



**Maalim v Republic (Criminal Case E001 of 2022)
[2022] KEHC 13266 (KLR) (Crim) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13266 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E001 OF 2022
CW GITHUA, J
SEPTEMBER 30, 2022**

BETWEEN

AHMED ABDULLAHI MAALIM ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. The accused, Ahmed Abdullahi Maalim, is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars allege that on December 22, 2021 at Nur Hotel and Restaurant along Muyuyu Street, Eastleigh in Starehe Sub-county within Nairobi County, he murdered Abdi Nasir Abdullahi.
2. Upon being arraigned in court on January 27, 2022, he denied the charges. His trial commenced on March 28, 2022 and four witnesses have already testified.
On January 25, 2022, the accused, through his advocates, Kalii & Company Advocates, filed a notice of motion dated 1 January 9, 2022 seeking to be admitted to bond or bail pending trial.
3. In the grounds premising the application and in his supporting affidavit, the accused contended that he has a qualified constitutional right to be released on bond or bail on reasonable terms and to be presumed innocent until the contrary was proved. He pledged not to interfere with witnesses or investigations if released and to abide by any conditions the court may impose as a pre-requisite for grant of bail or bond.
4. In addition, the accused deposed that he was a Kenyan citizen and a father of five school going children for whom he was the sole bread winner; that he has a fixed abode at Ole Kasasi Town in Ongata Rongai and he was not a flight risk.



5. The application is contested by the state through a replying affidavit sworn on February 21, 2022 by the lead investigating officer Cpl Walter Chepkwony. In a nutshell, Cpl Chepkwony deposed that the deceased is the accused's biological brother and that as some of the prosecution witnesses are his siblings and relatives, he is likely to interfere with those witnesses or cause them harm if released given the animosity that exists between them.
6. The deponent further averred that if released, the accused's personal safety and security cannot be guaranteed considering that there was a fight between him and his brothers over a land dispute. He stated that the accused's constitutional right to bail is not absolute and should be granted in the exercise of the court's discretion.
7. The victim's family also opposed the application vide a replying affidavit sworn by Mr Abdirashid Abdul Sharifow who described himself as an elder of the Asharaf Salman Community to which the accused and his family belonged. Mr Sharifow averred that he was opposed on behalf of the victim's family to the admission of the accused to bond or bail pending trial mainly because the accused and the deceased are blood brothers and the circumstances that led to the death of the deceased related to family property which was in the accused's custody and which he has refused to surrender.
8. He further deposed that the accused was a dangerous and violent man and has been threatening him, members of his family as well as members of the Asharaf Salman Community with death claiming that he will "finish them" upon his release. He further asserted that the accused was a flight risk as he may escape to Somalia or Australia if released on bond.
9. When the application was pending hearing, I called for a pre-bail report which was filed on March 16, 2022. The report confirms that the accused is a family man with five school going children and that he has a permanent residence in Ole Kasasi in Ongata Rongai. The report also confirms that the accused's siblings who are Australian citizens and live in Australia are apprehensive about their safety if the accused was admitted to bond pending trial. According to the report, members of the Asharaf Salman Community are not opposed to the release of the accused on bond as well as the residents of Ole Kasasi where the accused has resided with his family for over 15 years.
10. The application was argued orally before me by learned counsel Ms Kalii who represented the accused, learned prosecuting counsel Ms Ogweno for the state and learned counsel Mr Manwa who represented the victim's family.
In their respective submissions, learned counsels expounded on the depositions made by the accused, the investigating officer and Mr Sharifow in supporting and opposing the application.
11. I have carefully considered the application, all the affidavits sworn in support and in opposition to the same and the oral submissions made by counsel for each of the parties. I have also considered the authorities cited by Ms Kalii and Mr Manwa as well as the content of the pre-bail report.
12. It is settled law that under article 49 (1) (h) of the Constitution, a person who has been arrested has a right to be released on bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons against such release.
13. A reading of this constitutional provision leaves no doubt that this right is guaranteed to every arrested or accused person irrespective of the seriousness of the offence charged. As correctly pointed out by the accused person in his supporting affidavit, the constitutional right to bond or bail pending trial is qualified not absolute as it is subject to existence of compelling reasons.
14. The constitution has not defined what constitutes compelling reasons. This is left for determination by the trial court depending on the circumstances of each case.



However, the Court of Appeal in *Michael Juma Oyamo & Another V Republic*, [2019] eKLR has given guidance on what would amount to compelling reasons to warrant denial of bond pending trial. The court stated 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 standards set by the *Constitution*.”

15. It is trite that the duty to demonstrate existence of compelling reasons lies squarely on the prosecution in cases where the state is opposed to the admission of an accused person to bond or bail pending trial.

To discharge this burden, the prosecution must support with evidence the reasons advanced in opposition to grant of bond or if what is relied on is the commonly cited reason which is what has been advanced in this case that if released, the accused is likely to interfere with witnesses or that his safety may be compromised, the prosecution must place before the court material to demonstrate that their fear is well founded and justified. Mere allegations cannot suffice.

