



**Mutwiri v ODP/Prosecution (Criminal Case 79 of 2019)  
[2025] KEHC 3505 (KLR) (Crim) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3505 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 79 OF 2019  
MW MUIGAI, J  
MARCH 20, 2025**

**BETWEEN**

**ELIUD MUTWIRI ..... APPLICANT**

**AND**

**ODPP/PROSECUTION ..... RESPONDENT**

**RULING**

1. By Application, Notice of Motion filed on 21/1/2025, the Applicant sought the following orders;
  - a. Pending hearing & determination of the matter the Applicant is admitted to reasonable bond terms or in the alternative Cash bail.
  - b. The Court issues any further orders it deems expedient in the circumstances in the interest of justice.
2. The applicant relied on Articles of the Constitution that fortify the grant of bail/bond Articles 50 (2) (a) 49 (1) (h) Article 10 & 24 (1) (e).
3. The Respondent shall not suffer any prejudice if prayers are granted by the Court
4. It is fair and just and equitable and in the interest of justice that the Court grant the orders sought in the Application.
5. The Applicant's Supporting affidavit filed on the same date, the Applicant deposed he was charged 23/11/2019 and arraigned in Court on 10/12/2019.
6. On 5/4/2022 he filed an application for grant of bail /bond and was heard on 7/12/2022 and Ruling delivered on 25/1/2023 and he was denied bail.



7. The Applicant took the view that he was not interviewed by the Probation Officer before the Probation Report was filed and thus the Report failed to discharge the burden under Section 107 (1) of the Evidence Act. Secondly no material was placed before Court that formed the basis of existence of compelling reasons to warrant denial of bail.
8. The Prosecution on numerous occasions as gleaned from the Court record has failed to secure the attendance of witnesses and to proceed while he and his Advocate have always been ready to proceed.
9. The Applicant submitted that it will be humanely impossible to conclude trial in a timely and expeditious manner, a failure that will prejudice his rights if not admitted to bail.
10. The grounds are that if released on bail bond he would harm society was not substantiated by evidence and the fact of being a flight risk was not proved.
11. The Applicant submitted that the denial of bail is punishment before conviction which is excessive and punitive. This court is under a duty to protect and promote fundamental rights and freedoms guaranteed to all persons by the Constitution.
12. Despite Court Directions issued on 23/1/2025 parties have not filed or exchanged skeletal submissions.
13. Article 49 (1) (h) of the Constitution provides:

“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.”

14. The Bail & Bond Guidelines 2015 prescribe the following issues to be considered in grant of bail or bond. These are; the nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty. The strength of the prosecution case. Character and antecedents of the accused person. The failure of the accused person to observe bail or bond terms. Likelihood of interfering with witnesses. The need to protect the victim or victims of the crime. The relationship between the accused person and potential witnesses. Child offenders. The accused person is a flight risk. Whether accused person is gainfully employed. Public order, peace or security. Protection of the accused person.

In Rep v Dwight Sagaray & others High Court Criminal Case No 61 of 2012, Milimani. Hon.R. Korir, L.J.

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others..., at least some facts must be placed before court otherwise it is asking the court to speculate.”

15. In the case of Abmad Abolafathi Mohammad [2013] eKLR, Hon L.Achode L J ( as she then was ) considered the issue of accused persons being a flight risk and having been dishonest about their identities and observed as follows:

“The probability that the respondents may not surrender themselves for trial: In Daniel Dela Amega v Republic [2006] eKLR, to which I was referred by learned counsel, Mr. Wandugi, Makhandia J, (as he then was ) held that if there is merited fear, that the respondents may



abscond if granted bail, then the court would ordinarily refuse to admit such an accused person to bail.”

