoted with approval the definition in [S v Petersen](#) 2008 (2) SACR 355 (C) and had this to say: -

Meaning of “exceptional circumstances”

- (39) The phrase “exceptional circumstances” is not defined in the *Superior Courts Act*. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as “ordinary” in one case may be treated as “exceptional” in another. For instance, in Petersen a *Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court)* observed in relation to an application for bail under section 60(11) (a) of the *Criminal Procedure Act*:

On the meaning and interpretation of ‘exceptional circumstances’ in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the



question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.

21. Defining the term further, the South African Court in *S v Bruintjies* 2003 (2) SACR 575 (SCA) had the following to say: -

.... What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.

... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

22. Still on the South Africa jurisprudence, in *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266 g-h, the court dealt with what exceptional circumstance are and reiterated that the applicant in bail application must, on a balance of probability, demonstrate that “exceptional circumstances” in his or her case, indeed, do exist and that they “in the interests of justice permit his release”. This, according to the court, involves the balancing” between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown by the accused to exist”.

23. And, in *Antonio Jacobie Snyders v The State* (A455/2015) 2015 ZAGPPHC 618, the High Court in South Africa dismissed an appeal against denial of bail on the basis of the fact that the community was up in arms as it found it necessary to voice its opinion regarding the conduct of the appellant. The appellant’s concessions relating to his safety meant that it would not be wise to release the appellant on bail. Indeed, the appellant conceded that the community would not accept him back with open arms and that there existed some enmity between him and the community.

24. Given the amorphous nature of the term ‘compelling reasons’ or ‘exceptional circumstances’, a court while exercising its discretion in dealing with a bail and bond application must ‘consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release’ and must also balance “between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown....”. In Kenya those ‘compelling reasons’ or ‘exceptional circumstances’ must be demonstrated by the prosecution.

25. In delineating the parameters of ‘compelling reasons’ and ‘exceptional circumstances’ and remaining alive to the provisions of section 123(A) of the CPC, the High Court in *Republic v Pascal Ochieng Lawrence* [2014] eKLR stated as under: -

.... It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the state. The court in exercising its discretion as to whether or not to grant bond is, however, to be guided by the following parameters: -

the seriousness of the offence although this carried greater weight under the old constitutional dispensation; the weight of the evidence so far adduced if the case is partly heard; the possibility of the accused interfering with witnesses; the safety and protection of the accused once he/she is released on bail/bond; whether the accused will turn up for trial; Whether the release of the accused will jeopardize the security of the community.”



26. Further, the High Court in *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR in determining the criteria to be applied on whether to grant bail or bond relied on the decision by the Supreme Court of Nigeria in *Alhaji Muiabid Dukubo-Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows: -

...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -

- i. The nature of the charges;
- ii. The strength of the evidence which supports the charge;
- iii. The gravity of the punishment in the event of conviction;
- iv. The previous criminal record of the accused, if any;
- v. The probability that the accused may not surrender himself for trial;
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- vii. The likelihood of further charges being brought against the accused;
- viii. The probability of guilty;
- ix. Detention for the protection of the accused;
- x. The necessity to procure medical or social report pending final disposal of the case". [Emphasis added]

27. The prosecution's contention in this matter is threefold. First, that the accused was a flight-risk in that he is likely to flee to Uganda given the overwhelming evidence against him including eye-witnesses, second, that the accused had no fixed abode and, third, that the life of the accused is at risk upon release since the villagers are still hostile.

28. In dealing with this matter, this court should not lose sight of the fact that the right to bail or bond is one of those rights under the bill of rights whose enforcement is aimed at preserving the dignity of individuals and communities, the promotion of social justice and the realisation of the potential of all human beings.

29. Having said as much, this court now turns to a consideration of the grounds tendered in opposition to the application.

30. On the ground that the accused was a flight-risk in that he is likely to flee to Uganda given the overwhelming evidence against him including eye-witnesses, this court takes the view that the allegation of overwhelming evidence ought to be treated with a lot of caution at this point in time since the evidence is yet to be supplied to this court and more importantly, it is yet to be subjected to the rules of evidence.

31. On the issue of the applicant being a flight-risk, it is a fact that the West Pokot County borders Uganda. It is also the case that many people living within the county have other families and/or relatives in Uganda and, for such people, their movement in and out of the West Pokot county into Uganda and back, may not attract a lot of restrictions. However, even with such a scenario at hand, for a court to



- decline to admit an accused on bond or bail on such a ground, there is need of such evidence to be availed. For instance, the best case would be a disposition from the local administration affirming such a position. In this case, none was availed thereby making the assertion, although serious, unproved.
32. The twin issues of the accused having no fixed abode and that the life of the accused is at risk upon release since the villagers are still hostile, have not only been deposed to by the investigating officer, but also dealt with in the pre-bail report tendered by the probation office.
  33. The report is dated August 11, 2023. On the aspect of the accused's abode, the report indicated that the accused has a family which is settled at Lokitede village, Poole sub-location, Riwo Location, Kapenguria sub-county within West Pokot county. The family practises farming and is also pastoralist.
  34. The father and an uncle to the accused were interviewed by the probation officer. They indicated their readiness to stand surety for him using title deeds. On the basis of the foregoing, this court finds that, indeed, the accused, contrary to the averments by the prosecution, has a fixed abode.
  35. The last issue is the accused's safety. The animosity on the ground is admitted by all the parties. In fact, the area chief stated that the accused was lucky not to have been arrested by the villagers, otherwise he would have been killed by mob injustice. The administrator stressed that the accused ought not to return to his home for his own safety even when he is admitted to bail or bond.
  36. Acknowledging the animosity, an uncle to the accused offered to take him up and live with him in his home in Endebes within Trans Nzoia county pending the determination of this case.
  37. As stated, the safety of the accused is at stake. The fact has even been admitted by the accused's family members and the local administration. This court has been asked to admit the accused to bail or bond on condition that he relocates to a different place. Even if this court is to do so, there is no way such an order can be supervised by this court, thereby, this court would not be in a position to guarantee the life of the accused while out on bond or bail.
  38. Having carefully considered this matter and in light of the in-depth analysis of the Constitution, the law and various decisions, this court finds in light of article 49(1)(h) of the Constitution and section 123A(2)(b) of the CPC, there is a compelling reason in this case such that admitting the accused to bail or bond at this point in time will be prejudicial to the safety of the accused. The compelling reason is the proven animosity against the accused within his village.
  39. It is on the basis of the above sole reason and in light of the unique circumstances of this case that this court declines the application.
  40. Consequently, the following orders do hereby issue: -
    - a. The application seeking that the accused admitted to bond and bail pending trial is hereby declined.
    - b. The hearing of the case will, however, be expedited.Those are the orders of this court.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 1 delivered virtually and in the presence of: -

Mr. Ndinyo, Learned Counsel for the Accused.



Mr. Makori, Learned Senior Assistant Director of Public Prosecutions instructed by the Office of the Director of Public Prosecutions for the Respondent.

Juma/Hellen – Court Assistants.

