



REPUBLIC OF KENYA



**Republic v Kadima (Criminal Case E002 of 2021)  
[2022] KEHC 659 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE E002 OF 2021  
GV ODUNGA, J  
MAY 31, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EULOGUE CHRISTIAN BALEDI KADIMA ..... ACCUSED**

**RULING**

1. Eulogue Christian Baledi Kadima, the accused herein is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 7<sup>th</sup> January 2021 at Syokimau Ferndale Court in Athi River Sub-County within Machakos County, he murdered Elizabeth Koki Musyoki.
2. The hearing of this matter commenced before Kemei, J and 4 witnesses testified before Kemei, J was transferred to Bungoma. On 18<sup>th</sup> November, 2021, Muigai, J recused herself from handling this matter and the matter was placed before this Court. By then the directions under section 200 of the Criminal Procedure Code had not been issued.
3. By an application filed on 24<sup>th</sup> February, 2022, the accused herein seeks that he be granted bond pending the hearing and determination of his case.
4. The application is supported by an affidavit sworn by himself in which he deposed that he is a Congolese aged 38 years and a father of two children. In his affidavit he undertook to attend all court sessions whenever required to do so and cooperate with the court till determination of his case. It was his averment that he comes from a poor family in a remote area where land has no value and hence his request that his circumstances be taken into account. He also disclosed that he is a pauper hence he ought to be exempted from paying fees.
5. In his submissions, the accused while appreciating that the right to bail is not automatic submitted that the determination of whether there are compelling reasons that can justify the denial of bail should



- be made by evaluating whether or not the accused person will attend his or her trial. In this case it was contended that the State had not shown any compelling reasons as to why the applicant shouldn't attend trial as required by law. He therefore prayed that this Court do evaluate any non-exhaustive factor in his case as there is nothing that hinders his prayer sought.
6. The Accused submitted that the decision whether or not to grant bail is discretionary and he undertook to attend court as expected by law as asserted that he had no intention to undermine the wheels of justice.
  7. On behalf of the Law Society of Kenya it was submitted that in a ruling delivered on 9<sup>th</sup> June, 2021, Kemei, J declined the accused's application to be released on bond/bail. It was averred that the prosecution had advanced grounds in opposition to the grant of bail/ bond pending trial; that the accused has no documentation and that the accused had no fixed abode and was a flight risk. It was submitted that the family of the victim similarly opposed bail on grounds; that the accused nationality is unknown, that the accused has no fixed abode and the conduct immediately after committing the offense exhibited one who is a flight risk and that the accused is likely to interfere with a key witness.
  8. According to the Law Society, a pre-trial bail report was filed which confirmed that the nationality of the accused person is unknown. The report further contended that the accused's original South African passport is not available and that the accused comes from a disintegrated family whose parents and siblings are living in different countries.
  9. In the said submissions, the Law Society relied on an affidavit sworn on 3<sup>rd</sup> February, 2021 by No. 84421, PC Antony M. Matuto, the Investigating Officer, who averred that the accused person was arrested on 8<sup>th</sup> January, 2021 in a lodging in Nairobi in possession of a Congolese temporary pass no. A70001, a printed extension of a visitors pass, a police abstract and a bus ticket obtained on 8<sup>th</sup> January, 2021 (barely a day after the date of the offence) under the names of Eric Kambayi Katalayi his destination being Kampala Uganda. The accused in his replying Affidavit sworn on 1<sup>st</sup> March, 2021 stated that he is a South African national by registration and a Congolese by birth.
  10. It was further submitted that the Pre-bail Report shed more light into this issue as it confirmed that the accused's South African original passport was not available and that he comes from a dysfunctional family with which he has no strong ties and that he has no relatives living in Kenya.
  11. Based on that it was submitted that since the accused's immigration status cannot be determined, it would be a risk for this court to release him on bail pending trial. In this regard reliance was placed on the case of *Republic vs. Nadifo Mohamed Absbir* (2019) eKLR where the court found that the prosecution had proved that the accused was a flight risk and granting her bail would not be in the interest of justice as the accused had no papers proving her status in Kenya and that she had no fixed abode in Kenya and resided in the rented houses of which her last known rented house had been repossessed by the landlord.
  12. According to the Law Society, the discretion to grant bail and determine the amount rests with this Court and in exercising its discretion, the Court must seek to strike a balance between protecting the liberty of the individual while safe guarding the proper administration of Justice. In this case, it was submitted that it has been demonstrated that the accused uses fictional names, his country of origin is unknown, the accused person does not have a fixed place of abode and that he was attempting to flee the country using someone else particulars. The above facts constitute compelling reasons for this Court to deny the applicant bail pending trial and this Court was urged to decline the accused's application for bail.
  13. Similar submissions were made by the prosecution.



