



**Mutungi v Republic (Miscellaneous Criminal Application
E057 of 2023) [2024] KEHC 955 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E057 OF 2023
RN NYAKUNDI, J
FEBRUARY 7, 2024**

BETWEEN

FRANCIS NJOROGE MUTUNGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant is facing a charge of Assault causing bodily harm contrary to section 251 of the penal code in brief on the 8th day of January 2023 at Soweto area within Moisbridge town, in Soy sub-county within Uasin Gishu assaulted Susan Njeri Mutungi, thereby occasioning him actual bodily harm. The applicant pleaded not guilty culminating in the crime being prosecution by the DPP. At the interlocutory stage the learned trial magistrate decline to release the applicant on bond as stipulated in Art. 49 (1)(h) of *the Constitution*. He has preferred a review before this court based on affidavit in support filed in court on 5th July, 2023 depose as follows;
 1. That I am Kenyan citizen adult male of sound mind hence complete to swear this affidavit.
 2. That I was charged with offence as assault contrary to section 251 of the *CPC*
 3. That the trial is yet to commence and fixed hearing date
 4. That upon plea taking the prosecution opposed my bail application without a compelling reason.
 5. That I am making this application before this honorable court as provided by *the constitution* under Art. 65 (6) (7) of *the Constitution* of Kenya 2010 and in reliance to section 362, 363 and 365 of the *CPC*
 6. That may this honorable court be pleased and review the orders of the trial court and allow applicant with bail pending the hearing of the trial court



7. That the applicant has a young family which depends on him
8. That all I have deponed herein is true to the best of my knowledge information and belief.

Decision

2. The right to bail and bond is a constitutional right anchored under Art.49 (1) (h) of *the Constitution* as read with section 123 and 123 (a) of the *CPC. The Constitution* outlines in Art.24 on limitation of rights and fundamental freedoms. Therefore, right to bail is not absolute going by the provisions of this article which states as follows;

A right or fundamental freedom in the Bill of Rights shall not be limited except by law and the only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom taking into account all relevant factors including;

- a. The nature of the right or fundamental freedom.
 - b. The importance of the purpose of the limitation.
 - c. The nature and extent of the limitation.
 - d. The need to ensure that the enjoyment or rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms other and
 - e. The relation between the limitation and its purposed and whether there are less restrictive means achieve the purpose.
3. The court in the case of *Dr. Kiiza Besigye vs Uganda Criminal Application No. 83 of 2016* the court held that;

court has consider and balance the rights of the individual, particularly with regard personal liberty, the active principle in granting bail is that of upholding the liberty of the individual, while simultaneously protecting the administration of justice”.

4. The court further in *DKN vs Republic (2021)* eKLR illuminating case law as to what constitutes compelling reasons to deny an accused person enjoyment of the rights to bail adopted the approach taken by the court of appeal in *Michael Juma Oyamo & another vs Republic (2019)* eLKR adopted the definition of the phrase “compelling reason in the case of *R. vs Joktan Malende and 3 others Criminal Case no. 55 of 2009* where the learned Judge held that;

The phrase compelling reasons would denote that are forceful and convincing as to make the court fell very strong that the accused not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by *the Constitution*”.

5. In the case of *Republic vs Francis Kimathi (2017)* eKLR the court held that;

There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Except, however, compelling reason should be a reason or reasons which is rousing, strong, interests, attention, and brings conviction upon the court that the accused person should be denied bail. Flimsy reasons will not therefore do. Therefore, the standard is high for it draws from the constitutional



philosophy that any restrictions of rights and freedoms of persons must be sufficiently justified given the robust Bill of rights enshrined in *the Constitution*”.

6. In the instant application it was contended by the applicant that the learned trial magistrate in declining to protect his right to bail erred in both law and facts to call upon this court to exercise revisionary jurisdiction to set aside the impugned order and have it substituted with that of releasing him on bail in terms of Art. 49 (1) (h) of *the Constitution*. The vital point to note is that the discretion to release an accused person on bail pending trial is conferred upon the court of first instance. The dominant characteristic of that process involves the exercise of discretion to be performed after an assessment of the facts to which any particular of it would impact on the decision to be made commensurable with the constitutional imperative on the right to bail. It is essential also to mention that the pre-bail report dated 6th February, 2023 is non responsive. The compelling circumstances as identified by the probation officer include the high probability of the applicant to interfere with the witnesses and also his own security and safety. There is no corresponding rebuttal evidence to the cited compelling reasons. Based on this premise I find no reason to review the decision on bail as agitated by the applicant. The application is lost and the primary file shall be returned to the trial court to fast track the hearing and determination on liability against the applicant.

DATED SIGNED AND DELIVERED THIS 7TH DAY OF FEBRUARY, 2024.

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R. NYAKUNDI

JUDGE

