



**Republic v Werunga & another (Criminal Case E003 of 2024)  
[2024] KEHC 3186 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3186 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE E003 OF 2024  
AC MRIMA, J  
APRIL 5, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**JAPHET MASHA WERUNGA ALIAS JEFF ..... 1<sup>ST</sup> ACCUSED**

**HEZRON WANJALA MAHANGA ALIAS SIRO ..... 2<sup>ND</sup> ACCUSED**

**RULING**

**Introduction and Background:**

1. This ruling relates to the application by way of a Notice of Motion dated 28<sup>th</sup> February, 2024. It was taken out by the Prosecution.
2. The application seeks an order of this Court to decline to place the accused on bond/bail pending trial.
3. Among the grounds in support of the application were that the accused disappeared immediately they committed the offence and the 2<sup>nd</sup> Accused had to be arrested in Nairobi, that two other suspects were still at large and that the ground was still hostile to the accused and they were likely to be attacked on release.
4. The accused vehemently opposed the application.
5. They orally submitted through Miss. Rutto, Learned Counsel, that they were constitutionally-entitled to bail pending trial since they were presumed innocent until proved otherwise. They recalled that the averments made by the investigating officer in the application were not proved and amounted to heresay. They, in particular, contended that they had fixed abodes and that they were not flight risks and undertook to comply with all the conditions given by this Court.



6. Citing the Constitution, Learned Prosecutor Miss. Kiptoo argued that the right to bail pending trial was not absolute. She 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 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 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 Constitution. 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. The rationale behind bail or bond in Kenya is premised on the constitutional imperative under Article 50(2)(a) of 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 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 10<sup>th</sup> 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 DPP [2012] eKLR, among others, the Courts reverted to the meaning of the word ‘compelling’ as defined in the Concise Oxford Dictionary, 9<sup>th</sup> 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. Among the averments deposed to by the Investigating Officer relates to the situation on the ground. The officer stated in paragraph 5 of his Affidavit in support of the application as follows: -
5. That due to the facts surrounding this case and situation on the ground, the respondents are in danger of being harmed by the members of the public. Due to the sensitivity of the case and anger which it has generated in the society. I am afraid that should the accused be released on bond/bail at this particular time the public may see it differently and may resort into some sort of lawlessness against the accused persons.
27. The accused did not file any responses on oath to the application. They did not, as well, tender any evidence on oath in Court over the averments in the application. They instead relied on the oral submissions by their Counsel.
28. This Court has previously, and in another matter, witnessed a scenario where an investigator opposed a bond application on the ground of hostility and after a protracted and vicious hearing, the Court admitted the then accused into bond/bail. On release, the accused was killed and another murder case is still pending before this Court.
29. Whereas cases must be determined on the basis of their peculiar circumstances and factual attributes, a Court must always remain vigilant with a view to inter alia protect the lives of people.
30. In this case, the contention on oath that there was hostility by members of public against the accused was not rebutted. This Court, therefore, finds the averment to be prima facie true.



31. It is, hence, on that basis that this Court will reluctantly allow the application.

**Disposition:**

32. And, on the basis of the above discussion, the following orders do hereby issue: -

- a. The Notice of Motion dated 28th February, 2024 is hereby allowed.
- b. In the meantime, the Accused shall not be admitted into bond/bail until the civilian witnesses testify. Once that happens, the Accused shall be at liberty to renew the application.
- c. In view of the above orders, the hearing herein shall be expedited and a hearing date shall; be fixed today.

Those are the orders of this Court.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**A. C. MRIMA**

**JUDGE**

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

Miss Rutto, Learned Counsel for the 2<sup>nd</sup> Accused.

N/A for Kisaka, Learned Counsel for the 1<sup>st</sup> Accused.

Mr. Kiptoo, Learned Senior Assistant Director of Public Prosecutions instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

