



**Republic v Aiyeko & 2 others (Criminal Case E007 of 2024)
[2025] KEHC 9095 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE E007 OF 2024
RC RUTTO, J
JUNE 19, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

BONIFACE JUMA AIYEKO 1ST ACCUSED

GEOFREY OKOTH OKEYO 2ND ACCUSED

TONY OMONDI OMOLO 3RD ACCUSED

RULING

1. By way of an application under certificate of urgency dated 26th October, 2024, the accused persons moved court seeking the following orders, that;
 - a. Spent.
 - b. The Court do set aside the recommendations of the pre-bail reports all dated 17th September 2024 and using its unfettered discretionary power, commute the Applicants to their right to bail/bond as provided for in the Article 49(1)b of *the Constitution*.
 - c. The Applicants be granted reasonable cash bail and bond in respect of case HCCR E007 of 2024.
 - d. The Court be pleased to grant any other order it will deem fit.
2. The application is supported by the affidavits sworn by the three Applicants and is founded on the grounds on the face of it. The accused deponed that they were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*; that they have never been granted bond; that as it stands, they are being presumed guilty contrary to Article 50(2) of *the Constitution*; that it is against the law of natural justice to be condemned unheard and a breach of their constitutional



- right not to be admitted to reasonable bail/bond terms; that the probation reports do not disclose any compelling reasons why they cannot be released on bail/bond; that they are not a flight risk and neither do they pose any threat to the community where they reside; that they are willing to comply with any terms set for their admission to bail bond; and that it is in the interest of justice that the application be allowed.
3. From the record, the accused persons were charged with the offence of murder contrary to Section 203 as read with 204 of the *Penal Code*. Plea was taken on 20th June 2024 when they all pleaded not guilty to the charges.
 4. On 15th July, 2024, the matter came up before Court when counsel for accused made an oral application for bond. Upon hearing the application, the Court directed that a pre-bail report be prepared by the probation officer for the Court's consideration before making a decision whether or not to grant bond/bail. Three pre-bail reports in respect of all accused persons were prepared, all dated 13th September, 2024.
 5. On 28th October, 2024 upon perusal of the reports, when the matter came before Court, it was noted that they contained negative recommendations on the grant of bail. Consequently, the Court directed the accused persons to make a formal bail application. It is this bail application that is subject of this Ruling.
 6. In support of the application, the accused persons filed written submissions dated 8th February 2025. They submitted that pursuant to Article 50(2)(a) of *the Constitution*, they have a right to be presumed innocent until proven guilty. As such, it is prejudicial for them to be remanded in prison which presumes that they are serving a sentence for a matter not heard and determined. That their continued incarceration contravenes the law of natural justice.
 7. It was their submissions that in the event the charges are not proven, it will be hard to remedy them for the suffering they will have endured being incarcerated for trumped up charges.
 8. The Applicants also made reference to Article 49(1)h of *the Constitution* which grants arrested persons the right to be released on bond or bail. It was their submission that the pre-bail reports filed in Court do not provide any compelling reasons to warrant denial of bail/bond. That the reasons advanced are far-fetched truth, malicious and are unsubstantiated. To buttress their argument, reference was made to the case of Republic versus Danson Mgunya and another (2010) eKLR; and Hillary Wachira Wanjiku versus Republic (2020) eKLR.
 9. They urged the Court to find that the pre-bail report cannot be the yardstick to measure the sustainability of an accused person to be released under reasonable bond terms. Further they urged that they were not a flight risk, have permanent places of abode and are willing to be reporting to the nearest police station fortnightly or monthly as the Court may direct.
 10. It was their further submission that the right of the deceased to be accorded justice does not override the rights of the accused persons, to be granted bail/bond and a balance ought to be reached.
 11. They urged the Court to exercise its discretion judiciously and be guided by the Judiciary Bail and Bond Policy Guidelines, in granting reasonable bond terms pending the hearing and determination of the suit.
 12. The prosecution opposed the application by way of oral submissions submitted in Court. They submitted that Article 49(1)h of *the Constitution* is not an absolute right. That the probation report indicated that the accused persons were not suitable for consideration to be released on bond. The compelling reasons given were as follows: that there is likelihood of interference with the prosecution



- witnesses; that the accused persons give threats to the community; that their act of disappearing from Yatta and later being arrested in Homabay demonstrates that they are a flight risk.
13. The prosecution urged the Court to consider the views of the victim pursuant to Section 9 of the *Victim Protection Act*. Further, it was submitted that the issue of bond/bail is an issue of discretion and the Court should be guided by the Bond and Bail Guidelines which if put to measure, all the accused person will not meet the set parameters.
 14. It was the prosecution's assertion that being denied bond does not mean a party has been condemned unheard. They urged the Court to find that all the accused persons were not suitable for bail/bond and the hearing of their case to be expedited.
 15. Article 49(1)(h) of *the Constitution* provides that, an accused 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. The compelling reasons are espoused in Section 123A of the *Criminal Procedure Code* which 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.
 16. The Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at page 25 sets out the 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.

