



REPUBLIC OF KENYA



Rotich v Rotich (Criminal Case E007 of 2025) [2025] KEHC 9696 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL CASE E007 OF 2025**

E OMINDE, J

JULY 3, 2025

BETWEEN

ELIZABETH JEPKURGAT ROTICH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on unknown dates between 21/02/2024 and 28/02/2024 at Kapsio village in Mindililwo Sub Location, in Keiyo North Sub County, within Elgeyo Marakwet County, with others not before court, she murdered Simeon Kiprop Cheboi.
2. Counsel for the Accused Person made an oral application for bail in open court. he prayed that the court admit the applicant to bail pursuant to Article 50(2) of *the Constitution* as there are no compelling reasons to deny her bail. That the Accused Person undertakes to attend court and has a place of abode. He cited the case of Joseph Thiong'o vs Republic and urged that the court should alternate a balance between the competing interest. He prayed that the court grant the Accused Person a bond of Kshs. 300,00/- or in the alternative, a cash bail of Kshs. 70,000/-. The Prosecution prayed to Court to direct that a Pre- Bail Report be availed first before it could respond. The court so directed and the same dated 27/03/2025 was filed.
3. Counsel for the accused in his application for bond urged that even after having perused the Pre Bail report, he was still of the view that the accused deserved to be released on bond. That this is because the Prosecution had failed to demonstrate that the ground was still hostile as therein alleged. That it is not correct as therein stated that the accused is a flight risk. That the accused presented herself to the Police upon being issued with summons. That the accused house was burnt down because it was alleged to have been built by the deceased. That because of this, there is no likelihood that the accused will go back there because even the family members that lived with her there have since relocated to a different place simply because there is no house to live in and not because their lives are in danger. That



in these circumstances then, the issue of her presence at the locus in quo being an emotional trigger does not arise.

4. Counsel further submitted that the pre bail report is merely persuasive not binding on the court. He relied on the case of R v Danford Kabagi Mwangi in support of this submission and further stated that in this same case, the court held that the main concern of the court should be whether if released on Bond, the accused will attend court. That the court may attach conditions to bond and further that the accused has a place to live and will religiously attend court upon whatever conditions the court may set if released on bond.
5. Counsel Mr. Cheruiyot watching brief for the family of the deceased submitted that the family was strongly opposed to the release of the accused on bond because the ground is still hostile and they are still very bitter with what happened. That it is also not in dispute that the accused was arrested outside the jurisdiction of the court and so therefore the assertion that she is a flight risk is very well founded. That the house was burnt down by members of the public out of rage and so the accused has no fixed abode and this is confirmed by Counsel for the accused that a relative is ready to accommodate her and for what period, it is not known and so it is their submission that until she gets a fixed abode, she remains in custody.
6. The Counsel for the Prosecution associated itself fully with the submissions of Counsel Watching Brief for the family and opposed the Application for bond on the grounds that the pre bail report was negative. She urged that the ground is hostile and the Accused Person's house was burnt to the ground following the incident. Therefore, for her own safety she needs to be in custody.
7. According to the pre bail report, the family of the victim is yet to come to terms with the death of the deceased and further, they said that the sight of the accused would be an emotional trigger as the deceased was their sole breadwinner. Further, that there have been no reconciliatory talks initiated due to the animosity on the ground. Additionally, the Report states that applicant ran away and was arrested in Western Kenya and that she is therefore a flight risk.
8. That whereas members of her family are ready to receive her, members of the community are still in shock and they felt that the presence of the accused would be a trigger due to the existing emotional tension. Some of the members of the community, when interviewed, expressed fear for the life of the accused as her house was even burned down by angry villagers. The probation officer concluded that the home environment was not conducive for the Accused Person to be released. He recommended the court defer her bond request to a later date.

Analysis & Determination

9. The relevant Constitutional provision governing the release of an accused person on bond is Article 49(1)(h) which 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.
10. Also applicable are the provisions of Section 123(A) of the CPC which sets out exceptions to the right to bail or bond. It provides that: - "
 - (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 relevant circumstances and in particular -



- a) the nature of 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 as 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."
11. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of *the Constitution*, the courts are to be guided by the provisions of section 123A of the *Criminal Procedure Code* which provides:

"In such a determination the courts are to factor the following exceptions to limit the right to bail;

- (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the Accused Person;
 - (c) The defendants record in respect of the fulfilment of obligations under previous grant of bail;
 - (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 if released on bail, it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own good."
12. 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.”

13. The High Court in *Republic v Pascal Ochieng Lawrence* [2014] eKLR stated 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: -The seriousness of the offence although this carried greater weight under the old constitutional dispensation;The weight of the evidence so far adduced if the case is partly heard;The possibility of the accused interfering with witnesses;The safety and protection of the accused once he/she is released on bail/bond;Whether the accused will turn up for trial;Whether the release of the accused will jeopardize the security of the community.”
14. Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 sets out judicial policy on bail as follows: -
- The following procedures should apply to the bail hearing: -
- 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.
15. I have considered the application for and against the release of the accused on bond. I have addressed my mind to the recommendations made in the Pre-bail Report. Even as I agree that these recommendations are not binding to the court they are persuasive and act as a guide for the court in determining not only what the circumstances on the ground are, but also the views of the victims on the plea for the release of the accused on bond which is a factor that the court is enjoined to take into account in reaching its determination.
16. In this case, it is very apparent from the findings in the said Report that the ground is very hostile and it is alleged that the accused ran away after the commission of the offence and was arrested in the Western part of the country which goes to show that she is a flight risk. That the family of the victim were strongly opposed to her release on bond for this reason and for reasons that the deceased who was the husband of the accused was the sole breadwinner of the family and the release of the accused would act as an emotional trigger for reasons that they had not yet healed appropriately even to initiate reconciliation talks.
17. Because it is not in dispute that the accused house was burnt to the ground then it is a fact that she does she have anywhere to live at the moment. All considered, I am satisfied that the Prosecution



has sufficiently demonstrated that there are compelling reasons to warrant the denial of bond to the accused person and more particularly that she is a flight risk. I am therefore satisfied that the granting of the application is not warranted and the same is accordingly denied. The Accused shall therefore be remanded in custody pending the hearing and determination of this case and it is now hereby so ordered.

18. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 3RD JULY 2025.

E. OMINDE

JUDGE

