



Imwene alias Stephen Imwene alias Daniel Imwene v Republic (Criminal Case E009 of 2021) [2024] KEHC 1233 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL CASE E009 OF 2021
CW GITHUA, J
FEBRUARY 14, 2024**

BETWEEN

**DAVID DOUGLAS IMWENE ALIAS STEPHEN IMWENE ALIAS DANIEL
IMWENE APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. In the Notice of Motion dated 23rd February, 2023, the accused person through his advocate, Mr James Denis Maina seeks review of the orders issued by this court (Hon. Kimondo, J) on 15th March, 2021 and prays that he be admitted to bond on reasonable terms pending conclusion of his trial.
2. The background against which the application was filed as can be ascertained from the court record is that when the accused was arraigned in court on a charge of murder, he denied the charges and subsequently, his advocate applied for his admission to bond pending trial.

The application was contested by the prosecution mainly on grounds that the accused was a flight risk for two main reasons: First, he did not have any known fixed abode and secondly, he had disappeared from the locus in quo for four days before he was arrested through intervention from an acquaintance.
3. In a ruling delivered on 15th March 2022, Kimondo, J concurred with the prosecution and held that the accused was a “serious flight risk” which was a compelling reason to justify denial of bail. The Hon Judge consequently denied him bail but directed that his trial be fast - tracked. These are the orders the accused person is inviting this court to review.
4. In the affidavit sworn in support of the current application, the accused avers that his father had sworn an affidavit saying he would live with him if released on bond and therefore, he will have a fixed abode. He denied that he was a flight risk and asserted that he had no intention of leaving the court’s jurisdiction. He pledged to attend the court whenever required.



5. The application is opposed by the state through the replying affidavit sworn on 20th November, 2023 by P.C Henry Mutua, one of the investigating officers. P.C Mutua deposed that the risk of the accused absconding was now higher given that his trial had already commenced; that the gravity of the offence he faced was another motivator for his temptation to abscond. Another secondary reason raised in opposition to bail is that if released, the accused was likely to interfere with witnesses.
6. The application was argued orally before me on 13th December, 2023. Learned counsel for the accused, Mr. Jimmy Maina submitted that the claim that the accused was likely to interfere with witnesses was baseless since the state had not adduced any evidence to demonstrate that the accused had any relationship with the prosecution witnesses. Further, counsel submitted that the claim that the accused was a flight risk was mitigated by the fact that he had close family ties and his father who was a minister in the Anglican Church was willing to stand surety for him and will ensure that he did not abscond.
7. In her response, learned prosecution counsel Ms. Gakumu opposed the application mainly on grounds that the accused was a flight risk given that it was not disputed that he was arrested in Weiteithie which was in Kiambu County whereas the offence was committed in Murang'a County; that even if the accused will live with his father and family if his application was successful, this did not clear the issue of him not having a fixed abode since in his affidavit sworn in support of the earlier application, his father did not indicate his physical address and it was not clear whether their home was in Bungoma or Busia County. In the circumstances, counsel submitted that if the accused absconded, tracing him to effect arrest would be very difficult.
8. I have carefully considered the application and the affidavits sworn in support and in opposition thereto. I have also duly considered the submissions made by both learned counsel and the content of the pre-bail report filed on 20th November, 2023. Having done so, I take the following view of the matter:
9. First, the application invites me to review the ruling of Kimondo J in which he declined to admit the accused to bond pending trial. In my view, this prayer is misconceived because this court lacks jurisdiction to review orders made in criminal proceedings by a judge exercising concurrent jurisdiction. A party aggrieved by the decision of such a Judge ought not to apply for review but should appeal against the decision to the Court of Appeal or in cases like this one where an accused person is denied bond or bail, the accused can make a fresh application for the court's consideration if circumstances that led to refusal of bail had subsequently changed.
10. That said, it is apparent that in filing the current application, the accused's counsel was of the mistaken view that he could only apply for renewal of his client's application for bond by applying for review of Kimondo J's orders. I could be wrong in this finding but whatever the case, I find that it would be in the interest of dispensing substantive justice to treat the application as one renewing the accused's bail application. I'll proceed to treat it as such and consider it on its merits.
11. I will start by observing that it is trite that the right to bond or bail pending trial is a constitutional right enshrined in Article 49 (1) (h) of the *constitution*. It is available to any accused person irrespective of the gravity of the offence charged. That right is however not absolute as it is limited by the existence of compelling reasons.
12. The factors that guide the court's exercise of discretion in deciding whether or not to grant an accused person bond are several and are well enumerated in Section 123 A of the *Criminal Procedure Code* as well as the *Judiciary's Bail and Bond Policy guidelines*, 2015 but the overarching consideration is whether if released, the accused will attend his trial or was likely to abscond.



13. In this case, it is not disputed that the accused fled from the scene of crime in Kabati area of Murang'a County and was only arrested several days later in Witeithie, Kiambu County where he was tracked down by the police through an acquaintance.

There is no suggestion that there was any threat on his life or safety which would have made him run away from the deceased's home on the night in question in search of safety. The accused after leaving the home did not surrender to the police. It is therefore evident that the sole reason for fleeing the deceased's home was to evade arrest and this in my considered view was a clear demonstration of the accused's disposition to abscond.

14. I appreciate the finding in the pre-bail report that the accused's family is supportive of his quest to be admitted to bond and his father who is a church minister has offered to stand as his surety and to live with him during the pendency of the trial. The accused has also expressed his wish to live with his parents in their home in Busia County during the trial if his application was allowed. However, it is not lost on me that the Probation Officer has noted that the accused did not have strong social ties that would prevent him from moving away from his parent's home. Moreover, this court cannot order as a precondition to bond that the accused shall only live with his father during the trial since this is a condition that this court is ill equipped to enforce.
15. Further, as noted by Kimondo J, the accused uses many alias names for reasons that are not clear. Besides, there is a claim in the pre-bail report which is not disputed that the accused is yet to obtain a national identity card which means that his Bio data and other personal details are yet to be captured in the National Registration Bureau data base. This in effect means that if he was released on bond and he absconded, the chances of the police tracing him to execute a warrant for his arrest may be very slim.
16. In addition, the *Victims' protection Act* 2014 obligates courts to consider views of the victim's family at this stage. Those views have been captured in the pre- bail report and it is clear that the victim's family is opposed to admission of the accused to bond for fear that he may be a flight risk.
17. For all the foregoing reasons, I have come to the same conclusion as Kimondo J did that if released, there was a high probability that the accused may not turn up for his trial. As stated earlier, the major consideration that a court bears in mind when determining applications of this nature is whether the accused if released will attend to his trial or he was likely to abscond. In this case, for the reasons stated above, I am satisfied that the accused has failed in that test. I therefore find that this application lacks merit and it is hereby dismissed.
18. Now that the accused has been denied bond, it is only fair that his trial be expedited. Consequently, I order that since the case is already partly heard, its conclusion be accelerated by the prosecution ensuring availability of witnesses on hearing dates which dates shall be taken on priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 14TH DAY OF FEBRUARY, 2024.

C. W GITHUA

JUDGE

In the presence of:

The Accused

Mr. Jimmy Maina for the Accused

Ms. Muriu Prosecution Counsel



Ms. Susan Waiganjo Court Assistant