17. In the case of Republic v Pascal Ochieng Lawrence 2014 (KEHC) 6587 KLR the court held as follows;

“It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the State. The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:-

- a. the seriousness of the offence although this carried greater weight under the old constitutional dispensation;
- b. the weight of the evidence so far adduced if the case is partly heard;
- c. the possibility of the accused interfering with witnesses;
- d. the safety and protection of the accused once he/she is released on bail/bond;
- e. whether the accused will turn up for trial;
- f. whether the release of the accused will jeopardize the security of the community.

18. In Republic v Fredrick Ole Leliman & 4 Others [2016]eKLR the court held that:-

“The principles set out under the Bail and Bond Policy Guidelines I have been referred to are the same ones that were set out in the celebrated case of Ng’ang’a v Republic 1985 KLR 451 where Chesoni J, as he then was thus:-“The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (Cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-

- a) The accused will fail to turn up at his trial or to surrender to custody;
- b) The accused may commit further offences; or
- c) He or she will obstruct the course of justice.

The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;



- a. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
 - b. The strength of the prosecution case;
 - c. The character and antecedents of the accused;
 - d) The likelihood of the accused interfering with prosecution witnesses.”
18. In this case, the key issue for consideration is whether the reasons presented by the prosecution constitute compelling grounds to justify denying bail pending trial. While the right to bail is fundamental, it is not absolute. If there are compelling reasons to restrict this right, the burden falls on the prosecution to provide sufficient evidence demonstrating why the accused should not be granted bail.
 19. The prosecution has argued that there are compelling reasons to deny the accused persons bail, citing findings from the pre-bail reports prepared by the probation officer. Regarding the 1st accused, the report highlights several concerns, to wit: that he is viewed by the community as a social misfit, has a previous non-custodial sentence for an alcohol-related offence, and is perceived as a security threat by the community, which is unwilling to have him back. Additionally, there is a likelihood that he could interfere with witnesses, as they are well known to him. For the 2nd accused, the concerns include his history of issuing threats to the community, negative character assessment by the local administration, and a high flight risk, as he fled from Yatta after the alleged incident. The 3rd accused is not directly considered a security risk; however, his association with the other co-accused persons has caused fear and panic among the witnesses.
 20. Additionally, the pre-bail reports indicate that the victims' families strongly opposed bail for all accused persons, expressing concerns that they might abscond and evade justice. On the other hand, the family members of the accused requested that they be granted favorable bond terms, stating their willingness to secure bond for them. The reports recommended that the 1st and 2nd accused persons are not suitable for bail or bond, while the 3rd accused's bond application should be deferred until key witnesses have testified.
 21. In this regard, I note that the prosecution heavily relies on the pre-bail report in opposing the accused persons' bond application. However, it is important to emphasize that an accused person is presumptively entitled to bail or bond. The burden rests on the prosecution to provide compelling reasons to justify denial. To meet this burden, the prosecution must present material evidence and substantive arguments supporting their position. Typically, this is done through an affidavit sworn by the Investigating Officer, which when supported by additional grounds presented by the prosecution—ordinarily provides a sufficient basis for the court to decide whether to grant bail.
 22. While the court may seek a pre-bail report for further insight, it is not binding and should not be treated as definitive proof for denying bail. Unlike an affidavit, which is sworn evidence, a pre-bail report consists of untested assertions and is largely based on perceptions and apprehensions rather than concrete evidence. Therefore, while it may assist the court in assessing the circumstances, it cannot independently justify the denial of bail or bond
 23. Before this Court, no proof has been presented, by way of affidavit or oral evidence before the court, demonstrating that the accused persons, if granted bail, would interfere with key witnesses. The prosecution has not substantiated this claim through affidavits or other admissible evidence to establish its likelihood. Additionally, the assertion that the accused persons' safety is at risk remains unverified,



as no supporting evidence has been provided. This claim appears to be speculative rather than based on any factual foundation.

24. I make reference to the case of R v Joktan Mayende & 3 Others (2012) eKLR, where the court in considering the scope of Article 49(1)(h) stated that the phrase “compelling reasons” denote that the reasons are forceful and convincing as to make the court feel strongly that the accused should not be released on bond. Bail should therefore not be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by *the Constitution*. An application for denial of bond is an application to limit a right enshrined in *the Constitution*. That limitation must be done on very cogent reasons.
25. In my view therefore, the prosecution has not provided any substantial evidence to support its submissions. I find that the reasons cited do not meet the threshold established under Article 49(1)(h) of *the Constitution*.
26. The upshot of the above is that the prosecution has not proved on a balance of probabilities that there are compelling and exceptional circumstances to warrant the denial of the bail/bond application. I therefore find that the accused persons ought to be granted bail in the following terms:-
 - a. The accused persons may be released on bond of Kshs.1,000,000.00 each with two sureties each of similar amount, to be approved by the Deputy Registrar of this Court.
 - b. They shall attend the Court whenever required to do so without fail.
 - c. The Accused persons shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that have been supplied by the State to the defence.
 - d. In the event that any of these conditions are violated, each is liable to have his bail cancelled and he shall proceed with the case while in custody.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF JUNE 2025

RHODA RUTTO

JUDGE

In the presence of;

.....ODPP

.....Accused

Sam, Court Assistant

