



**Republic v Juma (Criminal Case E002 of 2024)
[2024] KEHC 3737 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E002 OF 2024**

AC MRIMA, J

APRIL 16, 2024

BETWEEN

REPUBLIC APPLICANT

AND

BRIAN MUSALWA JUMA ACCUSED

RULING

Introduction And Background

1. This ruling relates to the Accused’s oral application for bail pending trial. The application was presented by Learned Counsel Miss. Rutto for the accused.
2. The application was vehemently opposed.
3. The accused submitted that he was constitutionally-entitled to bail pending trial since he was innocent until proved otherwise. He recalled that the averments made by the investigating officer were not proved and amounted to heresay. He, in particular, contended that he has a fixed abode, there is no hostility against him in the village and that he is not a flight risk.
4. On its part, the prosecution relied on an Affidavit sworn by No. 111446 PC. Kennedy Njoroge, the investigating officer, on 17th January, 2024.
5. In the disposition, the investigator deposed that the Accused was a flight-risk and that he had disappeared immediately after the commission of the offence herein. That, he was only arrested two years later through intelligence reports. He also averred that there was overwhelming evidence against him including eye-witnesses all who are ready to immediately testify. He reiterated that the Accused had no fixed abode and also decreed that the life of the Accused is at risk upon release since the villagers are still hostile. Counsel urged this Court not to admit the Accused into bail pending trial.



6. Citing the the Constitution, Learned Prosecutor Miss. Kiptoo argued that the right to bail pending trial was not absolute. He urged this Court to really consider the rights of all parties and to strike a balance by disallowing the application.
7. It is on the basis of the foregoing that this Court is called upon to determine the bail and bond application.

Analysis:

8. The foundation of bail or bond in Kenya is the the Constitution and the Criminal Procedure Code, Cap. 75 of the Laws of Kenya (hereinafter referred to as ‘the CPC’).

9. Article 49(1)(h) of the the Constitution states as follows: -

An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or a trial, unless there are compelling reasons not to be released.

10. Section 123(A) of the CPC sets out exceptions to the right to bail or bond. The provision was brought on board with a view to align the CPC with the the Constitution. It provides that: -

- (1) Subject to Article 49(1)(h) of the 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. The rationale behind bail or bond in Kenya is premised on the constitutional imperative under Article 50(2)(a) of the the Constitution that an accused is presumed innocent until the contrary is proved.

12. In bail or bond applications, therefore, the primary consideration must always be the ability of the accused to attend trial. The only exception remains where compelling reasons are demonstrated. Ibrahim, J (as he then was) in *Republic v Danson Mgunya & Another* [2010] eKLR described the right to bail as an “inalienable right” by holding that;

The result of the foregoing is that a murder suspect has a constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.



13. Therefore, in granting bail or bond, the trial Court is called upon to exercise its discretion and, if there are no compelling reasons to deny an accused bail or bond, the trial Court should exercise its discretion in favour of the accused.
14. Both the the Constitution and the CPC do not define what ‘compelling reasons’ are.
15. But what does the term ‘compelling reasons’ mean?
16. The term has been used in other jurisdictions to mean ‘exceptional circumstances’ or ‘unusual’ and ‘extraordinary circumstances’. Having gone through various statutes, scholarly writings and decisions within and outside our jurisdiction, it appears that the term ‘compelling reasons’ (or as the case may be) is not settled and may include a rubric of circumstances.
17. The 10th Edition, Black’s Law Dictionary defines ‘extraordinary’ as “beyond what is usual, customary, regular or common”. It also defines ‘a circumstance’ as “an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event”. The dictionary goes ahead to define “extraordinary circumstance” as “a highly unusual set of facts that are not commonly associated with a particular thing or event.”
18. In Kenya, Courts have, as well, dealt with the issue. In Republic v Joktan Mayende & 3 Others (2012) eKLR, Mohamed Abdurrahman Said & Another v Republic (2012) eKLR, Wilson Thirimba v DPP (2012) eKLR, among others, the Courts reverted to the meaning of the word ‘compelling’ as defined in the Concise Oxford Dictionary, 9th Edition which is defined as ‘rousing, strong, interest, attention, conviction or admiration’.
19. Admitting the challenge in the term ‘exceptional circumstances’, the Constitutional Court of South Africa in Liesching and Others v S (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (29 August 2018) quoted with approval the definition in S v Petersen 2008 (2) SACR 355 (C) and had this to say: -

Meaning of “exceptional circumstances”

- (39) The phrase “exceptional circumstances” is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as “ordinary” in one case may be treated as “exceptional” in another. For instance, in Petersen a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court) observed in relation to an application for bail under section 60(11) (a) of the Criminal Procedure Act:

On the meaning and interpretation of ‘exceptional circumstances’ in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a



court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.