16. On 22/01/2025, Ms Tum of ODPP informed the Court on the said date that they were not served with the instant Application which this Court directed to be served to the ODPP and thereafter respond and/or file skeletal submissions.
17. Working with the Court record, this Court considers the following factors issues applicable in determination of the Application;
18. On 25/1/2023 Hon Justice D.O. Ogembo delivered Ruling and dismissed the application for bail/bond as it lacked merit. The Court found 2 compelling reasons proved by the Prosecution which justified the denial of grant of bail/bond.
19. The 1<sup>st</sup> compelling reason was that there was likelihood of interference with witnesses. The Prosecution submitted the Accused person’s mother was/is one of the witnesses and is reluctant to appear in Court and if Accused person is released, the situation will only get worse. The Accused person if released would go home where his mother resides. The possibility of interference and intimidating the witness is real.
20. The 2<sup>nd</sup> compelling reason was that the Applicant was/is a flight risk. The Prosecution submitted that immediately after the death of the deceased on 19/1/2019, the Applicant went underground. It was not until 23/11/2019 almost a year later that the Accused person was traced and arrested. This shows if he is released on bond, there is every likelihood that the Applicant may not surrender himself to Court for trial.
21. To date, for various reasons the hearing has never started and these circumstances outlined above that were considered as compelling reasons have not changed.
22. The issue of possible interference of witness(es) and possibility of the Accused person being a flight risk are deposed in the Affidavit filed by Investigating Officer Corporal Samson Cheruiyot who confirmed from the investigations that the Accused person’s mother is a key witness among other witnesses. Secondly, that after the incident the Accused person fled until he was arrested months later.
23. The Accused person sought review of the bond and bail terms of the Ruling of 25/1/2023 on the basis that the Court was not furnished with a Pre-bail Report by Probation Officer and/or if produced he was not interviewed. Secondly, the matter has been delayed the hearing has never taken off yet he has been languishing in remand and he is prejudiced.
24. The Court record confirms that this matter entails family members, a mother is a special person as one’s parent and therefore, on release on bond, the Accused person will contact and /or visit his mother as it should be. However, in light of the fact that the Investigation Officer deposed that the Accused’s mother is a key witness, this Court is under legal obligation to safeguard rights of both the accused person and victim/witness. This Court is not in control of unfolding events upon Accused person’s release and therefore should err on the side of caution. In this case, ensure Accused person’s mother’s safety & security at least until she takes the stand and testifies.
25. With regard to the Accused person being a flight risk, the circumstances leading to his arrest strongly suggest a probability of jumping bail; after the incident that gave rise to these proceedings, the Accused person went into hiding and was arrested months later.
26. With regard to Probation Report/Pre-Bail Report before consideration by the Court on grant of bail/bond, it is useful to have Pre-bail report to aid in informed decision-making on grant of bond and bail



but it is not mandatory to obtain one. The Pre-Bail report is prepared at the request of the Court but in the instant case, it was not requested for nor availed. The Court relied on the evidence adduced by Investigation Officer which was not controverted.

Republic versus Danson Mgunya & Another High Court at Mombasa, Criminal Case No 26 of 2008 Constitution ought to be interpreted in a manner that enhances the rights and freedoms of individuals Compelling reasons must be stated, described and explained. If based on belief, the justification or basis for the belief must be demonstrated or shown.

Primary consideration is whether the accused person shall attend court and be available for trial (the omnibus criterion). Other factors to be considered within the parameters of this principle

27. It is the court's duty to grant bail/bond on reasonable terms and conditions in order to enforce Art. 49 (1) (h) of the *Constitution* and in compliance to the Bail and Bond Policy Guidelines 2015.
28. Having considered the application for review of grant of bail, the law and precedence, and the evidence on the Court record, I am persuaded that there are compelling reasons that have been stated and explained to deny the accused bail/bond for now at this stage. Once the Accused's mother is called as witness and family member testifies, bail/bond shall then be reconsidered.

**RULING DELIVERED DATED SIGNED IN OPEN COURT ON 20/3/2025 IN OPEN COURT  
CRIMINAL DIVISION-NAIROBI-MILIMANI.**

**M.W. MUIGAI**

**JUDGE**

