



**Republic v Farah (Criminal Case E007 of 2024)
[2024] KEHC 11269 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E007 OF 2024
JN ONYIEGO, J
SEPTEMBER 24, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DEKOW ABDI FARAH ACCUSED

RULING

1. The subject herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars are that on 12.07.2024, at Bulla Hodhan area, Garissa Sub County, within Garissa County jointly with others not before the court murdered Ibrahim Abdi Mohamud. Having returned a plea of not guilty, he sought to be released on bail pending trial.
2. Counsel for the subject urged that the subject is a minor and a student hence needs a chance to go back to school and continue with his studies. Learned counsel contended that the subject is entitled to bail considering that it is a constitutional right. That he was ready to abide by the terms that this court may deem fit.
3. Mr. Ewoi, the prosecution counsel opposed the application relying on an affidavit sworn on 28.08.2024 by PC Joseph Mutonya Jonathan wherein it was deponed that the subject is not suitable to be released on bail for the reason that he is likely to interfere with prosecution witnesses. It was averred that his life is equally in danger for the reason that members of the public are against his release noting that previously, he has been involved in many criminal activities in the area. Additionally, that his release would cause the delay of speedy hearing of this matter and that he is a flight risk.
4. It was averred that should the subject be granted bond/bail at this juncture the chances of him breaching the bond/bail terms are high due to his engagement in criminal activities. That the offence the subject is facing is very serious and attracts heavy penalty thus the same may cause the subject to



- abscond court. Basically, he reiterated the content of the pre-bail report and maintained that the subject is not suitable to be released on bail.
5. Counsel appearing for the subject in her rejoinder urged that the subject is a minor aged 17 years and the same notwithstanding, right to bail is a constitutional right. That the subject is a student and that he stands to lose if he was to be kept in custody further. It was her argument that the minor's situation is worsened by the fact that he comes from a poor background and therefore it is just that he be released on reasonable bail/bond terms preferably cash bail.
 6. I have considered the application herein, the arguments both in support thereof and in opposition thereto as well as the oral submissions made.
 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. 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;(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. [Also see *Waititu vs Republic* [2021] KESC 11 (KLR) and Kenyan Judiciary's Bail and Bond Policy Guidelines issued in March, 2015 at pages 16 to 19].
 9. 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.
 10. It is trite that there is no definite definition as to what constitutes compelling reasons. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a compelling reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond or fail to appear for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend court and whether or not the free and fair trial can be achieved notwithstanding the release of the accused on bond.
 11. In determining whether or not a free and fair trial is possible, the Court ought to consider the circumstances of the accused as well as that of the potential witnesses. However, since the release on bond or bail is a constitutional right, it is upon the prosecution to satisfy the Court why a free and fair trial is not possible if the accused is so released. Thus, the prosecution must satisfy the court that there exist compelling reasons which justify the denial of bail or bond. [See *Mohamed Abdurrahman Said & Another vs Republic* [2012] eKLR].
 12. I have carefully considered the material before court and more specifically the affidavit by PC Joseph Mutonya Jonathan wherein it was deponed that the subject herein is not suitable to be released on bail for reasons that he is likely to interfere with prosecution witnesses and that his life was equally in danger.



13. More specifically, I have had due regard to the bail report filed. This report is an important tool in aiding the court to appreciate the circumstances of the case and the court to be in a position to determine the subject's suitability to be granted bail.
14. It is alleged in the pre- bail report that the subject is a juvenile delinquent who has continually involved himself in criminal activities. It is clear that he dropped out of school sometime back and therefore, the averment that he is losing school hours is unfounded. Unfortunately, there was no proof that the subject has been involved in any criminal activity before. He has never been charged nor report made against him.
15. Mere suspicion without evidence is not sufficient ground to deny accused bail. On the ground that he is likely to interfere with witnesses, there was no factual basis or foundation laid to justify the claim. There was for instance no proof of any attempt by the subject a minor having attempted to influence any witness
16. As to being a flight risk, there was no basis laid to satisfy the court that the subject had attempted to run away or had fled and was arrested later. The mere fact that his perceived accomplices are at large is not a ground to justify his detention.
17. As to the seriousness of the offence, all offences are bailable under *the constitution* hence that perse is not a ground unless proved that the fear of the repercussions, is most likely to influence the subject abscond.
18. Concerning the bitterness of the victim's family, it is normal. To deny the accused bond on that ground alone without any evidence that retaliation is imminent is to overstretch the grounds for denial of bond. If that were to be the general rule, nobody will be released on bail.
19. Taking into account the application herein, circumstances under which the offence was committed and the age of the subject who is a minor, I do not find any compelling reasons to deny the subject bail. The best interest of a child can not also be ignored as we do not currently have a holding facility for children offenders in Garissa.
20. In the circumstances, the application for bail is allowed. The subject shall be released on a bond of Kshs 1,000,000/= with one surety of similar amount.

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

J. N. ONYIEGO

JUDGE

