



**Republic v Akonae (Criminal Case E002 of 2022)
[2022] KEHC 15125 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 15125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE E002 OF 2022
SN MUTUKU, J
JULY 26, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER AKONAE ACCUSED

RULING

1. Peter Akonae, the accused herein, is charged with the murder of Onesmo Abisalom contrary to Section 203 as read with Section 204 of the [Penal Code](#). This offence is said to have been committed on March 2, 2022 at Ormanie Namanga Division in Kajiado Central Sub-County within Kajiado County.
2. The plea was taken on March 23, 2022. The accused pleaded not guilty. Counsel for the accused made an oral application to this court to admit the accused on bail. The said application was opposed by the Prosecution through an affidavit dated June 15, 2022 in which it is deposed that the accused person is a foreigner with identification documents; that he is a flight risk who might not attend court if released on bond. It is deposed that the police may not be able to access the home of the accused if he absconds.
3. The application was argued on June 15, 2022. Counsel for the accused argued that though the accused is not a Kenyan he has been in Kenya since 2005; that he has no intention of going back to Tanzania and that he is not a flight risk. She argued further that the right to bail is a constitutional right under Article 49(1)(h). She argued that the accused is employed and therefore his place of abode is known. She asked the court to fast track the trial in the event that this application does not succeed.
4. Counsel for the state opposed the application for bail on the grounds that though bail is a constitutional right the same can be denied if there are compelling reasons. Counsel argued that the accused is a foreigner with no documentation. That the accused has also not given any information on where he lives or who he lives with and therefore, the court should deny him bail.



5. This court called for a pre-bail report which was filed in court on June 23, 2022. I have read the Report. It shows that the accused is a Tanzania national which weak family ties. His parents are deceased; that his two surviving sisters are married in Mwanza and are not in touch with the accused. The accused was married with two children but is now separated from his wife and children and are not in touch.
6. The report shows that the accused has been in Kenya since 2005 doing casual jobs. He has not returned home since 2005, nor communicated with any of immediate family members. The report further states that the accused does not have contacts of family and it would be impossible to trace him if he crossed over to Tanzania.
7. I have considered the application for bail pending trial, rival arguments together with the Affidavit in opposition by the Respondent. I have also considered the pre-bail report by the Probation Officer.
8. The law under Article 49 (1) (h) of *the Constitution* provides that:
 - (1) 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
9. Under Article 50(2) of *the Constitution*, every accused person is entitled to the presumption of innocence. Further, the *Judiciary Bail and Bond Policy Guidelines*, recommended that:

“The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.”
10. Further, Section 123A of the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya, 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 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.
 - a. These principles have been stated in a number of cases. In *R -v- Hillary Mugo Mwendia and 2 others* Cr. Case No. 7/2012 High Court Kerugoya where the



case of Nganga -Vs- Republic (1985) KLR 451 and Marui -V- Republic 1985 KLR 279 were cited with approval, it was held that:

Generally, and because of the presumption of innocence an accused person should be granted bail unless it is shown by the prosecution that there are substantial grounds to believing that:

- (a) The accused will fail to turn up at his trial or to surrender to custody, or
- (b) the accused may commit further offences or
- (c) he will distract the cause of justice and (d) the accused would cause more by absconding.”

12. In the matter before me, I have considered that the accused is a Tanzanian national with no identifying documentation. There is no evidence that he has been living in Kenya legally. The Probation Report has clearly explained the family circumstances of the accused. Having lived and worked in Kenya since 2005 does not mean that the accused is in the country legally.
13. The law is clear that bail is a right. This right is not absolute. It can be denied by the court of proof of compelling reasons. Given the circumstances under which the accused has been in this country and weak family ties, this court is constrained to release the accused on bond. I have considered the paramount consideration in granting bail/bond that an accused person will attend court at all times he will be required until the case he is facing is heard and fully determined. I am not persuaded that the accused will attend court when required to do so.
14. I have noted from the report that the accused does not have friends. He is a person who does not enjoy good relationships with neighbours. He is a loner. If he were to cross over to Tanzania, the authorities in Kenya will have a difficult time tracing if. I am persuaded that there are compelling reasons to deny the accused bail. There is an indication that the neighbourhood where he used to work is hostile and the accused may not be safe to return there. It is my considered view that the accused would be better while in custody.
15. Consequently, this application fails. The accused shall remain in custody until his case is heard and determined. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH JULY 2022.

S. N. MUTUKU

JUDGE