14. On 9<sup>th</sup> June, 2021, Kemei, J delivered his ruling on whether or not the accused could be released on bail and expressed himself as hereunder:

“On the issue of whether the accused is a flight risk, it is noted that he was arrested a day after the commission of the offence from a lodging and was in possession of a bus ticket issued on 8/01/2021 indicating that he was to travel from Nairobi to Kampala on 9/01/2021. The police also recovered a Congolese temporary pass issued the same day in the name of Eric Kambayi Katalayi. Also recovered was a police abstract dated 8/01/2021 on loss of original Congolese passport. The Safaricom call data on mobile phone number 0742 640 835 indicated the registered owner as Zukiswa Nomganga a South African national. Looking at the conduct of the accused in trying to travel out of the country immediately after the incident, I find that the same is a clear indication that he had planned to flee out of the country. All the travel paper work was processed a day after the commission of the offence. This militates against his plea for release on bail since the possibility of him turning up for trial once admitted to bail will not be guaranteed. The accused did not deny the fact that he was preparing to leave Kenya since he has deliberately avoided to respond via his replying affidavit. It transpired also from the pre-bail report that the accused has been travelling to several countries and hence it is likely that he might not be traced once released on bond as he can easily melt away in any of those countries...The pre-bail report indicates that the accused has in the past travelled to several countries in Africa and hence there is a possibility that once he is granted bond he can easily disappear in any of those countries and it would be difficult to secure his attendance in court. I am satisfied by the prosecution’s claim that the accused person is a flight risk and that there would be difficulties in tracing him once he absconds...On the issue of the identity of the accused, it has transpired that the accused went by several names and which might explain the reasons behind the investigating officer preferring alias names for him. Indeed, the investigating officer indicated that the police have already forwarded the accused’s details to Interpol for verification on his true identity and nationality. The accused maintains that his name is Kadima Euloge and has attached a copy of his South African Passport No. A04739359. However, the Congolese travel pass recovered from him had the name Eric Kambayi Katalayi and which are also indicated on the police abstract on loss of passport. The bus ticket recovered from him has the name Eric Kambayi. From the above, it can safely be concluded that the accused had different names on each of the passports for South Africa and The Democratic Republic of Congo. Again, the mobile number that he was using is registered in the name of one Zukiswa Nomganga. It is clear therefore that the identity of the accused has not been clarified and hence it would be unsafe to admit him on bond as there is a high likelihood that he might not turn up for his trial. It is noted from the documents recovered from the accused that he gave out the name Eric Kambayi to the police when seeking for a police abstract on loss of passport. The same name also features on the travel pass from the DRC embassy. With all those details on the various names, the accused’s claim that his only name is Kadima Euloge is not truthful at all. Further, it transpired that the accused does not have any familial ties in Kenya. Even though he claimed that the deceased had been his wife with whom he intended to formalize their union, the pre-bail report painted a picture of a person always on the move. The report indicated that the accused’s modus operandi was that he would befriend ladies whom he would cohabit for short periods and then end the relationship and kept on changing residence while he was in Kenya. The report also indicated that he came from a dysfunctional family since his father had separated with his mother and that the father resides in the Democratic Republic of Congo while the mother lives in South Africa with



the siblings living in other countries. The accused has claimed that his country's embassy officials are willing to guarantee his availability to court but that is as far as it went because none of the alleged officials have sworn affidavits in support of the accused's quest to be released on bond. Again, none of his former girl friends or acquaintances have come forward to express any interest in bailing him out. The pre-bail report indicated that the accused provided a list of his Kenyan friends but upon being contacted they shied away claiming that their properties might be sold off in the event the accused absconds court. The report also indicates that the accused does not have a fixed place of abode and it will be difficult to trace him once he jumps bail. The report indicates that the accused kept on changing residence and the last one was the one belonging to the deceased and after the incident the accused ended up in a lodging and was arrested while in the process of fleeing to Kampala Uganda. There is therefore proof that the accused does not have a fixed place of abode and it will be difficult to trace him once he is admitted to bail and fails to turn up in court... The circumstances obtaining in the above case perfectly fit with the present circumstances of the accused herein. I am satisfied that it is not prudent to grant bond to the accused as there is high possibility that he might not attend court for his trial... 16. In light of the foregoing, it is my finding that the accused's application to be released on bond/bail lacks merit. The same is declined. The accused shall remain in custody pending the hearing and determination of his case or until further orders of the court."

15. Although the Court did consider the accused's application and declined to admit him to bond, an application for release on bond may be made at any stage of the proceedings. In other words, the mere fact that an application for release on bond is made in the first instance and declined does not bar an accused for making a similar application for consideration in future. That, in my view, must have informed the decision by the learned judge to state that "The accused shall remain in custody pending the hearing and determination of his case or until further orders of the court." However, for the Court to review its earlier decision the accused must satisfy the Court that the circumstances that led to the denial of the bond have changed for the better. Otherwise any challenge to that earlier decision may only be by way of an appeal.
16. In this application, the accused has not placed before me any material on the basis upon which I can find that the circumstances that prevailed at the time of the earlier ruling have changed in his favour. In the absence of that, by arriving at a decision contrary to that which Kemei, J made would amount to sitting on appeal on his ruling and I have no jurisdiction to do that.
17. In the premises I decline to review the decision of Kemei, J but reiterate that this Court is not barred from reconsidering the position in future should circumstances warrant.
18. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 31ST DAY OF MAY, 2022**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**The accused in person**

**Ms Kabita for Ms Kamende and Ms Odero for the Law Society of Kenya**

**Mr Jamsumba for the State**



CA Susan