20. Defining the term further, the South African Court in *S v Bruintjies* 2003 (2) SACR 575 (SCA) had the following to say: -

.... What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.

... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

21. Still on the South Africa jurisprudence, in *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266 g-h, the Court dealt with what exceptional circumstance are and reiterated that the Applicant in bail application must, on a balance of probability, demonstrate that “exceptional circumstances” in his or her case, indeed, do exist and that they “in the interests of justice permit his release”. This, according to the Court, involves the balancing” between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown by the accused to exist”.
22. And, in *Antonio Jacobie Snyders v The State* (A455/2015) 2015 ZAGPPHC 618, the High Court in South Africa dismissed an appeal against denial of bail on the basis of the fact that the community was up in arms as it found it necessary to voice its opinion regarding the conduct of the Appellant. The Appellant’s concessions relating to his safety meant that it would not be wise to release the Appellant on bail. Indeed, the Appellant conceded that the community would not accept him back with open arms and that there existed some enmity between him and the community.
23. Given the amorphous nature of the term ‘compelling reasons’ or ‘exceptional circumstances’, a Court while exercising its discretion in dealing with a bail and bond application must ‘consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release’ and must also balance “between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown....”. In Kenya those ‘compelling reasons’ or ‘exceptional circumstances’ must be demonstrated by the prosecution.
24. In delineating the parameters of ‘compelling reasons’ and ‘exceptional circumstances’ and remaining alive to the provisions of Section 123(A) of the *CPC*, the High Court in *Republic v Pascal Ochieng Lawrence* [2014] eKLR stated as under: -

.... 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.”

25. Further, the High Court in *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR in determining the criteria to be applied on whether to grant bail or bond relied on the decision by the Supreme Court of Nigeria in *Alhaji Muiabid Dukubo-Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows: -

...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -

- i. The nature of the charges;
- ii. The strength of the evidence which supports the charge;
- 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. The probability of guilty;
- ix. Detention for the protection of the accused;
- x. The necessity to procure medical or social report pending final disposal of the case”. [Emphasis added]

26. Returning to the case at hand, the prosecution’s contention in this matter is threefold. First, that the Accused was a flight-risk in that he flee for 2 years after commission of the offence; second, that there was overwhelming evidence against him including eye-witnesses who are ready to testify, and third, that the Accused had no fixed abode.
27. In dealing with this matter, this Court should not lose sight of the fact that the right to bail or bond is one of those rights under the Bill of Rights whose enforcement is aimed at preserving the dignity of individuals and communities, the promotion of social justice and the realisation of the potential of all human beings.
28. Having said as much, this Court now turns to a consideration of the grounds tendered in opposition to the application.
29. On the ground that the Accused was a flight-risk, this Court notes that the Accused did not specifically respond to the allegation. There was no disposition on oath at least to highlight on his whereabouts during the period in issue. The State’s contention is, therefore, uncontroverted and, hence, proved.



30. On the allegation of overwhelming evidence, such ought to be treated with a lot of caution at this point in time since the evidence is yet to be supplied to this Court and more importantly, it is yet to be subjected to the rules of evidence.
31. The issue of the Accused having no fixed abode was deposed to by the investigator. Again, the Accused did not file any disposition thereto.
32. This Court directed that a Pre-Bail report be filed. The Probation Office duly complied. The Report The report is dated 11th March, 2024. This Court has considered the Report with the caution that it was untested. In the report, the Accused's family had serious reservations on his release as they feared that the members of public are likely too harm him on his immediate release. The position was buttressed by the local administration. In fact, it was alleged that members of the public had been harassing the Accused's family to disclose the Accused's whereabouts during the time the Accused was at large.
33. Having carefully considered this matter and in light of the in-depth analysis of the the Constitution, the law and various decisions, this Court finds in light of Article 49(1)(h) of the the Constitution and Section 123A(2)(b) of the CPC, there are compelling reasons in this case qualifying the non-admission of the accused to bail or bond at this point in time. The compelling reason are that the Accused is a flight-risk given the period of 2 years he has been at large and that there is proven animosity against the accused within his village.
34. It is on the basis of the above twin reasons and in light of the unique circumstances of this case that this Court declines the application.
35. Consequently, the following orders do hereby issue: -
 - a. The application seeking that the accused admitted to bond and bail pending trial is hereby declined.
 - b. The hearing of the case will, however, be expedited.

Those are the orders of this Court.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually and in the presence of: -

N/A for Miss. Rutto, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

