



**Republic v Serem (Criminal Case E011 of 2024)
[2024] KEHC 9996 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E011 OF 2024
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

KENNEDY KIPTOO SEREM RESPONDENT

RULING

Mr. Mark Mugun for the State

Background

1. This is a case in which the accused person has been arraigned in this case for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 27th September, 2021, at Ainabkoi sub-county the accused murdered Paul Serem Sawe. The elements of the charge were read to the accused on 22nd April, 2024 in which he pleaded not guilty and therefore vesting the duty upon the prosecution to disapprove his innocence beyond reasonable doubt as stipulated in Art. 50(2)(a) of the Constitution. In terms of Art. 50 2(h) learned counsel Mr. Oyaro was retained to represent the accused person in prosecuting his defence. The lead counsel for the state is Mr. Mark Mugun.
2. In the interim period learned counsel Mr. Oyaro on behalf of the accused made an oral application for him to be released on bail under Art. 49(1)(h) of the Constitution. As a consequence of this application, the state which has the responsibility to demonstrate existence of compelling reasons why the accused should not be released on bond or bail filed an affidavit to vehemently oppose the application. The said affidavit was sworn by PC Bonface Kipsoi who identified himself as the investigating officer based at DCI Ainabkoi Sub-County. His grounds of opposition on oath stated inter alia;
 - a. That I humbly pray that the accused person should not be granted bond or bail under any circumstances until this matter is heard and determined based on the following grounds:



- b. The accused person when released on bond may interfere with the prosecution witnesses.
 - c. Members of the public are baying for his blood so when released on bond he might be harmed by the members of the public as tension is still high.
 - d. The accused person is at flight risk and might run away from the jurisdiction of this court if granted bail terms.
 - e. The accused person on several occasions has tried to escape from police custody.
 - f. The accused person went on hiding for more than two years immediately after released from the police station pending determination of the ODPP, but later traced and charged.
3. The probation officer Uasin Gishu County equally filed a Bail Assessment Report dated 24th July, 2024, investigating the background of the accused's family, the accused's personal history, the circumstances of the offence, community ties, Bail sureties and the Victim Concerns. The report concluded that the accused resides in his father's homeland, where he lives close to his parents, this indicated that he had a place of fixed abode, hence not a flight risk. His family also vouched for his release on bond. However, there are concerns regarding his character as reported by the community members, the local administration and security agencies. They highlighted that the accused was not easy to surrender to arrest, despite involvement of a substantial number of security agencies to apprehend him. This behavior according to the security agencies, raises significant concerns regarding the suitability of granting bond. Additionally, the family of the deceased vehemently opposed the release of the accused on bond. They stressed that it was their persistent efforts that brought this matter back into focus, and they express a deep fear that the accused might attempt to harm them to obstruct the course of justice, hence their objection to release of accused on bond.
 4. The victim's input to this application as contextualized in the Pre-Bail Assessment report states that the family of the deceased, have expressed their grief and distress, stating that three years have passed and they are yet to come to terms with the loss of their family provider, the deceased who was a teacher. They feel that the justice system has been slow, and it was only their own initiative and follow-up with the Independent Policing Oversight Authority (IPOA) that led to the case being revived and the suspect being arraigned in court.
 5. They have conveyed their fear that if the accused is released from custody, it may cause further delays in the justice process. Additionally, they have concerns about the safety of the deceased's children, as they have been the ones who have been actively engaged to ensuring the suspect's arrest. As such, the family strongly objects to the release of the accused on bond, citing these reasons. They also acknowledge that the accused person's family attempted reconciliation through a customary practice, which they objected to, believing that such practice could not serve their quest for justice to the deceased.
 6. The concerns and objections raised by the deceased's family are significant. The alleged murder of their relative occurred in September 2021, and it was not until April, 2024 that the accused was arraigned. Their fears of further delays in the justice process and concerns for their safety are profound. The family's active role in seeking justice and their prolonged grief underscore empathetic consideration regarding their objections to granting bond.
 7. Given such findings, the report recommended that the accused person is not suitable for bond and that any bond terms should be considered at a later date when the vulnerable witnesses have testified.



