



REPUBLIC OF KENYA



**Republic v Bursar (Criminal Case E018 of 2023)
[2023] KEHC 26037 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL CASE E018 OF 2023
RL KORIR, J
NOVEMBER 30, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

DANCUN KIPKIRUI ALIAS BURSAR ACCUSED

RULING

1. Dancun Kipkirui alias Bursar (Accused) is charged with the offence of murder contrary to Section 202 as read with Section 204 of the *Penal Code*. The particulars are that on 5th February 2023 at Bomet Township in Bomet Central Sub-County, Bomet County, he murdered Sheila Chepngetich.
2. The Accused took plea on 27th September, 2023 and denied the charge. The court directed the filing of a Probation Officer's Pre-bail Report and set the case for pre-trial directions. When the matter came up for pre-trial on 1st November, 2023, Mr. Iteipa Learned Counsel for the Accused made an oral application for the Accused to be released on bond pending trial.
3. Counsel submitted that the application was premised on Article 49 (I) of the *Constitution*. He also submitted that they relied on the pre-bail report filed on 13th October, 2023. He invited the court to look at page 3 where the probation officer indicated that the Accused's family was not opposed to the Accused being granted bond. That further the Victim's family was also not opposed as the two families had reconciled. He submitted that the report was favourable and the accused was not a flight risk. Finally, Counsel urged the court to find that the prosecution had not brought the existence of any compelling reasons to the court as there was no sworn affidavit in opposition.
4. In response Mr. Njeru the learned prosecution counsel opposed the application on the ground that the Accused was a flight risk. He submitted that the offence was committed in February 2023 and the Accused was arrested in September, 2023 having disappeared for the intervening period. He urged the



court to find that the Accused might not attend court if released. He also prayed for stiff conditions in the event that the court exercised its discretion to grant bond.

5. In a rejoinder, Mr. Leteipa urged the court to find that there were no compelling reasons as the prosecution should not approbate one part of the report while excluding the other.

6. This application is anchored on Article 49(1) (h) of the Constitution which provides: -

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

7. In this case the prosecution has opposed the grant of bail on the ground that the Accused was a flight risk. As observed by the learned defence counsel, there was no affidavit on record to demonstrate that indeed the Accused was a flight risk.

8. This court has held and rightly so on sound authority that it was the duty of the prosecution to demonstrate compelling reasons. In the celebrated case of Republic vs Danson Mgunya & another (2010) eKLR, Ibrahim J (as he then was) held:-

“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.”

9. Affidavit evidence demonstrating compelling reasons was the best evidence the prosecutor would bring before the court. In practice such an affidavit is sworn by the investigating officer who is presumed to be well versed with the investigation, the circumstances of the offence, and any attendant risks to the particular trial. This does not however mean that the court would not consider any other evidence brought to its attention by the prosecution or indeed the probation officer. It must be remembered that in the end, the grant or denial of bail is an exercise of judicial discretion exercised in accordance with the law.

10. I have considered the pre-bail report dated 12th October, 2023. The report states that the Accused’s family desired his release on bond and assured of his safety while the deceased’s family was hostile to his release and was apprehensive that he would escape trial. The report also states that the Accused disappeared after the incident which confirms the prosecutor’s submissions that he had disappeared.

11. I have looked at the information filed in court on 7th September, 2023. The particulars of the offence show that the alleged offence occurred on 5th February, 2023 while the charge is dated 7th September, 2023. This confirms the position that the Accused was not available to be arrested and charged immediately after the incident.

12. The primary purpose of bail is to secure the Accused’s attendance at trial. In Republic vs Godfrey Madegwa and 6 others (2016) eKLR, Mwita J held: -

“The primary purpose for bail is to secure the accused’s person’s attendance to court to answer the charge at the specified time. The primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial”.



13. I have considered the fact that the Accused disappeared for a prolonged period after the alleged commission of the offence. It is my finding from antecedents that he was a flight risk and given the opportunity would abscond trial.
14. In the end, I am not inclined to grant the Accused bond at this stage. He shall remain in custody pending trial or until further orders of this court.
15. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF NOVEMBER, 2023

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R. LAGAT KORIR

JUDGE

Ruling delivered in the presence of Mr. Njeru for the State, Mr. Kipngetch Dancun for the Accused.

