



**Republic v Muli alias Rasta & another (Criminal Case E008 of 2024)  
[2024] KEHC 10901 (KLR) (Crim) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10901 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E008 OF 2024  
LN MUTENDE, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JACOB MATHIAS MULI ALIAS RASTA ..... 1<sup>ST</sup> ACCUSED**

**DOMINIC MBITHI NYAMAI ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. Jacob Mathias Muli alia Rasta (1<sup>st</sup> Accused ) and Dominic Mbithi Nyamai (2<sup>nd</sup> Accused) were arraigned following allegations of having committed the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Particulars of the offence being that jointly with another not before court, they murdered Simon Mbuthi Wanjiku (Deceased) on the 25<sup>th</sup> December, 2023 at Baraka Mowlem area in Kamukunji Sub-County within Nairobi County.
2. Pursuant to an accused person’s constitutional rights provided by Article 49(1) (h) of *constitution* the accused seek to be released on bail/bond pending trial.
3. The application is opposed by the State through an affidavit deposed by No. 86805 Corporal Samuel Gichuki who deposes that the accused with their brother who is at large assaulted the deceased on allegation that he had stolen a mobile phone belonging to one of them.
4. That the incident was witnessed by neighbours and members of public who tried to separate them but they turned their anger towards them, assaulted and injured one of them in the process. For that reason, the civilian witnesses have expressed fear for their lives and are apprehensive that the accused may harm them should they testify against them. That some of the witnesses on hearing that the accused have applied to be released on bond have relocated to unknown places.



5. That immediately after the incident the accused ran away from the scene and went into hiding within Buruburu but were arrested after the police received intelligence report from informers. That if released they will regroup with their accomplice who is in a hideout so as to scuttle the process and they are likely to be flight risk.
6. The accused through their Counsel opted to respond through submissions. It was urged by the 1<sup>st</sup> Accused that the State did not adduce tangible evidence to support the claim that he would interfere with witnesses as required by law per Section 107 of the *Evidence Act*. Reliance was placed on the case of R v. Joktan Mayende and 3 Others Criminal Case No. 55 of 2009 where the court stated that:

“In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to *constitution* of Kenya, 2010.”

7. And, *Republic -v- General Mutumu Nyaliti & Another* (2015) eKLR where Muriithi J. held that:

“In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49(1)(h) of *constitution* of Kenya, the Prosecution must, in my view, demonstrate a more whimsical probability of interference. It must be shown that the accused persons are in such close family, filial relationship which creates an environment of control and influence of the witness by the accused person such as to of the witness to attend court. interfere with the ability of the witness to give evidence before the court or the ability of the witness to attend court...”

8. That the State has stated that witnesses have already relocated to unknown places, witnesses who have not been disclosed, it is hence unclear how the accused will interfere with them. That there is no previous records of accused absconding court and the accused have fixed places of abode. That no evidence was tendered in support of the allegations that the accused are flight risk or they escaped while in lawful custody.

9. The 2<sup>nd</sup> Accused did not file submissions despite being granted the opportunity.

10. In submission, the State reiterates the argument that witnesses have expressed fear that the accused may harm them if released on bond. That the accused fled and hid in Buruburu hence likely to vanish. That in the case of *Lydia Jelagat Kipgetich -v- Republic* (2022) the court held that:

“However, no concrete plan has been placed before this Court to support this proposal. In the circumstances of this case, it is therefore apparent that the life of the Applicant may be jeopardized if she is released on bond. The danger to her life may increase the chances of making her a flight risk as the place where she will be residing once released on bond will be unknown”

11. Further, that their security is not guaranteed as they are known in Baraka Mowlem for all bad reasons as they were about to be lynched and had to be saved by the deceased uncle. Reliance was placed on the case of *Republic -v- Ndegwa* (Criminal case E016 of 2021 (2023) KEHC 1850 (KLR) where the court held that:

“Whether the release of an accused person will disturb public order or undermine public peace or security, protection of the accused person. Whether pretrial detention is necessary



to protect the accused person among other things. Thus, the court directs the emotions to cool, and circumstances change, including the ground to be safe for an accused person to fit in. Thus, the grant of bail/bond pending trial is deferred to a later date”.

