



**Republic v Jayeshkumar & 4 others (Criminal Case E005 of 2024)
[2024] KEHC 5141 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL CASE E005 OF 2024
DR KAVEDZA, J
MAY 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

VELJI JAYABEN JAYESHKUMAR 1ST ACCUSED

MBITHI MUNGUTI MULANDI 2ND ACCUSED

KEYLAN VEKARIYA KALYAN SHIVJI 3RD ACCUSED

GIDEON MUASYA NTHALE 4TH ACCUSED

STEPHEN MWEU MUSEMBI 5TH ACCUSED

RULING

1. The accused persons have been charged with the offence of murder contrary to section 203 as read with 204 (Cap 63) Laws of Kenya. The particulars of the offence are that on February 14, 2024 at Mavoko Sub County within Machakos County jointly with others not before court murdered Jayesh Kumar Kanji Velji.
2. The accused, represented by their advocates, applied for bail pending trial. Mr. Kassim, representing the 1st accused, argued that his client is innocent until proven guilty and has a permanent residence in Kenya. He also stated that she is not a flight risk, as her passport is currently held by the DCI Langata. Mr. Muthama and Mr. Kago representing the 2nd and 5th accused respectively, similarly emphasized that their clients were not a flight risk. Mr. Wekesa, representing the 3rd accused, asserted that his client also has a permanent residence in Kenya, and her passport is held by the DCI Langata. He argued that there are no compelling reasons to deny bail. Mr. Muimi, representing the 4th accused, maintained that his client also has a permanent residence in Kenya and argued against denying bail pending trial.



3. In response to the applications for bail, PC Hudson Nyongesa submitted an affidavit opposing the release of the accused persons on bail. He emphasized that the deceased was the husband of the 1st accused, suggesting potential public unrest if she were to be granted bail, especially considering their shared residence in Nairobi West. He raised concerns about the 1st and 3rd accused persons, pointing out that they possess Indian Passports and Kenyan resident cards, implying a flight risk if they were to be released. Additionally, he expressed apprehension that the 3rd accused might interfere with prosecution witnesses, particularly siblings and close relatives. Moreover, he noted that the 1st accused, who resides with her mother, a prosecution witness, has not arranged an alternative place of residence.
4. Further arguments were presented regarding the attempts of the 3rd and 5th accused persons to interfere with evidence related to the deceased's death. Additionally, he highlighted that the 2nd, 4th and 5th accused persons lacked a fixed place of abode adding weight to the argument for the denial of bail. These assertions were put forth as compelling reasons to oppose the granting of bail.
5. In rebuttal, learned counsel representing the 1st accused argued that if granted bond, she would reside with her brother instead of returning to her matrimonial home in Nairobi West. Additionally, learned counsels Mr. Muthama, Mr. Wekesa, Mr. Muimi, and Mr. Kago reiterated that their respective clients would not interfere with prosecution witnesses if released on bail or bond. Furthermore, they assured the court that their clients would comply with any conditions set by the court.
6. Having considered the application, the response thereto, the submissions made and the applicable law, the issue for determination is whether there are compelling reasons to deny the accused persons reasonable bail/bond terms.
7. Article 49(1) (h) of the *Constitution* guarantees the right of an arrested person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released. The onus of proof in bail applications in respect of compelling reasons is borne by the state under section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The right for an accused person to be released on bail is not absolute.
8. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of the *Constitution*, the courts are to be guided by the provisions of section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides:
 - “(1) In such a determination the courts are to factor the following exceptions to limit the right to bail;
 - (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;
 - (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 if released on bail, it is likely that he would fail to surrender to custody;



(b) Should be kept in custody for his own good.

