



**Republic v Abdulahi (Criminal Case E074 of 2023)
[2024] KEHC 8030 (KLR) (Crim) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E074 OF 2023
LN MUTENDE, J
JULY 2, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOHAMED ABDULAHI-ALUI ALIAS AMIN ACCUSED

RULING

1. Muhamed Abdullahi-Alui alias Amin, the accused, is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence being that on 17/8/2023 at 2200hrs at Eastleigh area, Starehe Sub County jointly with others not before court murdered Hussein Abdikadir.
2. Having denied the information presented by the Director of Public Prosecutions, the accused seeks to be released on bail pending trial. An application that is opposed by the State through No. 101370 PC Gilbert Langat who depones that the deceased was found lying down and bleeding at around Matangili area in Eastleigh and was rushed to hospital where he was confirmed dead.
3. That the accused was last seen with the deceased and 3 other friends at the place the deceased was found lying down. The accused and his friends fled to Isiolo then Mombasa and later Uganda where he was arrested. That the accused comes from Badir village Mogadishu is a Somali national.
4. He came to Kenya in the year 2017 and the authenticity of his Identification card is under investigation. The accused has demonstrated he is a flight risk. Further that the accused friends managed to escape and if released, the accused might reunite with his friends who are at large and thwart investigations and efforts to trace them.



5. That the witnesses in the case are the accused close friends and relatives and the prosecution is apprehensive that he might interfere and instill fear in them.
6. Further that considering the serious nature of the offence and sentence to be meted out, there is the probability and incentive for the accused to abscond trial.
7. The accused invites court to consider the circumstances of the case and the applicable law in exercise of its discretion. That in this case the prosecution has not tabled sufficient evidence or compelling reasons to warrant denial of bail.
8. He depones that he came from Somalia in the year 2017 and became friends with Sharmake and Arman who worked at Garissa lodge. That he was introduced to the deceased in the year 2022 and they became close friends. That on 16/8/2023 when the offence allegedly occurred, they had gone partying at his girlfriend's place, they woke up the next day, 17/8/2023 with a hangover and the deceased proceeded to his house as he (accused) went to his sister's house. They later met, went to look for food, smoked some bhang and he eventually left his friends going to look for cigars. That the deceased was alive and well.
9. That Arman later called and informed him that Hussien had been killed, information that left him dumbfounded and in pain for the loss of his close friend. Upon wanting to go to where the deceased was his friend Sharmake who had joined them convinced him not to go to the scene as they would be accused of murder as they were the last persons to be seen with the deceased. In the result he fled to Uganda because of fear as the police would use his background and Somali origin against him.
10. That he lost contact with his friends when he arrived in Uganda and has not heard from them to date. He urges that he has no reason to interfere with witnesses either indirectly or directly and that every person is presumed innocent until found guilty.
11. Pursuant to the law a social inquiry was carried out which established that the accused is a 19 year old single man who is also a school dropout, he abuses alcohol and drugs and has no social ties and immediate family support. He appreciates the seriousness of the offence. He stated that he fled to Uganda for fear of the unknown and was also misled by his friends. He also knows the prosecution witnesses who are his neighbours within Eastleigh but he assures that he would not interfere with them.
12. The community views are represented by the residents of Jam Street in Eastleigh area. They are not opposed to the accused release on bond considering that compensation has already taken place. That alcohol and drugs are widely consumed by youth in the area and they cannot recall what happens. The probation officer recommended that the accused be denied bond until Maslaha is finalized in court and others are arrested.
13. The Investigating Officer was emphatic that the accused is a flight risk who can easily leave the jurisdiction of the court as he is a foreigner and one who can interfere with witnesses but he does not oppose his release considering compensation arrangements.
14. The accused family is ready to raise funds if cash bail is granted and his uncle is also willing to be his contact person. The accused prays for cash bail of Ksh 100,000/=, a car log book can also be availed and used as collateral. It is stated that the deceased was 21 years old at the time of his death and that compensation process was to end on 22/11/2023.
15. I have considered rival submissions. It is urged that the accused is entitled to be presumed innocent and further that pretrial detention should not constitute punishment. Reference is made to the Judiciary Bail and Bond Policy guidelines; the case of R -Vs- William Mwangi wa Mwangi (2014) eklr; R -Vs- Joktan Mayende (2012) eklr and definition of compelling reasons which should be real, cogent, forceful and convincing.



