



**Obadiah v Republic of Kenya (Miscellaneous Criminal Application  
E110 of 2022) [2022] KEHC 14381 (KLR) (Crim) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14381 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E110 OF 2022  
DO OGEMBO, J  
OCTOBER 27, 2022**

**BETWEEN**

**ZACHARIA NYAORE OBADIAH ..... APPLICANT**

**AND**

**REPUBLIC OF KENYA ..... PROSECUTION**

**RULING**

1. The applicant, Zacharia Nyaore Obadiah, has moved this court by way of a notice of motion application dated April 7, 2022. The application, brought under section 123(3) of the *Criminal Procedure Code*, article 49(1)(h), 50(1) and 160(1) of *the constitution*, has 2 substantive prayers:-
  - i. That this honourable court do revise the decision of the trial court delivered on March 31, 2022 in Milimani criminal Case No E354 of 2022 denying the applicant bail.
  - ii. That the honourable court do proceed to admit the applicant to bond on such terms as may be just.
2. The application is supported by an affidavit sworn by the advocate of the applicant, Guandaru Thuita. This application was canvassed on October 4, 2022.
3. Counsel for the applicant relied on the affidavit in support of the application in his submissions and added that the applicant is a victim of adverse publicity, and that the trial court denied the applicant bail because of the pressure the defence exerted in demanding that the ruling on the application for bail be delivered. That the trial court did not consider the bail bond policy guidelines. The defence also challenged the allegations contained in the affidavit of the investigating officer that the accused is at risk or that he would escape to Tanzania. That these are hearsay and fabrications. That the accused



- had been in Isebania near his home which is located in Kisii. Counsel also submitted that bond is a constitutional right and that the accused should not be denied bond because he is a poor Kenyan.
4. Mr. Kiragu appearing for the state, opposed this application. He relied on the affidavit of the investigating officer, Inspector Mwanzia. Counsel conceded that this was a highly publicized case. That it affected many boda bodas and had negative emotional responses. That many Kenyans were hurt by the actions of the applicant and it is for his own safety that he should be remanded in custody. It was further submitted that the action of the applicant after the incident leaves no doubt that he will escape the jurisdiction of the court. That he even discarded his phone and even his family offered no cooperation with the police on his whereabouts. Lastly, that the accused has no known place of abode.
  5. The counsel for the applicant made further submissions that the applicant is presumed innocent till it is proved otherwise.
  6. I have considered the 2 rival submissions of the opposing sides. I have also considered the affidavit sworn in support of this application and also the affidavit of the investigating officer in opposition. I have also considered the ruling of the learned trial magistrate delivered in this matter on March 31, 2022.
  7. This application is for bail pending trial article 49(1)(h) of the constitution states  

“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.”
  8. the above constitutional provision gives 2 major pronouncements. First, that the right to bail is available to all accuseds’ persons irrespective of the nature of the charges that they face. Second, that even though the right to bail is available to all accused persons, the right is not absolute and may be denied where it is shown by the prosecution that there exists compelling reasons. These are reasons that are strong enough as to justify the denial of the right to bail. Both sides are agreed on what would constitute compelling reasons. The bail and bond policy guidelines at paragraph 4.9 gives some of the circumstances that may be considered to be the following  
The nature of the charge and the seriousness of the punishment to be meted out in case of a conviction,  
The strength of the prosecution’s case,  
Character and antecedents of the accused person,  
Likelihood of interference with witnesses,  
Need to protect the victims(s),  
Relationship between the accused and the witnesses,  
Whether the accused is a flight risk,  
Whether accused is gainfully employed or has a place of abode,  
Public order, peace or security,  
Protection of the accused person.
  9. The list above is in no way exhaustive. The issue therefore of compelling reasons would be considered on a case to case basis depending on circumstances of each case.
  10. In this case, the prosecution has opposed bail on the following grounds;-
  11. First, on the fact that there was a huge public outcry over this matter, and thereby exposing the applicant to personal dangers should he be released on bail i.e his own safety. As seen above, the issue of the safety of the accused himself maybe a compelling reasons. In my view, however, it is incumbent upon the prosecution to show. Some proof of this fact. It is not sufficient for the prosecution to merely allege that the applicant would be exposed to any danger if released on bail. In the absence of any evidence pointing to the existence of any such threat to the personal security of the applicant if released on bail, I am not convinced that the prosecution quite proved this element as a compelling reason.
  12. Similarly, the prosecution, other than alleging that the applicant has no place of abode, did not venture to sufficiently prove this fact. It would perhaps have helped the prosecution’s case to show any attempts, if any taken to establish if the applicant indeed has no place of abode. As it were, this remained an unproven allegations that would and ran not qualify as a compelling reason.



13. Lastly, the prosecution has objected to release of the accused on bail on the twin grounds of the character and antecedents of the accused, and the likelihood of absconding should he be released on bail. It is important to note the primary purpose of the right to bail. At paragraph 4.9 of the aforementioned guidelines, the primary factor considered by the courts in bail decision-making is whether the accused will appear for trial if granted bail. Bail should therefore not be viewed as a licence to the accused to abscond and run away from facing his accuser and run away from facing his accuser in court. It is to secure his attendance even as he remains out of prison custody.
14. In the case of *Republic v Godfrey Madegwa and 6 others* (2016)eKLR, Justice E C Mwita, ruling on the same, held that the purpose for bail is to secure the accused's person's attendance to court to answer the charge at the specified time. That the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial.
15. I fully associate myself with the above finding of the honorable Judge.
16. In this case, the prosecution has pointed out a number of material circumstances for consideration of the character and antecedents of the accused and whether he is likely to abscond if released on bail.
17. It is agreed by both sides that this issue was highly highlighted on all forms of media, including radio, TV, and social media platforms. The applicant must have in the circumstances known or learnt about it, especially after he was allegedly identified as the one responsible. He failed to present himself to the police even though he was fully aware that he was being looked for. He did not have to wait to be served with any summons to present himself at any police station. The applicant instead left, Nairobi, and travelled hundreds of kilometers to Isebania at the border with Tanzania. In doing so, he left behind both his motor cycle and phone in Nairobi, this obviously meant to make it as difficult as it can be to trace him. He even bypassed his rural home in Kisii as he headed to Isebania. None of his family members knew where he had gone to or cooperated in any way with the police in disclosing his whereabouts.
18. I have considered all these factors and I reach the inescapable finding, same as that of then learned magistrate, that the character and antecedent of the applicant shows that should he be released on bail, he is likely to abscond never to turn up for his trial. This would obviously compromise on the very objective of bail as seen above.
19. In the circumstances, I am convinced that the prosecution has proved the existence of a compelling reason good enough as to justify the denial of the right to bail to the applicant. The application of the applicant dated April 7, 2022, lacking in any merit, is dismissed wholly. The accused shall remain in custody pending trial.
20. This file is ordered to be taken back to the trial court for hearing and determination in the normal manner. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**27<sup>TH</sup> OCTOBER, 2022.**

COURT:

RULING READ OUT IN COURT (ON-LINE) IN THE PRESENCE THE APPLICANT (NAIROBI REMAND), MS. KIIRU FOR ACCUSED AND MS. NJOROGE FOR MS. AKUNJA FOR THE STATE.

**D. O. OGEMBO**



**JUDGE**

**27<sup>TH</sup> OCTOBER, 2022.**

