



**Director of Public Prosecution v Abdi & 2 others (Criminal Revision
E020 of 2024) [2024] KEHC 8818 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CRIMINAL REVISION E020 OF 2024
JN ONYIEGO, J
JULY 24, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPLICANT

AND

OMAR FARAH ABDI ALIAS AFRO 1ST RESPONDENT

ABDIFATAH IBRAHIM GEDI 2ND RESPONDENT

ALI SHABAAN SHINIYO 3RD RESPONDENT

RULING

1. The respondents herein were charged with the following counts:
2. Count one; Commission of Terrorist Act C/SEC 4(2) of the *Prevention terrorist Act*, 2012 Particulars are that: Omar Farah Abdi alias Afro, Abdifatah Ibrahim Gedi and Sheikh alias Ali Shaban Shiniyo on the 25th day of March, 2024 at around 1036hrs at Fish point hotel in Mandera township of Mandera East Sub-County, jointly attacked Fish point hotel by use of improvised electronic devices fatally injuring three police officers, one civilian, seriously injuring more than 15 others and completely destroyed the said hotel.
3. Count two; Collection or provision of property and services for Commission of terrorist acts C/SEC 5(1)(a) (b) (c) as read with Section 5 (2) of the *Prevention of Terrorist Act*, 2012t. The particulars are that: On the 25th of March, 2024 Omar Farah Abdi alias Afro, Abdifatah Ibrahim Gedi and Sheikh alias Ali Shaban Shiniyo between 1000hrs and 1036hrs at Fish point hotel in Mandera township, jointly provided property and services namely means of transport through motor vehicles of registration number KDA 804N, KDG 304 M and donkey cart to themselves and improvised electronic devices to Fish point hotel where they jointly fatally injured three police officers, one civilian, seriously injuring more than 15 others and completely destroyed the said hotel.



4. Count three; Facilitation of terrorist Act C/SEC 9A of the [Prevention of terrorist Act](#),2012. Particulars are that, on the 25th of March,2024 Omar Farah Abdi alias Afro,abdifatah Ibrahim Gedi and Sheikh alias ALI Shaban Shiniyo between 1000hrs and 1036hrs at Fish point hotel in Mandera township, jointly provided property and services namely means of transport through motor vehicles of registration number KDA 804N,KDG 304 M and donkey cart to themselves and improvised electronic devices to Fish point hotel where they jointly fatally injured three police officers, one civilian, seriously injuring more than 15 others and completely destroyed the said hotel.
5. Count four; Conspiracy to commit a felony Contrary to Section 393 of the [Penal Code](#). Particulars are that; Omar Farah Abdi alias Afro, Abdifatah Ibrahim Gedi and Sheikh alias Ali Shaban Shiniyo on the 25th day of March,2024 jointly with others not before the court at around 1036hrs at Fish point hotel in Mandera township of Mandera East Sub-County, jointly attacked Fish point hotel by use of improvised electronic devices fatally injuring three police officers, one civilian, seriously injuring more than 15 others and completely destroyed the said hotel.
6. Count five; Entering Kenya through a place not designated as a place of entry or exit contrary to section 15(2)(a) as read with section 57 of the [Kenya Citizenship and Immigration Regulations](#),2012. Particulars are that, Adan Hassan Sheikh alias ALI Shaban Shiniyo on diverse dates between the years 2022 and 2024 at Mandera township location within Mandera East Sub-County of Mandera County of the Republic of Kenya were found having entered Kenya through Malka Suftu border point which is not designated point of entry or exit.
7. Count six; Being unlawfully present in Kenya C/SEC 53(1)(j) as read with Section 53(2) of the [Kenyan Citizenship and immigration Act](#) No.12 of 2011. Particulars are that, Adan Hassan Sheikh alias Ali Shaban Shiniyo on the 18th of April,2024 at around 1845 hours at Choma Zone hotel in Mandera township location within Mandera East Sub-County of Mandera County of the Republic of Kenya being an Ethiopian National was found unlawfully present in Kenya without valid passport or permit/ visa authorizing him to stay in Kenya.
8. Count Seven; Failing to report Entry to the immigration office contrary to Regulation 17(1)(a) as Read with Section 57 of [Kenya Citizenship and Immigration Regulations](#),2012. Particulars are that Adan Hassan Sheikh alias Ali Shaban Shiniyo on diverse dates between the years 2022 and 2024 at Mandera township location within Mandera East Sub-County of Mandera County of the Republic of Kenya through Malka Suftu border point which is not designated point of entry or exit as required by Law.
9. Count eight; Giving false information to a person employed in a public Service C/SEC 129(a) of The [Penal Code](#). Particulars are that Adan Hassan Sheikh alias Ali Shaban Shiniyo on the 18th day of April,2024 at around 1845 hours at Mandera police station in Mandera east Sub-County gave false information to No.109031PC Elijah Nakeel, No.108239 PC Emmanuel Chacha and Mandera report office personnel that he is Ali Shaban Shiniyo a fact he knew was false.
10. Having pleaded not guilty, the court entered a plea of not guilty save for count six to which the 3rd respondent pleaded guilty to and sentenced to a fine of kes 30,000 in default serve 9 months imprisonment. Consequently, the respondents prayed for their release on reasonable bail terms. Before the application for bail could be argued, the court asked for a pre-bail report which recommended that the respondents were suitable to be released on reasonable bail terms. In the same report, the application indicated that the investigating officer was not opposed as long as they were not released on lenient bail terms.
11. On their part, prosecution opposed release of the respondents on bail arguing that they were a flight risk; the investigating officer pc Elijah Nekeel swore an affidavit on 17-03-24 deposing that the



