



Director of Public Prosecutions v Mutai & 3 others (Criminal Case E028 of 2023) [2024] KEHC 3718 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E028 OF 2023
RN NYAKUNDI, J
APRIL 18, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

LEONARD KIBIWOTT MUTAI 1ST ACCUSED

ROBERT KIPRUTO 2ND ACCUSED

GIDEON KIPKURUI KANGOGO 3RD ACCUSED

PHILIP CHERUIYOT KIGEN ALIAS SIMBA 4TH ACCUSED

RULING

1. By a Notice of Motion dated 14/3/2024, the accused persons seek the following orders;
 1. Spent.
 2. That this Honourable Court be pleased to grant reasonable bail and bond terms to the accused persons/Applicants.
 3. That this Honourable Court be pleased to issue any necessary directions, and/ or issue such orders as may be fair and just in the circumstances of the case.
2. The application is premised on the grounds therein and is further supported by affidavit sworn by Philip Cheruiyot Kigen, the 4th accused person on 14th, March, 2024.

The Applicants' Case

3. The Applicants deposed that sometime in mid-November, 2023 they were arrested on the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The Applicants maintain that this Court made a ruling that a pre-bail report be filed in Court and the same was done indicating



that all of them were suitable for admission for bond. Further, that at the behest of this Court, the pre-bail report was compiled and files by Ms. Catherine J. Amugohe on 23/1/2024 for consideration for bail. The Applicants maintain that the said officer visited the homes for both the victims and the Respondents and filed a report indicating that all the accused persons were suitable for admission to bond. According to the Applicants, the state is not opposed to this instant application as the proceeding of 24/1/2024 indicate that Ms. Okok did not oppose their bail application and in fact proposed that they could be released on a bond Kshs.400,000/= with a surety of similar amounts each and in the alternative, the state proposed that each accused person could be released on cash bail of Kshs.250,000/= each and on any further terms that the Court may issue.

4. The 4th accused person maintains that he has an underlying medical condition and had been admitted to hospital severally during the period within which he has been in custody and that his health has deteriorated significantly since he was incarcerated.
5. The Applicants further deposed that the issued forming the substratum of this instant application is that despite of the accused persons being ready with their bond instruments, title deeds as well as valuation reports as well as sureties, this Court has not pronounced itself on whether it has granted or denied bail and bond to their detriment. The Applicants urged the Court to consider the rights the accused persons and the right to fair hearing in granting and or denying their right to bail noting that they have been in custody for close to 5 months as at the time of filing this application. The Applicant deposed that this matter has been slated for hearing on 16/9/2024, and the issue of bond is yet to be determined.
6. The Applicants contend that unless the orders herein are granted they are likely to continue suffering prejudice and continue serving a sentence without trial against the laid down constitutional principle on presumption of innocence pending trial and determination if suit.
7. On 24/1/2024, the Office of Director of Public Prosecutions through State Counsel Ms. Emma Okok did not object to the Applicants application of bond. Ms. Okok told the Court that the accused persons may be released on a cash bond of Kshs.400,000/= and or a surety of a similar sum or in the alternative a cash bail of Kshs.200,000/=.

Determination

8. The Court has discretion to grant or refuse bail depending on the circumstances of each case. The Court is required to take into consideration settled principles of the law when determining whether or not to grant bail pending the hearing of a criminal case or pending the hearing of an appeal.
9. Article 49(1)(h) of *the constitution* of Kenya provides;
An arrested 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. Section 123(3) of the *Criminal Procedure Code* provides;
The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.
11. Section 123A of the *Criminal Procedure Code* provides;



- (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;
12. At Paragraph 3.1. (d) of the Bail and Bond Policy Guidelines (at page 9) it is provided that:
 - d) “...Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.
 13. On whether the Orders for release of the accused person herein on bail/bond pending trial is merited, bail/bond is a constitutional imperative for arrested persons but that right is not absolute where there are compelling reasons to limit the right.
 14. While appreciating that the accused persons herein are innocent until proven guilty as no evidence has been placed before this Court yet on their culpability.
 15. A pre-bail report acts as a guide to the Court when considering the suitability of an accused person whether to be released on bail and/or bond. However, the pre-bail report is not the final say. The Court had directed that a pre-bail report be filed. According to the Pre-bail Assessment Reports dated 6/3/2023 and filed on 7/3/2023 the Probation Officer urged that the bond terms be deferred until when the Court is through with the four witnesses because of vulnerability.
 16. In *Republic Vs. William Mwangi Wa Mwangi* [2014] eKLR where Muriithi, J held that:

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial



and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

17. Similarly, in the case of *Kelly Kase Bunjika v Republic* [2017] eKLR the Court had this to say: -

“It is clear that the primary consideration for bail is whether the accused will attend his trial for charges facing him and it must therefore be a compelling reason if it is demonstrated that the accused person is likely to fail to attend court proceedings. The question in this matter becomes whether there is on a balance of probabilities evidence that the accused is likely to abscond.”

18. In Nyeri High Court Criminal Case No. 8 of 2016 *Republic vs Danford Kabage Mwangi* the criteria or compelling reasons to consider in the exercise of judicial discretion in bail applications were set out to include:

- i. The nature of the charges.
- ii. The strength of the evidence.
- iii. The gravity of the punishment in the event of conviction.
- iv. The previous criminal record of the accused, if any.
- v. The probability that the accused may not surrender himself for trial.
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.
- vii. The likelihood of further charges being brought against the accused.
- viii. Detention for the protection of the accused.

19. In this case, the prosecution has not adduced any compelling reasons to enable the Court deny the accused persons the enjoyment of their constitutional right to bail as they can be mitigated through appropriate bond and bail terms. Further the prosecution has not tendered any evidence to suggest that the accused persons herein are unlikely to attend Court or is likely to interfere with the prosecution witnesses.

20. Having considered the circumstances of this case, the pre-bail report, I therefore find and hold that there being no compelling reason to deny the accused persons bail/ bond, the same to be released on a Kshs.400,000/= personal bond with one surety of a like sum or in the alternative each accused person is hereby released on a cash bail of Kshs.250,000/=.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF APRIL, 2024.

In the Presence of

Mr. Oduor for the Accused

Accused

.....

R. NYAKUNDI

JUDGE