9. the Constitution specifically requires under Article 49 (h) of the Constitution of Kenya that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the Criminal Procedure Code, Article 49 (h) of the Constitution places the burden of proof on the state to demonstrate compelling reasons. It is therefore upon the prosecution to prove that there are compelling reasons why the accused should not be released on bail.
10. The prosecution, through an affidavit opposing bond, asserted that the 1st and 3rd accused, who hold Indian Passports, are foreigners and therefore pose a flight risk, as they may attempt to flee the jurisdiction of the court. In deciding whether this is a compelling reason, this court is guided by Article 49(1)(h) of the Constitution, the Bail/Bond Policy by the Judiciary, and decided cases.
11. In the present application, the main concern of this court is whether the 1st and 3rd accused persons will attend court if he is released on bail pending trial. That fact that he is innocent until proven guilty by a court of competent jurisdiction is without doubt. In cases where the accused is a foreigner, the courts have come up with certain principles to be taken into further consideration in determining whether or not to release the accused on bail/bond pending trial. The cases this court has considered include Republic vs Kokonya Muhssin [2013] eKLR, Republic vs Dwight Sagaray & 4 Others [2013] eKLR, Republic vs Makoy Madhak Deer [2015] eKLR and Republic v Richard David Alden [2016] eKLR.
12. Being a foreigner per se is not an inhibiting consideration in determining whether or not the accused should be released on bail pending trial. Another factor is whether the accused has a fixed abode in Kenya and whether he has property or familial connections in Kenya. Another factor is the nature of the charge that the accused is facing and whether the likely sentence to be meted out may serve as an incentive or impetus for the accused to abscond from the jurisdiction of the court. In addition, the court should also consider antecedent and subsequent conduct of the accused before and after being charged. The factors listed above are by no means exhaustive. Each case will depend on its facts and circumstances.
13. The fact that the 1st and 3rd accused persons are foreigners is a material factor when this court is determining whether or not he should be released on bail pending trial. The prosecution in their affidavit admitted that the 1st and 3rd accused hold Kenyan residence cards. In addition, they have a fixed abode in Nairobi West. It is this acknowledgement. It is perplexing, however, that they now claim that they lack a fixed abode thus contradicting their solemn affirmations.
14. In my view, the prosecution did not supply cogent and credible evidence to support the contention that the 1st and 3rd accused persons lacked a fixed abode and were a flight risk by virtue of being foreigners. It was shown that they had a fixed abode and family ties in the country. Being a foreigner is not a sufficient grounds to deny them bail. Their attendance to court can be secured by the court granting an order for appropriate Kenyan sureties.
15. Regarding accused 2, 4 and 5, it was also contended that they had no known fixed place of abode. The prosecution attempted to equate living in rental premises to having no fixed abode. Surely that cannot be a reason for the denial of bond. Most urban dwellers do not live in their own houses. Such a ground would mean that anyone living in a rental house would be found to have no fixed place of abode. No evidence has been placed before the court to show that the 2nd, 4th, and 5th accused persons change residences so frequently that they can be assigned such a label.



16. Finally, the prosecution contended that there was accused persons were likely to interfere with prosecution witnesses. I find that the allegations that the accused persons are likely to interfere not to be supported by evidence. As such, the ground fails.
17. It is my finding that the prosecution has not provided compelling reasons for the denial of bail/bond. From the foregoing, I find merit in the application for bail pending trial and make the following orders:
- i. Velji Jayaben JayeshKumar the 1st accused and Kaylan Vekaria Kaylan Shivji the 3rd accused are each hereby admitted to a surety bond of Kshs. Five million (5,000,000) of a fixed asset owned by a Kenyan Citizen.
 - ii. The 1st and 3rd accused are hereby directed to deposit their respective passports in Court which shall be retained during the period of the trial.
 - iii. The 1st and 3rd accused are each directed to provide one contact person who is Kenyan Citizens.
 - iv. This order shall be served upon the Indian Embassy by the Court Process server who are directed not to issue the 1st and 3rd accused persons with a new/replacement passport.
 - v. This order shall be served upon the Immigration Department by the Court Process server who shall issue a red alert against the 1st and 3rd accused persons barring them from travelling outside the jurisdiction of the court during the period of their trial.
 - vi. Mbithi Munguti Mulandi the 2nd accused, Gideon Muusa Nthale the 4th accused and Stephen Mweu Musembi alias Musungu the 5th accused are each admitted to a surety bond of Kshs. Three million (3,000,000). In the alternative, they are each admitted to a cash bail of Kshs. One million (1,000,000).

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Paklea for the State

Kassim for the 1st accused

Muimi h/b for Muthama for the 2nd accused

Wekesa for the 3rd accused

Muimi for the 4th accused

Kago for the 5th accused

Joy Court Assistant