respondents are facing serious charges relating to terrorism and that the attack at fish point restaurant within Mandera township caused the death of some people and others seriously injured. That they are likely to abscond and disappear to Ethiopia or Somalia; they are likely to interfere with witnesses; if released on bail they are likely to further acts of terrorism; they have no place of affixed a bode and that they are a danger to society.

12. The respondents however asserted that bail was a constitutional right and that they were ready to abide by with any terms the court was willing to impose. They asserted that the charges they are facing are false; they are Kenyan citizens save for the 3rd respondent and that they have places of fixed a bode.
13. After considering the application, the court delivered its ruling on 21-05-24 thereby finding that there were no compelling reasons to deny the accused bail. The court found that there was no proof that they were likely to interfere with witnesses. The court further held that the respondents had places of fixed a bode; that there was no previous adverse record against them and that; the pre-bail report was in their favour. Finally, the court granted them bail of kes 500,000 with one surety of same amount.
14. Aggrieved by the grant of bail, prosecution moved to this court vide a notice of motion dated 23-05-2024 seeking stay of the ruling of the trial magistrate pending hearing and determination of the application herein and secondly; review of the said ruling by cancelling the same and thereafter set aside the bail terms and or bond granted to them and that they remain in custody pending hearing and determination of their case being Mandera CR. Case No. E133 of 2024.
15. The application is supported by the averments contained in the affidavit in support sworn by Pc Elijah Nekeel on 23-05-24 which is a replica of the affidavit sworn before the trial court citing similar grounds in opposition to the respondents being released on bail. In response, the 2nd respondent swore a replying affidavit opposing the application on grounds that; he is not a flight risk; he is well known within the community and even by the area chief; he is a taxi operator and that he has a known place of fixed a bode; the pre-bail report is suitable and no compelling reasons have been advanced. Mr. Wethow learned counsel appearing for the 2nd respondent basically reiterated the content of the replying affidavit.
16. The 1st respondent submitted orally thus opposing the application on grounds that he was not a flight risk and that he was a Kenyan with a place of fixed a bode. The 3rd respondent an Ethiopian national equally opposed the application arguing that he was not a flight risk.
17. I have considered the application herein, objection thereof and submissions by both parties. The only issue for determination is whether there are compelling reasons to deny the respondents bail pending trial.
18. This court has been moved for revision orders which is anchored under section 362 and 364 of the CPC as well as Art 165 of the constitution of Kenya.
19. Article 165(6) does bestow high court supervisory powers upon the subordinate courts as well as any person, body or authority exercising a judicial or quasi -judicial function but not over a superior court. Sub-article (7) goes further to provide that; for the purposes of clause (6), the high court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
20. The above provision is further amplified by Sections 362 and 364 of the CPC. Section 364 provides thus;

Powers of High Court on revision



- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.