Decision

8. Under Article 49(1)(h) of the Constitution an arrested person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. This right can only be limited where it is shown that there exist compelling reasons not to be released. The prosecution bears the burden to prove the existence of compelling reasons.
9. The Court of Appeal in Michael Juma Oyamo & another v Republic [2019] eKLR adopted the definition of the phrase “compelling reasons” in the case of R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 where the Learned Judge held as thus; -

“..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.”

10. Section 123A of the Criminal Procedure Code which was introduced vide the Statute Law (Miscellaneous Amendments) Act, 2014 provides as follows; -

“ 123A.

- (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.”

11. The Bail and Bond Policy Guidelines under section 4.9 further lists the factors to be considered in determining what compelling reasons are and includes; -
 - i. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty
 - ii. The strength of the prosecution case



- iii. Character and antecedents of the accused person
 - iv. The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond
 - v. Likelihood of interfering with witnesses
 - vi. The need to protect the victim or victims of the crime from the accused person
 - vii. The relationship between the accused person and potential witnesses
 - viii. Child offenders
 - ix. The accused person is a flight risk
 - x. Whether accused person is gainfully employed
 - xi. Public order, peace or security.
 - xii. Protection of the accused person
12. From the foregoing legal provisions, it is evident that the right to bail is not absolute. Given compelling reasons, the right can be limited and the prosecution is vested with the burden of establishing and justifying the compelling reasons. In the instant case, the prosecution advanced various reasons why the applicant should be denied bail. It is pre-empted that the applicant might interfere with the prosecution witnesses and that members of the public are baying for his blood. In further opposition, the prosecution stated that the accused person in several occasions has tried to escape from police custody and that he has been in hiding for more than two years immediately after he was released from the police station.
13. In the instant case, the affidavit evidence by the Investigating officer dated 30th July, 2024 opposing bond under Art. 49(1)(h) of the Constitution has not been controverted by the applicant. This affidavit together with the detailed Pre-Bail report dated 24th July, 2024 raises fundamental compelling reasons of such a significance to persuade this court to exercise discretion against granting of bail to the applicant.
14. First and foremost, the question of the applicant being a flight risk has documented by the state through the investigating officer stands unchallenged. The burden of proof on the application to be granted bail is on the accused person particularly, when the state has raised evidential material hinging on red flags why that right should not be protected and guaranteed to the accused person as of right.
15. It is trite law in our legal system that bail is not an absolute right. It is the discretion of the court to grant or refuse bail if it is satisfied that there are substantial grounds or as the constitution prescribes compelling reasons for believing that the applicant will abscond or interfere with witnesses or otherwise obstruct the course of justice. From the prima facie evidence of the Investigating officer and the probation officer's report against the accused, the probability of him appearing for trial is real given his conduct from the 27th September, 2021 until his arrest. This leave of absence without surrendering to the criminal justice actors for investigations is a greater pointer to the probability that he might not appear for trial if released on bail.
16. What will be the motivation? The offence is serious and the maximum sentence is severe including that of the death penalty. The accused applicant has not laid any evidence before court of any exceptional circumstances which made him not to submit to the constitutional organs mandated to investigate crime and upon being satisfied of an offence having been committed recommend for a prosecution of



the suspect. However, one thing must be made clear that even with an indictment of an accused person by the state under Art. 157(6) & (7) of the *Constitution*. The presumption of innocence is a guaranteed right until the alleged offence has been proved beyond reasonable doubt. The essence of bail is not to set the accused person free but to release him from the custody of the law and entrust him/her to the custody of a surety who takes cognizance with the court that he/she will ensure that the accused will appear at all times of the scheduled dates by the court.

17. What does the evidence from the state witness tell us about the character and conduct of the applicant/accused? there are high chances that he will jump bail given the history and antecedent of the case since 27th September, 2021. The motion is denied and dismissed for want of merit. The matter shall proceed in earnest to trial and the pre-trial is set on 17th September, 2024 before Justice Ominde.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

In the Presence:-

Mr. Mugun for the state

The accused person

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HON. R. NYAKUNDI

JUDGE

