



**Mwangi v Republic (Criminal Case E019 of 2023)
[2024] KEHC 9453 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE E019 OF 2023
AK NDUNG’U, J
JULY 25, 2024**

BETWEEN

TERESIA WOTHAYA MWANGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This ruling resolves the question whether the Accused person should be released on bond pending trial.
2. The state is opposed to grant of bail and in an affidavit in opposition to bail, dated 18th February, 2024, Gladys Kariuki, a prosecutor, reiterated the contents of the pre-bail report and maintained that the Accused is not suitable to be released on bail.
3. She averred that should the accused be granted bond/bail at this juncture the chances of her breaching the bond/bail terms are high due to the fact that she has a habit of changing residence and contacts, a probable indication of her being a flight risk. That her security will not be guaranteed if she is released on bond/bail owing to her violent nature.
4. It is urged that the right to be released on bail pending the hearing and determination of the trial is not absolute and is at the discretion of this honourable court. She prays that this honourable court does find that the above-mentioned reasons compelling enough to deny the accused bail.
5. The accused through his counsel Mr. Mathea filed submissions on bail and bond dated 18th April, 2024. He stated that it is not disputed that the accused, like all other accused persons, has a constitutional right to be released on bail or bond pending trial and to be presumed innocent until proved guilty. Article 49(1) (h) of the *Constitution* stipulates that an accused person has a right to be released on bond or bail, on reasonable conditions, pending a charge of trial unless there were compelling reasons not to be released. Reference is made to Section 123(2) of the *Criminal Procedure Code*, *Harish Mawjee*



Ɖ Another v Republic [2020] eKLR and Judiciary’s Bail and Bond Policy Guidelines at p.9 paragraph 3.1(d)

6. That it is trite law that granting bail entails the striking of a balance of proportionality in considering the rights of the Applicant who is presumed innocent on the one hand and the public interest on the other. That on proportionality of bail and bond terms the liberty of an individual is precious and is to be jealously protected by the Constitution and the Honourable courts and for this reason an accused person should be admitted on bail and bond. The cornerstone of the justice system is that no one should be punished without the benefit of due process.
7. It is submitted that it is trite law that an accused person is simply an accused person and the presumption only shifts upon being adjudged guilty by the court or at the earliest and arguably upon being found to have a case to answer. That the doctrine of presumption of innocence is indeed a right protected under Article 50(2) (a) of the Constitution of Kenya. Reference is made to the case of Andrew Young Otieno v Republic (2017) eKLR.
8. That the Applicant herein undertakes and is committing that if granted bail on such reasonable terms, she will diligently attend court without failure at all material times, she will not interfere with the investigation or any of the witnesses, she has and will maintain her known place, that is, Gathura where she is known to have been doing casual jobs and she is not a flight risk, and she has no known history of absconding bail at all. The Applicant is willing to abide by any other terms that this honourable court may place as it deems just in the circumstances.
9. That her continued stay in custody not only unfairly subjects her to further severe hardship and anxiety as an individual, but is adverse to her young children who now are left under the care of the relatives.
10. That the prosecution has only alleged but has not adduced any evidence that the Applicant herein is at risk if released on bail or that she is likely to interfere with witnesses or faces risk as to her own safety to life and security or that her detention is for the preservation of public order and security of the state.
11. That the contents of the affidavit dated 8th February, 2024 by the prosecutor are mere allegations and the appropriate person to swear an affidavit in opposition of bail is the investigating officer since he/ she is the person who has the complete background of the case.
12. The stated filed its skeletal submissions dated 8th May, 2024 stated that Article 49(1) (h) of the Constitution of Kenya gives an arrested person the right to bond or bail on reasonable conditions pending charge or trial, unless there are compelling reasons not to be released. From the foregoing, it is clear that the right to bail/bond is not absolute.
13. On what are the compelling reasons for grant or denial of bail or bond, the State relied upon the following grounds;
 - (a) **The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty;**
 14. Where the charges against the accused person is serious, and the punishment heavy, it is assumed that there are move probabilities and incentives for the accused person to abscond.
 - (b) **Strength of the prosecution’s case;**
 15. It is justifiable to subject an accused person to pre-trial detention where the evidence against the accused person is strong.



(c) Character and antecedents of the accused person;

16. Although the character and antecedents of the accused person do not by themselves form the basis of denial of bail or bond, they may justify the refusal of bail or bond if they are coupled with other adverse factors.

(d) The need to protect the victim or victims of the crime from the accused person;

17. Where it is apparent that the accused's release will affect the victim of the crime, it's prudent to have the accused detained.

(e) The accused person is a flight risk;

18. Where the accused person is a person without a known fixed place of abode is considered a flight risk and not eligible to grant of bail.
19. Further to the affidavit dated 16th March, 2024 opposing bail/bond, the State submitted that the accused herein has been charged with murder which is a felony and the prosecution through its decision to charge guidelines finds that there is sufficient evidence to sustain the charge of murder.
20. The character of the accused has been put to question by victim's family who state that she is known to be of violent nature, which in fact makes them worried about her release. Her immediate family members state that she is known to change contact and residence without notice and therefore proves that she is not reliable or easily traced when need arises.
21. That there is need to protect the victim or victims of the crime from the accused person as her sister stated that she was afraid that the accused might go for her child and later abandon him like she had with the first born once she is released on bond. This might be the case with the young toddler currently living with the deceased's mother, hence re victimizing the toddler.
22. The accused person is a flight risk as he has had a lifestyle of often changing residence without notice even to those close to her. This is coupled with the fact that the immediate family is not willing to offer surety for her pre-trial release confirms that she is possible flight risk if released on bail.
23. In light of the above, the State humbly prays that the court does find the above reasons compelling enough not to release the accused on bail/bond pending the determination of this case.
24. The relevant law to this application is Article 49(1)(h) which provides that:
- (1) 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.
25. From the reading of Article 149, bail is one of the rights protected by the Constitution. It is based on the notion that the accused is presumed innocent until proven guilty.
26. The provision relating to bail gives the prosecution the window of presenting compelling reasons to the court on why the accused person ought not to be released. This invokes discretion of the court to interrogate the reasons given by the prosecution and reach a conclusion whether the same are compelling.
27. The word "compelling" is defined in Concise Oxford Dictionary as "force or obliging to do something; bring about by force or pressure".



28. The court must therefore ensure that compelling reasons presented to it militate against the grant of bail.
29. I have considered the charges, the affidavit in opposition to bail and the submission by learned counsel. In addition, I have looked at the bail information report, always a very useful tool in assessing the circumstances of an accused.
30. The prime consideration in the application before court is that the accused shall attend her trial. That she is not a flight risk. The fear of an accused being a flight risk is mitigated by the existence of a known fixed abode as well as established strong social ties at family and society levels.
31. The court too has to consider the possibility of interference with witnesses, risk to witness/victims, the accused's own safety, the nature of the charge and the strength of the prosecution's case. The later will only be considered jointly with other factors not as an independent impediment to grant of bail.
32. On the material before court, it emerges from the bail information report that that the accused has no fixed abode. Her own family has had challenges tracing her from time to time as she keeps changing residences and contacts. This is independent information from a government agency.
33. On that basis alone, am persuaded that the accused is a flight risk and on release on bail, her attendance to court cannot be assured. I consider this a compelling reason to deny the accused bail.
34. With the result that the application for bail is denied. In the interest of justice and to ensure minimal incarceration during the pendency of the trial, the case herein shall be expedited.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JULY, 2024.

A.K. NDUNG'U

JUDGE