12. To capture views of the victims of crime pursuant to the requirement of the *Victim Protection Act*, a social inquiry was carried out by the Probation Officer who filed pre-bail reports.

The 1<sup>st</sup> Accused stated to be 34 years old was described by his family to be of good behavior. He has no history of jumping bail.

13. The secondary victims are opposed to the accused release on bail. They fear that the accused will be lynched as there was an attempt to lynch him but he was assisted by the deceased uncle. That his brother fled and if released he will also flee like his brother.

14. The community through the Chief Kithagani Location and the Nyumba Kumi elder where the accused hails had no issue with his conduct. However, the Nyumba Kumi elder of where the accused resided reported that he was known for all bad reasons and strongly opposed his release on bond for his personal security. It is hence the recommendation of the Probation Officer that he is not suitable for release on bail owing to the strong sentiments against him and lack of place of abode.

15. The 2<sup>nd</sup> Accused aged 33 years an orphan is supported by his maternal relatives who undertake to ensure he attends court. The secondary victim oppose bail on the ground that the accused may interfere with witnesses who hail from the locality where the incident occurred where he (Accused) resided. But since the accused was fairly new in the locality, they pray that he be released after sometime as he may disrupt peace in Baraka area.

16. The community indicated that his presence was not likely to cause any meaningful change in peace and stability but the accused was almost lynched with his co-accused after the act. It was however the recommendation of the Probation Officer that he could be admitted to bail/bond. That the court could impose terms and conditions to ensure compliance.

17. An accused person is presumed innocent until the contrary is proved. The logic behind it is enshrined in Article 50(2)(a) of *constitution*. According to Article 49(1) (h) of *constitution* every individual charged is guaranteed the right to be on bond or bail unless compelling reasons exist requiring him to be incarcerated.

18. Case Law has attempted to define compelling reasons. In *Republic -v-Joktan Mayende & 4 Others* Bungoma High Court Criminal Case No. 55 of 2009, the court defined the term “compelling reasons” as follows:

“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 standard set by *constitution*.”

19. Section 123A of the *Criminal Procedure Code* (CPC) lists circumstances in which bail may be denied. It provides thus:

1. Subject to Article 49(1)(h) of *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
20. The *Bail and Bond Policy Guidelines* provides that the primary factor to be considered on the decision of bail is whether the accused will turn up for trial. It also guides on other factors to be considered by the court in determining what amounts to compelling reasons. This is because *constitution* is silent on what amounts to compelling reasons. These include:
- The likelihood of interfering with witnesses; the need to protect the victim of crime; the accused being a flight risk; and, protection of the accused.
21. On the question of the accused being flight risk, the accused are Kenyan nationals who lived at Mowlem where the incident occurred. It has not been stated whether the accused were in gainful employment. The basis of the argument was that after the act they fled and were later found within Buruburu. The distance between Mowlem and Buruburu is approximately 7 Kilometers. What is apparent is that the act was committed on 25<sup>th</sup> December, 2023 and the arrest was effected on 26<sup>th</sup> December, 2023 according to the investigating diary. The prosecution failed to demonstrate that indeed the accused will flee upon being released on bond.
22. The prosecution contends that the accused safety may be at stake if released on bond. Pre-trial detention may be necessary to ensure the accused person's safety, especially in the case where it is alleged that members of public were about to lynch them. The accused are young adults who are presumed innocent until proven otherwise. Currently courts are taking inordinately long periods prior to cases being determined due to capacity, therefore conditions to be set may address the question.
23. On the allegation of interfering with witnesses, the prosecution that alleged was duly bound to demonstrate by proving the allegation beyond reasonable doubt to persuade the court of existence of that fact. Allegations that are not established hence remain bare and must be treated as such.
24. The upshot of the above is that each accused be and is hereby released on bond Kenya Shillings One Million (Ksh. 1,000,000/-) with a Surety in an even sum, on condition that they relocate from Mowlem to other places that should be notified to the court through a letter by the area chief.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. N. MUTENDE**  
**JUDGE**