16. That Section 123 of the Criminal Procedure Code sets out compelling reasons which he addresses in the facts of the case. That the seriousness of offence being considered does not apply since murder is bailable and accused has a constitutional right to benefit from bail. Reference in this regard is placed on the case of R -Vs- John Kahindi Karisa & 2 Others (2010) eklr.
17. On consideration of the strength of evidence, the accused contends that it should be based on evidence that has been tested, proved and formally admitted by affidavit or viva voce evidence before the court.
18. On his likelihood of interfering with witnesses the accused places reliance on the case of Antony Ngirita -Vs- R 2016 eklr , R-Vs- Doris Wambui Inguku & 2 Others (2022) eklr and the case of R –Vs- Edwin Odiwour Otieno vs R 2021 eklr and submits that there is no evidence to support the allegations. That he has not improperly approached any prosecution witnesses and he does not intend to do so. That merely knowing witnesses in itself is not sufficient.
19. Lastly that the fear of prosecution cannot be used to deny him bail and the State has a duty to track down, arrest and arraign the other persons linked to the offence.
20. On whether he is a flight risk, he contends that he has strong family and community ties in Kenya and would be living with his sister during the trial. That the possibility of being a flight risk should not automatically deny him bail and the court should impose stringent conditions. In this instance he refers to the case of Dwight Sagaray & 4 Others -Vs- R (2013) eklr. That the agreed compensation was paid as a means of ensuring harmonious co-existence and is not an admission of guilt.
21. The State submits that the accused is a foreign national and his Kenyan identification is currently under investigations. That his conduct of fleeing from the scene immediately after the incident points out that there is irresistible likelihood that he would disappear without trace. That the accused admits having fled from Eastleigh to Nairobi then to Mombasa and eventually to Uganda where he was traced.
22. That nothing has been produced to confirm his identification, employment, conduct of business, assets or family relations in Kenya. That the accused does not have a fixed abode and has no ties in the country and this hence diminishes the chances of tracing him.
23. Reliance is placed on the case of R -Vs- Joseph Kuria Irungu & Another(2018)eklr, where the court considered that the accused did not have assets in Kenya and only had an intention to set up a security firm. The court denied him bond upon the argument that he did not have a fixed abode, he lacked deep emotional, occupation or economic ties in Kenya.
24. The State further submits that the accused would interfere with prosecution witnesses; That 5 of the accused friends are key witnesses, the said witnesses were with the deceased and accused on the fateful night. It also relies on R -Vs- Fredrick Ole Leliman & 4 others (2016) eklr where the court described witness interference as inducing or terrifying or doing acts with the aim that the witness does not give evidence or that the witness will give it in a particular manner.
25. The right to be released on bail pending determination of trial is a constitutional right which can only be denied or limited where the prosecution proves existence of compelling reasons. Which is defined as one that is convincing, persuasive or forceful and the court should find that bail should only be denied in the wider interest of justice.
26. Granting bail is a discretionary exercise of the trial court and is determined under the provisions of Section 123 of the Criminal Procedure code and the Bail Bond Policy guidelines which set out the list of compelling reasons. The main aim of granting bail is to enable the accused attend his trial, thus the consideration is always whether the accused, if released will be able to turn up for his trial or whether he would abscond and frustrate the entire proceedings.



27. In *Ng'ang'a -Vs- Republic* 1985 KLR 451, Chesoni J, (as he then was) stated thus:
- “The court in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (Cap 75), should grant bail to an accused person unless it is shown by the prosecution that there are substantial grounds for believing that:-
The accused will fail to turn up at his trial or to surrender to custody; The accused may commit further offences; or He or she will obstruct the course of justice”
28. Further consideration is whether it is in the interest of justice that he be released or his right to bail be withheld. This calls for a holistic consideration of the case, the public and victim’s interest.
29. In *R. -Vs- Richard David Alden* (2016) eKLR, Lessit J (as she then was) in interpreting the principles of bail held that:
- “Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.”
30. Although the social inquiry carried out indicated that the accused does not have family or community ties, the Probation Officer met with the accused family during the interrogation. His family’s willingness to raise bail and the meetings with deceased family and reconciliation process for peaceful coexistence all demonstrate that the accused has family and community ties. The ties are traceable to Eastleigh where Maslaha and Islamic sheria process is being pursued per the allegation.
31. On the question whether the accused is a flight risk, the principle is that the discretion of granting bail should be liberal and should only be denied where the circumstances show that the accused chances of absconding are higher than his chances of complying and turning up for trial.
32. It has been demonstrated that the accused though of Somali origin is also a Kenyan national having acquired a national identification card in the year 2017. However, the challenge is that the accused identification card is under investigations
33. The accused also admits taking steps with his friends to flee from the scene of crime and they later crossed to Uganda. The investigating officer has deponed how the accused was arrested in Kampala and Interpol police at the border had to be involved to bring him to Nairobi for his arraignment. This proves tangible arrangements to evade arrest and trial were made. The accused also admits that other possible suspects in the case are still at large.
34. The totality of the circumstances and further considering the serious nature of the offence and sentence, it is demonstrated that the accused is a flight risk and no amount of stringent bond terms or conditions would avert the chances of absconding trial.
35. As to whether the accused is likely to interfere with witnesses, The State has submitted that the accused was in close contact with the witnesses prior to the offence. Further that 5 of the said persons, though not identified by name are key witnesses. The prosecution had a duty to point out particular witnesses who would face the perceived threat.



36. Close or filial relationship between the accused and a witness is a ground to prove his chance of interfering of affecting witness eventual testimony. In Republic -Vs- Gerald Mutuku Nyalita & Another (2015) eKLR E.M. Murithi J held that:

“[5In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of *the Constitution* of Kenya, the Prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant...”

37. Here, it is common ground that the witnesses are the accused close friends and relations and the said witnesses live in Eastleigh where the offence occurred .The risk is also heightened by the fact that the accused family and community ties are traceable to Eastleigh .

38. Compensation and atonement are a positive step towards ensuring peaceful coexistence. In this case the community and victim’s family had chosen to support the accused release on bond after Maslaha payment has been cleared. This peaceful coexistence no doubt comes with close proximity and contact with witnesses and a further temptation of adversely influencing the prosecutions case. This influence can be from the witnesses, the victim’s family or his relations and the court should be able to avert the risk.

39. Republic -Vs- Fredrick Ole Leliman & 4 Others (2016) eKLR where the court held that witness influence, threatening or interference can be immediately on commission, during investigation at the inception of the charge or during trial and can be the accused witnesses or other persons.

40. Denial of bail on ground of witness interference is considered as a matter of course and in the interest of justice. Similarly, there is no guarantee that the accused will not contact or join his friends and therefore frustrate the trial.In the upshot, the State has put forward forceful and /or convincing reasons requiring the accused person being denied bail. Accordingly, the application for bail is dismissed.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 2ND DAY OF JULY, 2024.

L. N. MUTENDE

JUDGE

