



**Republic v Mariko (Criminal Case E001 of 2025)
[2025] KEHC 89 (KLR) (15 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 89 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E001 OF 2025
JN ONYIEGO, J
JANUARY 15, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

HASSAN SALAT MARIKO ACCUSED

RULING

1. The accused person herein is charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. Particulars are that on 26th day of December 2024, at Sarira area of Sunkuri ward within Garissa county, jointly with others not before court murdered Jacob Maluki Mwanzia.
2. Having pleaded not guilty to the charge, he applied for his release on bail. Consequently, the court ordered for a pre-bail report. At the same time, prosecution filed an affidavit sworn by one Farahan Abdirahman the investigating officer opposing accused’s release on bail on grounds that; accused is a flight risk considering that his accomplices are still at large; if released on bail, he is likely to delay the trial; he is likely to interfere with witnesses; he is charged with a serious offence attracting a heavy penalty hence likely to abscond and; it is in the public interest that accused remains in custody pending his trial.
3. According to the pre-bail report dated 7-1-2024, the accused is suitable for release on bail pending trial. On his part, accused urged that bail is a constitutional right hence entitled to bail pending trial. He contended that there are no compelling reasons advanced by the prosecution to deny him bail. He further urged that, he is the sole bread winner of his family. That he has property and a family hence not likely to abscond. He urged the court to consider the circumstances under which the offence was allegedly committed with the deceased having been caught raping his (the accused’s) wife. It was submitted that the victim’s family and that of the accused are engaged in reconciliation arrangements hence no animosity.



4. Mr. Okemwa appearing for the state opposed the release of the accused on bail. He reiterated the content contained in the affidavit in opposition of the accused being released on bail.
5. I have considered the application herein, the response thereof and oral submissions by both counsel.
6. 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. Compelling reasons are not defined in *the Constitution* in as much as Section 123A of the Criminal Procedure Code, provides 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 fulfillment 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.
8. The considerations in determining whether or not to grant bail are also set out in the Kenya Judiciary's Bail and Bond Policy Guidelines and in the same breadth, it is not in doubt that the rationale behind any release of an accused person on bail or bond in Kenya is premised on the constitutional provision under Article 50 (2) (a) of *the Constitution* that an accused person is presumed innocent until the contrary is proved.
9. 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.
10. The question that seeks to be addressed is 'what is the meaning of compelling reasons.' In the case of Republic V Joktan Mayende & 3 Others [2012] eKLR, Mohamed Abdurrahman Said & Another V Republic [2012] eKLR, Wilson Thirimba V DPP [2012] eKLR, among others, the respective Courts reverted to the meaning of the word 'compelling' which is defined in the Concise Oxford Dictionary, 9th Edition as 'rousing, strong, interest, attention, conviction or admiration'.
11. However, 'compelling reasons' is relative as it depends on the circumstances of each case. As such, the mere fact that the offence with which an accused is charged carries a serious sentence is 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 from 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 a free and fair trial can be achieved notwithstanding the release of the accused on bond.



12. The imposition of terms of 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. See *Republic vs Wycliffe Nyakwana Nyamweya (Criminal Revision 135 of 2016) (2016) KEHC 7930 (KLR) (Crim) (28 July 2016) (Ruling)* where the court held that;

“It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial”.
13. Similar position was re-emphasized by the court in *Republic –Vs- Danson Mgunya & Another [2010] eKLR* where M. K. Ibrahim J (as he then was) held thus;

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”
14. 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. 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.
15. As already noted, the primary consideration for bail is whether the accused will attend court for his trial. Therefore, if a compelling reason is demonstrated that the accused person is likely to fail to attend court proceedings, then the discretion should be denied. [See *Kelly Kases Bunjika Vs Republic [2017] eKLR*].
16. In the instant case, the prosecution is alleging that the accused is a flight risk on grounds that his accomplices are still at large. There was no allegation made as to whether the accused person had attempted to flee this court’s jurisdiction. The mere fact that some of the alleged suspects are still at large does not mean that automatically the accused is likely to abscond. Accused is said to be a family man with a fixed place of a bode. He is a businessman with property. This is clear from the pre-bail report and the accused person’s submissions which is not controverted. Prosecution has not advanced persuasive and or supporting grounds to anchor the flight risk aspect. For those reasons that ground fails.
17. As regards the aspect of interference with witnesses, the same is speculative. There is no proof or allegation made that some witness or witnesses have been approached or intimidated or influenced with a few to withholding their evidence. To that extent, the same amounts to a general statement without any factual foundation. On account of the offence being a serious one, the same is immaterial as all offences are bailable.



18. Concerning the public interest aspect, it was not elaborated. The same was not explained as to the nature of the public interest to be preserved by detaining the accused. Regarding the claim that accused is likely to delay the speedy deposition of the case if released on bail, the same is misplaced as the accused does not have control over court proceedings. That is the work of the court.
19. Having addressed the grounds upon which accused's release on bail was challenged, and further having found that there are no compelling reasons for the denial of bail against the accused person, I am sufficiently convinced that there is no reason to keep detaining accused person in custody as there is no basis to do so. He is presumed innocent until proved guilty. To do otherwise would amount to detention before trial which is unconstitutional.
20. In view of the above holding, the application for release of the accused on bail pending trial is allowed. Accordingly, accused person may be released on abond of kshs one million with one surety of the same amount or in the alternative deposit cash bail of kshs 500,000/=.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JANUARY 2025

J. N.ONYIEGO

JUDGE