21. Section 362 further provides;

Power of High Court to call for records-

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

22. The right to bail is a constitutional right provided under Article 49 (1) (h) of the [constitution](#) which provides that every arrested person is entitled to be released on bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.

23. 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.”

24. Similar position was held by Kimaru J as he then was in [Hillary Wachira Wanjiku v Republic](#) [2020] eKLR as follows;

“This court agrees with Mr. Wandugi that as a matter of constitutional imperative, court should lean towards granting accused persons bail pending trial unless irrefutable compelling reasons are placed before the court by the prosecution”

25. It is trite that although bail is a right under the [constitution](#), the same is not an absolute right but rather a right subject to certain conditions. Among such conditions, guidance can be drawn from Section 123 of the [CPC](#) and judiciary bond and bail policy guidelines of 2015.

26. Section 123 of the [CPC](#) provides;

Exception to right to bail

- (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 fulfillment 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;
 - (b) should be kept in custody for his own protection.

[[Act No. 18 of 2014](#), Sch.]

27. Whether to grant bail or not is a matter of discretion by the trial court. The same should however be exercised judiciously and not whimsically or capriciously. See [Republic v Sifuna](#) (Criminal Case E014 of 2023) [2023] KEHC 22379 (KLR) (22 September 2023).
28. The [judiciary Bail and Bond Policy Guidelines](#) of 2015 thus underpin the right to reasonable Bail and Bond terms. That Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and presumption of innocence. To achieve the objective of release of one on bail, the bail or bond terms should not be unreasonable. They should not be excessive or far greater than is necessary to guarantee the accused person liberty pending his or her trial.
29. The bail aspect pending trial is principally anchored on the understanding that an accused person is deemed innocent until proved guilty. This is a constitutional imperative in compliance with Article 50(2) (a) of the [constitution](#). It is trite that courts should as much as possible avoid granting orders that will most likely promote detention before trial.
30. The crux of the application herein is that; the respondents are a flight risk; they are charged with serious offences; are likely to interfere with witnesses; are likely to commit further offences of terrorism and that they have no places of fixed abode. On account of likelihood of absconding or jumping bail, there was no proof or demonstrable evidence that they are likely to abscond. There was nothing placed before the court to support that assertion.
31. The mere fact that the respondents are facing terrorism related charges which is a serious offence is not enough to deny accused persons' bond. All offences are bailable unless there are compelling reasons not to grant. the [constitution](#) does not however define what constitutes compelling reasons but, it leaves it upon the trial court to exercise discretion depending on the facts of each case. The 1st respondent and 2nd respondents are Kenyans with well known places of fixed a bode as demonstrated by the pre-bail report.
32. As to whether they are likely to commit similar offences, that is being merely speculative hence not a good ground to deny the accused bail. As to the 3rd respondent an Ethiopian national, he was found being unlawfully present in Kenya which charge he has already admitted and sentenced accordingly. He did not explain to the court why he was illegally in Kenya. Admittedly he has no place of fixed a bode. In case he absconds, it will be difficult to trace him. To that extent, am persuaded that there is sufficient apprehension that if released on bail and subsequently absconds, it will be difficult to trace him even in his native country.



33. For the above stated reasons, am satisfied that the 3rd respondent an Ethiopian National is not suitable for release on bail. He shall therefore remain in custody until the case is heard and determined. As to the other two, the pre-bail report captures the investigating officer as one of the interviewees who was not opposed to their release save for the prayer that the court imposes tough bail terms. It is a contradiction on the part of the prosecution to oppose bail on one hand and accept it on the other hand.
34. In a nut shell, I do not find any compelling reasons to deny the 1st and 2nd respondents (1st and 2nd accused persons) bail. Accordingly, the Notice of Motion application in relation to the two respondents is not merited and therefore dismissed. The two shall be at liberty to process their release on bail terms imposed by the trial court upon approval of suitable surety by the court.
35. The Notice of Motion application in respect of the 3rd respondent (3rd accused) is merited and therefore the orders granting him bail by the trial court are hereby set a side. The 3rd respondent (3rd accused) shall remain in custody pending hearing and determination of the case.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY 2024

J. N. ONYIEGO

JUDGE

