



**Republic v Etiang (Criminal Case E008 of 2022)
[2022] KEHC 14279 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL CASE E008 OF 2022
JK SERGON, J
SEPTEMBER 29, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

MUSEE MOSES ETIANG ACCUSED

RULING

1. The accused is charged with the information of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that, on 9th May 2022, at Napeltakoit village in Lowerangak sub-location within Turkana County murdered Lokaale Napana.
2. On 7th June 2022, the court ordered for the Accused to be taken for mental assessment, and plea to be taken on 9th June 2022. The mental status assessment report, dated 08th June 2022, concluded that the Accused is mentally stable.
3. On 09th June 2022, the information charge was explained to the Accused person in Turkana language by Lokasach, the court assistant. The Accused maintained that it was not true. A plea of not guilty was entered.
4. The Accused learned counsel, Karanja, orally prayed for the Accused to be released on bond on reasonable terms. The Prosecution, Kahuthu, asked the court to consider the circumstance of the case, in particular, that the accused person was arrested by members of the public.
5. The Court directed the county probation officer to prepare and file a pre-bail report on the accused person. The report, dated 29th July 2022, indicated that the community was still angered and against accused being released on bail. It concluded that the accused home environment is hostile, the accused lacks strong grounding in the village – as to employment or family to maintain him at his current residence. The report recommended the accused to be denied bail.



6. I have considered the report and the circumstances of this case. 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.

7. In the case of *Republic v Robert Zippor Nzilu* [2018] eKLR, the court observed that,

It follows 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 not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. 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 determine the amount 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. 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. See also *S vs. Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017).

8. Notably, following the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR, it is no longer mandatory that those found guilty of murder must be sentenced to death.

9. The policy on bail-bond is operationalized. It is now clear that in interpreting the right to bail, 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.

10. In *Kelly Kases Bunjika vs. 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.”

11. 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 page 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.

12. Agreeing to the view expressed by Muriithi, J in *Kelly Kases Bunjika vs. Republic* (supra) 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.”

13. 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. 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. In *Clive Macholewe vs. Republic* 171 of 2004 (2004) MWHC 53, the Malawi High Court (Justice J. Katsala) stated,

“In my judgement the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires that the accused be deprived of his right to release from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial, then it is up to the state to prove when the court should make such an order.”

14. Since the primary objective of release on bond, in my view, is the by the accused person to attendance at Court; the terms to be imposed ought not be such that it amounts to denial of bail.
15. In cases where limitations to the right to bail contemplated above exist, 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.
16. 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.
17. The ordinary meaning of the word “compelling” according to Thesaurus English Dictionary is forceful, convincing, persuasive, undeniable and gripping. Thus, plain averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons. See *Republic v Robert Zippor Nzilu* (Supra).
18. In this instant circumstance, the court is inclined to granting bail/bond terms that are reasonable, considering that there are no compelling reasons to deny the accused his constitutional right. I allow the application and order that he be released upon the following bond terms: (a) To sign a bond of Ksh. 500,000/= with one surety of a similar amount. (b) In the alternative, to deposit a cash bail of Ksh. 250,000/=.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 29TH DAY OF SEPTEMBER, 2022.

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J. K. SERGON

JUDGE

