Rebublic v Mwololo & another (Criminal Case E015 of 2022)
[2022] KEHC 11133 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 11133 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL CASE E015 OF 2022

GV ODUNGA, J

JUNE 27, 2022

BETWEEN

REBUBLIC ..... PROSECUTION

AND

ROSE KAMENE MUTETI ..... 1ST RESPONDENT

ROBINSON MUSYOKI MWOLOLO ..... 2ND RESPONDENT

RULING

1. The accused herein, Robinson Musyoki Mwololo and Rose Kamene Muteti face the charge of Murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the charge are that the two, on the night of 24th day of August, 2020 at Syokimau, Muthama Road Area, within Machakos County, murdered Beverly Mumo Musyoki. The two pleaded not guilty to the charge.

2. When the duo was arraigned before the Court for plea taking on May 19, 2022, they pleaded not guilty. However, the prosecution opposed their release on bond/bail pending trial based on an affidavit sworn by PC Benard Muange. According to him, the Accused persons were arrested on the May 7, 2022having murdered the deceased on August 24, 2020. According to him the offence with which the accused are charged attracts a life sentence if found culpable ad there is overwhelming evidence irresistibly pointing to the accused's acts as what occasioned the death of the deceased hence high probability of their absconding.

3. It was revealed that the 1st accused absconded court in a civil matter being Milimani Children's Court Case No. 972 of 2017 and as a result, a arrant of arrest was issued which is still in force.

4. According to the deponent, some of the witnesses are minors who are well known to the accused hence there are chances that they may interfere with the witnesses. It was further averred that the 1st Respondent has a passport hence is a flight risk if released on bond.

5. According to the deponent, the right to life is inherent and the fact that the deceased's life was taken away out-weights the rights of the accused to be accorded bail pending trial.

6. In response the accused persons filed their respective affidavits. According to the 1st accused, he is civil employed by Kenya Pipeline Company working as a Senior Engineer. He averred that the murder took place way back in 2020 and he fully participated in interring his child's body. Since then, he has been living together with the 2nd accused as husband and wife at their Matrimonial home at Syokimau within Machakos County.

7. While admitting that a warrant of arrest had been issued against him, he disclosed that he had explained to Court through her Advocate that on the particular day he took his son one Fabian Kiamba for circumcision exercise and the said warrant of arrest was later lifted. He averred that there was no evidence by the State that he is capable of absconding bond in spite of the fact that he is a civil servant working with Kenya Pipeline Company where he is a Senior Engineer. He deposed that since the death of the deceased, he has never disappeared and has been living with his wife, the 2nd accused, at their Matrimonial home at Syokimau within Machakos County until their arrest on 7/05/2022 hence no evidence has been tendered by the prosecution to warrant denial of bail/bond.

8. According to the 1st accused, he has been denied access to the minors vide Children's Case No. 972 of 2017 and he has never seen the minors since 2020 and that the minors who have been living with the complainant since then. As a result, he does not know where and how the minors live. He averred that he is not at flight risk being a civil servant and undertook to deposit his passport/Visa in Court.

9. The 1st accused deposed that they have 2 children one in college and the other one is two (2) year and eight (8) months old in need of parental care. He deposed that they have a known place of abode in Syokimau where they live with their family even before arrest and have never been charged with any criminal offence. Further, that no evidence was presented before this Court to prove or suggest that they can escape from this Court's Jurisdiction hence no compelling reasons whatsoever have been tendered by the prosecution to deny them bail/bond.

10. The 2nd accused in her affidavit also reiterated the averments made by the 1st accused and maintained that being a mother of two and the last born being two (2) and eight (8) months old definitely in need of parental care especially motherly care and therefore there is need for her to be released in bail and bond terms.

11. She averred that she is a business woman in Mlolongo and Kitengela and having a known place of abode being Syokimau, where she was living with her family even before her arrest, and therefore cannot abscond court. In her view, no evidence presented before this court to prove or suggest that I can escape from this Jurisdiction hence there is no compelling reasons whatsoever tendered by the prosecution to deny me bail/bond.

12. It was submitted on behalf of the accused that that article 49(1)(h) of *the Constitution* provides that an accused person has the right to be released on bail or bond on a reasonable conditions pending charge or trail unless there are compelling reasons whose list is not be exhaustive but each case is to be considered based on its circumstances and facts. The court was urged to uphold the presumption of innocence principle under article 50 (2) of *the Constitution*.

13. According to the accused, the fact that the deceased is a child is not the basis for determining whether to admit the accused to bail or bond since the law treats all persons equally and there cannot be a discrimination based on any ground. It was submitted that the accused persons herein at this point are to be presumed innocent and the court cannot draw any findings on the evidence since it would be

violating the right to challenge evidence. In support of the submissions, the accused relied on Clause 2 of the Judiciary Bail and Bond Policy Guidelines and submitted that the issuance of bail pending trial is for the purpose of securing the attendance of the accused persons for trial. In this case it was submitted that no compelling reasons has/was advanced by the prosecution or victims to necessitate denial of bail/bond pending trial. According to the accused, the prosecution has not proved the allegations of witnesses' interference and that bail/bond should not be denied on flimsy grounds. It was urged that the application for admission of the accused persons to bail/bond pending trial is merited.