16. I cannot put it better than the Court of Appeal did in *Patius Gichobi Njagi & 2 Others v Republic*, [2013] eKLR, where it stated as follows:

“.... where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the state must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail. As stated in the celebrated case of *Jaffer v Republic*, 1973 EA 39, the court cannot be called upon to speculate.”

17. I must state at this juncture that the overarching consideration in determining whether or not to admit an accused person to bond or bail pending trial is whether if released, the accused will turn up for his trial or will abscond. Other factors the court ought to consider are set out in section 123 A of the *Criminal Procedure Code* and the *Kenya Judiciary's Bail and Bond Policy Guidelines*, March 2015 and include the following:

- a) Whether the accused is likely to commit, or abet the commission of a serious offence;
- b) Whether the accused is likely to endanger the safety of victims, members of the public or national security;
- c) Whether the accused is likely to interfere with witnesses, investigations or evidence;
- d) Whether it is in the public interest to detain the accused person in custody.”

18. In this case, the main reason relied on by the prosecution and the victim's family in opposing accused's release on bail is that there is a high likelihood that if released, he will interfere with and endanger the lives of prosecution's key witnesses who are his brothers and eye witnesses to the incident that led to the deceased's death; that his safety may be compromised due to the bad blood existing between him



and his siblings because of their land dispute. It was also stated on behalf of the victim's family that the accused is a flight risk.

19. Given the foregoing, the only issue for my determination in this application is whether the prosecution has established to the standard set out earlier that there are compelling reasons in this case to mitigate the exercise of the accused person's constitutional right to bond pending trial.
20. I am aware that in deciding applications for bond pending trial, the court is called upon to balance the rights of an accused person to enjoy his liberty while awaiting conclusion of his trial in view of the constitutional presumption of innocence, the public interest in the prevention of crime and the rights of victims of crime to access justice.
21. In this case, it is not disputed that the accused is alleged to have murdered his brother and that some of the prosecution's key witnesses are his siblings.

The prosecution has however admitted that the accused person's siblings except one are among the four witnesses who have already testified.

From the evidence adduced in court and other material placed before the court including the annexure to Cpl Chepkwony's affidavit, it is clear that all members of the accused's family including the sibling who is yet to testify are Australian nationals and they live in Australia. The accused is the only member of their family who lives in Kenya.

22. In view of the above facts, the prosecution ought to have demonstrated how and in which way the accused who is resident in Kenya was likely to interfere with or endanger the lives of his siblings who live thousands of miles away in Australia. This was not done. On my part, I find this claim totally unconvincing and farfetched.
23. I have noted the averments made in the replying affidavit sworn on behalf of the victim's family to the effect that the accused has been threatening his siblings and members of the Asharaf Community. It is noteworthy that these averments have not been backed by any evidence. There is no evidence of any direct or indirect communication, threatening or otherwise between the accused and his siblings or other witnesses.
24. The deponent, Mr Sharifow, from his averments did not have any familial relationship with the deceased and his siblings and as correctly observed by Ms Kali, he does not fit the description of a victim in this case as envisaged in section 2 of the *Victim Protection Act* which defines a victim as a person who suffers injury, loss or damage as a consequence of an offence. In any event, his averments that the accused has been threatening his siblings besides being unsubstantiated lack any probative value because the deponent did not disclose the source of his information.
25. The likelihood of interference with prosecution witnesses if proved is a serious matter since it has the potential of undermining the cause of justice. For this claim to form the basis of denying an accused person's constitutional right to bond, it must be proved by credible evidence or material which demonstrates actual or perceived interference. This can be done by proving, for instance, existence of threats made by the accused to witnesses or incriminating communication between the accused and the witnesses. No such evidence has been availed to the court in this case.
26. Finally, the claim that the accused is a flight risk is not well grounded considering that it is not disputed that the accused has a permanent abode in Ongata Rongai where he lives with his wife and children. The allegation that if released, his safety will be in danger or that he is likely to escape to Somalia or Australia have no factual basis and amounts to mere speculation which is a sphere this court refuses to be sucked into.



27. In view of the foregoing, I am satisfied that the prosecution has not established the existence of compelling reasons to justify denial of the exercise of the accused persons right to bond or bail pending trial. Consequently, I find merit in the application but taking into account the peculiar circumstances in this case regarding the relationship between the accused and some of the prosecution witnesses and their geographical locations, I find it prudent to allow the application on the following terms:
- i. The accused shall be released upon executing a bond of Kshs 1,000,000 with one surety of a similar amount. The surety will be approved by the Deputy Registrar of this court.
 - ii. Upon his release, the accused shall not, whether directly or indirectly by any means whatsoever, contact or interfere in any way with the remaining witnesses in this case.
 - iii. The accused shall not leave the jurisdiction of this court without leave of the court.
 - iv. The accused will attend this court whenever required without fail.
 - v. Failure to comply with any of the conditions set out above may lead to cancellation of the bond granted herein.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kalii for the accused

Ms Kagira holding brief for Ms Ogweni for the state

Mr. Chumo holding brief for Mr. Manwa for the victim's family

Ms Karwitha: Court Assistant

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