



**Republic v Mwendwa & another (Criminal Case E004 of 2024)
[2024] KEHC 8577 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE E004 OF 2024**

**FR OLEL, J
JULY 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALBANUS MWENDWA 1ST ACCUSED

SAMSON KITAKA 2ND ACCUSED

RULING

1. The accused herein, Albanus Mwendwa and Samson Kitaka face the charge of Murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya. The particulars of the charge are that the two, on the 15th day of January 2024 at unknown time at Kithimani location, within Yatta sub county within Machakos County, Murdered Nganda Mutinda. The applicants took plea on 8th February 2024, and they pleaded not guilty to the charge. The court requested for a pre bail report before considering the Applicants bail application. The said reports were duly filed on 23rd April 2024, and which reports made the recommendation that the applicants should not be released on Bond/bail until key witnesses have testified. Based on the said recommendations this court denied the applicants bond.
2. Subsequently the Applicants did file a formal notice of motion Application to have the court review its orders and be pleased to release the Applicants herein on reasonable bond conditions pending hearing and determination of this matter. The Application was supported by grounds on the face of the said application and the supporting affidavit of both Applicants dated 27th May 2024, where they deponed that the conclusion of the pre bail report was not supported by the facts as ascertained from the ground and community finding. They were not flight risk as they both had families to take care of and also had fixed abode.



3. There was no basis for saying that they would interfere with witnesses as they had no employer/employee relationship with the said witnesses and did not reside within the same area. The probation officer's apprehension was therefore misplaced and was made without any merit. The Applicants further deponed that if granted bond, they would be willing to keep their distance from any of the witnesses and would also abide by any conditions given by court as to conditions of bond/bail. Under the circumstances denying them bail would be prejudicial as the proceedings herein would take a long time and being in prison remand during that duration, would in the long term negatively affect their health.
4. This application was opposed by the ODPP, through the replying affidavit of the investigating officer, one IP Kennedy Karanja, who deponed that the prevailing compelling reason the basis upon which the applicants were to be denied bond was that they were likely to interfere with witnesses since they hail from the same village and some of the prosecution witnesses were their friends, personally known to the accused persons. There was also a key witness, who was a non-local, who had fled as she feared for her safety and that of her young family. If released, the applicants could compromise the safety of the said witness and she would not be able to testify freely on what transpired.
5. Finally, the respondent also deponed that, there was still a lot of tension on the ground as family members of the deceased family were still bitter with the two accused persons and might harm them if released. The respondent thus urged the court to defer granting the Applicants bail until the two witnesses had testified.

Determination

6. I have considered the foregoing.
7. Article 49(1)(h) of the [Constitution](#) provides that:-
An accused 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.
8. the [Constitution](#) does not define what qualifies under the term "compelling reasons". The ordinary meaning according to Thesaurus English Dictionary of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.
9. While the [Constitution](#) does not identify what qualifies under the term "compelling reasons", Section 123A of the [Criminal Procedure Code](#) gives the parameters for the grant of the right to bail as follows:
 - (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 fulfilment of obligations under previous grants of bail; and;



10. Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 at p. 25 also sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

- (a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:
- a. That the accused person is likely to fail to attend court proceedings; or
 - b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
 - c. That the exception to the right to bail stipulated under Section 123A of the *Criminal Procedure Code* is applicable in the circumstances; or
 - d. That the accused person is likely to endanger the safety of victims, individuals or the public; or
 - e. That the accused person is likely to interfere with witnesses or evidence; or
 - f. That the accused person is likely to endanger national security; or
 - g. That it is in the public interest to detain the accused person in custody.
11. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the *Constitution* expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. In *Kelly Kases Bunjika v. Republic* [2017] eKLR Muriithi, J stated that:
- “It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”
12. The pre bail reports filed with respect of both Accused persons, generally give a positive feedback. They are residents of Kithimani location, and are both family-oriented persons, the community members/ local administration had no adverse report about their character nor are they hostile towards them. The said reports also state that the secondary victims (family of deceased) were emotional and bitter at the loss of their kin and demanded justice, but did not express hostility towards the accused. Though they strongly opposed the applicants being released on bond on the basis that they may interfere with witnesses. The issue of tension and hostility on the ground as raised by the investigating officer, then does not arise.
13. The investigating officer further in his opposition to bond also harped on the fact that they were apprehensive that the Applicants would interfere with some of the witnesses as they were friend’s and one was a non-local. It is the duty of the State to ensure that all persons enjoy their fundamental



rights and this applies to both the victims and the accused persons. I associate myself with the opinion expressed in *Rep v. Dwight Sagaray & Others* High Court Criminal Case No. 61 of 2012 that:

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.”

14. The prosecution has not placed any fact/evidence, before court, the basis upon, which the court can infer that indeed the accused persons have threatened some of the witnesses directly or indirectly and all that is alleged remains pure speculation. The court also takes judicial notice of, the enactment and enforcement of provisions of *Witness protection Act*, which provides for mechanism of protecting witnesses. It has not been shown if any witness has been forced to seek protection thereunder, due to the Applicants direct threats. The Court must, as provided in Article 24(1)(e) of the *Constitution*, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words, the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial.
15. As I have stated above it is upon the prosecution to prove that there exist compelling reasons to justify the court in limiting both applicants’ otherwise constitutionally guaranteed rights to bond/bail pending trial. Such compelling reasons cannot be said to have been satisfied based on bare averments.
16. In the circumstances, I made the following orders:
 - a. The accused persons may be released on bond of Kshs.1,000,000/= each with one surety each of similar amount.
 - b. In the Alternative both accused persons are granted cash bail of Kshs.500,000/= each.
 - c. They shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that have been supplied by the State to the defence.
 - d. They shall attend the Court whenever required to do so without fail.
 - (e) In the event that any of these conditions are violated, they are liable to have their bail cancelled and they shall proceed with the case while in custody.
17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF JULY, 2024.

In the presence of;

Mr. Muoki for accused

Mangare/Otulo for ODPP



Susan Court Assistant

Accused present from Machakos prison