14. On behalf of the Prosecution, it was submitted that the prosecution through the Affidavits of Naomi Mutile Kiamba and PC Bernard Muange have shown that the 1st accused flagrantly disobeyed court orders, summonses, notices to show cause and warrants of arrest of course in cohorts with wayward officers. According to the Prosecution, the deceased would not have died while in the custody of the Accused persons had the 1st Accused obeyed Court Orders /directives/summonses/warrants which required the personal attendance of the 1st accused and production of the minor children who were in his custody in court. According to the prosecution, there is no hope that this time around he will obey court orders.

15. It was submitted that the 1st accused refused to support/maintain the minor children who are his biological children while in the custody of their mother, Naomi Mutile Kiamba, and swore an Affidavit to that end. It is therefore hypocritical on the part of the accused to allege he has a duty to take care of the minor children and therefore he should be released. According to the prosecution, the offense with which the accused persons are charged is of a serious nature made worse by the fact that it speaks to the murder of the 1st Accused's own child thereby infusing real fear to the main witnesses, Fabian Musyoki (minor, brother to the deceased) and Naomi Mutile Kiamba (mother to the deceased) of being harmed by the 1st accused person and his accomplice.

16. While appreciating that *the Constitution* guarantees the accused person the right to be presumed innocent until proved guilty but in this case, it was submitted that the scales of justice tilts against the accused person because it has been demonstrated that by the annexed witness statement of Fabian Musyoki that it is the first accused who was in the habit of beating up the deceased and it is further demonstrated that the accused person was unlawfully having custody of the minor by reason of disobedience to court orders and as such the death of the minor is neatly intertwined with the actions of the 1st accused. It was further submitted that the 1st accused has alleged that he is a Public Servant working for Kenya Pipeline as an Engineer however all Public Servants have a duty to adhere to Chapter six of *the Constitution* and the provisions of the Leadership and Integrity Act which he has miserably failed to apply himself to. It was contended that the 2nd accused is an accomplice of the 1st accused who also had unlawful custody of the deceased at the time of her death.

17. The court was therefore urged to uphold our submission and deny the accused persons bail/bond.

Determination

18. I have considered the foregoing.

19. Article 49(1)(h) of *the Constitution* provides that:-

An accused person has the 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.

20. *The Constitution* does not define what qualifies under the term "compelling reasons". The ordinary meaning according to Thesaurus English Dictionary of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

21. While *the Constitution* does not identify what qualifies under the term "compelling reasons", section 123A of the *Criminal Procedure Code* gives the parameters for the grant of the right to bail as follows:

> (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 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.

22. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail as follows:

> The following procedures should apply to the bail hearing:
>
> (a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:
>
> a. That the accused person is likely to fail to attend court proceedings; or
>
> b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
>
> c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
>
> d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

23. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since *the Constitution* expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial and whether or not the a free and fair trial can be achieved notwithstanding the release of the accused on bond. I associate myself with the view expressed by Muriithi, J in *Kelly Kases Bunjika vs. Republic* [2017] eKLR that:

> "It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "the accused person is likely to fail to attend court proceedings". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."

24. In determining whether or not a free and fair trial is possible the Court ought to take into account the circumstances of the accused as well as that of the potential witnesses. However, since the release on bond or bail is a constitutional right, it is upon the prosecution to satisfy the Court why a free and fair trial is not possible if the accused is so released.

25. The imposition of terms of the bail, if necessary, must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this.

26. However, where the prosecution satisfies the Court that there exist compelling reasons which justify the denial of bail or bond, then the Court will deny the same.

27. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. In *S v Nyaruviro & another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), the Court held that:

> "The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety

of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question...the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In S v Nichas 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in S v Hudson 1980 (4) SA 145 (D) 146 in the following terms;

"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken v AG* 1992 (2) ZLR 249 and Norman Mapfumo vs. The State HH 63/2008... The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

28. In this case, it was contended that the accused persons have been charged with the offense of murder that attracts life imprisonment. Gravity of the offence as a consideration was appreciated however by Mbogholi Msagha, J in Criminal Application No. 319 of 2002 *Priscilla Jemutai Kolonge v Republic* (unreported) at page 3, wherein he held as follows:

> " However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."

29. That was the position in the case of *Watoro vs. Republic* [1991] KLR 220, where the court held thus:

> " The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody...the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases...the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction..."

30. The Nigerian Supreme Court (Justice Ibrahim Tanko Muhammad J.S.C.) set out some essential criteria on the issue of whether to grant bail in *Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria* S.C. 20A/2006 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.

31. However, in *Republic v Danson Mgunya & another* [2010] eKLR, the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> " ...criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the

probability of guilt) appears to be in reference to where an accused has been placed on his defence."

32. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the *Criminal Procedure Code* which sets out the parameters for the grant of the right to bail.

33. In *Kelly Kases Bunjika v Republic* [2017] eKLR, Muriithi, J was of the view that:

> " The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'...Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the court finds a compelling reason within the meaning of *the Constitution* to refuse bail in the particular case."

34. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail.

35. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under *the Constitution* is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in *Republic v William Mwangi Wa Mwangi* [2014] eKLR where Muriithi, J held that:

> " It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail."

36. In this case, it is contended that the offence with which the accused are charged is punishable by grave sentence hence the accused are likely to be a flight risk. Further that the 1st accused is a holder of Kenyan passport and might might flee away in order to evade the judicial process. In *Foundation for Human Rights Initiatives v Attorney General* [2008] 1 EA 120 it was held by the Constitutional Court of Uganda that:

> " The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening *the Constitution*. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be

satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially...]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person's appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of *the Constitution*, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him."

37. As regards the same issue, Ochieng, J in *Republic v Ahmed Mohammed Omar & 6 others* [2010] eKLR expressed himself as hereunder:

> " Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;
>
> 'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'

Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."

38. According to the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, it is nolonger mandatory that those found guilty of murder must be sentenced to death.

39. As regards the alleged threats to the witnesses, the offence in question was allegedly committed in 2020. No evidence has been placed before me to show that the accused persons herein have acted in a manner that threatens the said witnesses. It is the duty of the State to ensure that all persons enjoy their fundamental rights and this applies to both the victims and the accused persons. I associate myself with the opinion expressed in *Rep vs. Dwight Sagaray & others* High Court Criminal Case No. 61 of 2012 that:

> " For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It

must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate."

40. In my view, there are in place constitutional and legislative to protect witnesses who are shown to be under real threat if an accused person is released. Therefore, the Court in making a determination must consider whether such safeguards, if invoked, are unlikely to have any impact of the safety of the witnesses. However, in that event, the Court must, as provided in Article 24(1)(e) of *the Constitution*, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words, the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial.

41. As regards the allegations that the 1st accused if a flight risk, no evidence has been placed before me indicative of the accused person's propensity to flee. The 1st accused has explained the circumstances under which he failed to attend the previous proceedings and has stated on oath which has not been challenged that the warrant of arrest that was issued against him was lifted. It must however be appreciated that there is always a risk that an accused may abscond in any matter. In fact, it is not unknown that even in minor offences, the accused persons sometimes do abscond. Our Constitution has however taken a calculated risk of granting the right to be admitted bail to all accused persons save where there are compelling reasons shown to exist by the prosecution. It is therefore upon the prosecution to prove that the temptation for the accused to flee in a particular matter, based on convincing reasons, is so high that it amounts to compelling reason. Those circumstances cannot however be based on mere fear and speculation and each case must be considered on its own peculiar circumstances since each person whether accused or even a convicted criminal has the right to dignity of the person. Therefore, the decision whether or not to admit the accused to bail depends on the circumstances prevailing at the time when the application is made and may be subject to review depending on whether there are changes in those circumstances which warrant such review.

42. In *Republic vs. Joktan Mayende & 4 others* Bungoma High Court Criminal Case No. 55 of 2009 court defined the term "compelling reasons" as follows:-

> " The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by *the constitution*."

43. Citing the same case, the court in *Felity Sichangi Nyangesa v Republic* [2014] eKLR held that:

> " Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the Case where a person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The Court is then entitled, if not bound to infer that the intention of the accused in accosting the witness had been to dissuasive the witness from giving evidence."

44. As I have stated above it is upon the prosecution to prove that there exist compelling reasons to justify the court in limiting the applicant's otherwise constitutionally guaranteed rights. Such compelling reasons cannot be said to have been satisfied based on bare averments.

45. While my view is that once an accused is arraigned before the trial court, whether or not an application for release on bail is made, it is the duty of the trial court to deal with the issue, where compelling reasons are given nothing bars the court from denying the release of the accused on bail even for a definite period. In other words, the trial court may find from the material placed before it that at that stage it would not be just to release the accused on bail and that the application may be renewed at a later stage when the circumstances have changed, for example where vulnerable witnesses have testified.

46. I have considered the material placed before me and I find the allegations made against the accused do not amount to compelling reasons to deny them admission to bond or bail. Accordingly, I see no impediment to their release on bond.

47. In the circumstances, I made the following orders:

    (1) The accused persons may be released on bond of Kshs 800,000.00 each with one surety each of similar amount to be approved by the Deputy Registrar of this Court.

    (2) I addition, the 1st accused to deposit his passport in court during the pendency of the case or until further orders of this Court.

    (3) They shall attend the Court whenever required to do so without fail.

    (4) They shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that have been supplied by the State to the defence.

    (5) In the event that any of these conditions are violated, they are liable to have their bail cancelled and they shall proceed with the case while in custody

48. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos 27th day of June, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Kiluva for the accused

Mr Jamsumba for the State

Mr Kaminza for the victim.

CA Susan