



**Republic v Aluda (Criminal Case E002 of 2024)
[2024] KEHC 12364 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E002 OF 2024
RE ABURILI, J
SEPTEMBER 16, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JARED OLOO ALUDA ACCUSED

RULING

1. This is a Siaya High Court matter which was filed and mapped to this Court under a certificate of urgency for consideration by this Court as Siaya High Court had no Judge of the High Court following the untimely demise of the presiding Judge hOn Daniel Ogembo (RIP) in the month of July 2024.
2. This ruling determines the Accused person’s application for bail pending trial. It is dated 25th September, 2024.The application was filed and argued by Learned Counsel Mr. Ochanyo for the accused person.
3. The application was served upon the prosecution who did not file any opposing affidavit and neither did they appear in court to oppose the same orally as directed by the court.
4. According to the accused person, he is constitutionally-entitled to bail pending trial since he was innocent until proved otherwise. It was submitted on his behalf that he had applied to be released on bail pending trial, which application was heard by the now late Justice Daniel Ogembo (rip) who, upon considering the application which was opposed on the ground that the accused, if released on bond may interfere with the witnesses who are his neighbours and that the accused would be endangered as his home was razed down by angry neighbours.
5. The accused through his wife deposed and it was submitted that he was suffering from diabetes type 2 which require close medical attention as shown by the annexed doctor’s medical notes and that nonetheless, the late Judge had ordered that the application for bail be reconsidered after two key



witnesses had testified, which hearing could not take place owing to the demise of the Honourable Judge.

6. According to the accused person's wife, the accused has a fixed abode and that she will ensure that he attends court as he is not a flight risk.

Analysis and determination

7. The footing of bail or bond in Kenya is *the Constitution* of Kenya, 2010 and the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya.

8. Article 49(1)(h) of *the Constitution* guarantees every arrested person the right to bail as follows:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or a trial, unless there are compelling reasons not to be released.”

9. Section 123(A) of the *Criminal Procedure Code* sets out exceptions to the right to bail or bond. The provision operationalizes Article 49(1)(h) of the Constitutions in the following terms:

“(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 relevant circumstances and in particular-

- a) the nature of 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 as 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.”

10. The reasoning behind bail or bond in Kenya is premised on the constitutional imperative under Article 50(2)(a) of *the Constitution* that an accused is presumed innocent until the contrary is proved.

11. In bail or bond applications, the primary consideration must always be the ability of the accused to attend trial. The only exception remains where compelling reasons are demonstrated. In *Republic v Danson Mgunya & Another* [2010] eKLR, Ibrahim J, (as he then was) described the right to bail as an “inalienable right” and stated that:

“The result of the foregoing is that a murder suspect has a constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.”



12. It therefore follows that, in granting bail or bond, the trial court is called upon to exercise its discretion and, if there are no compelling reasons to deny an accused bail or bond, the trial court should exercise its discretion in favour of the accused.
13. Neither *the Constitution* nor the Criminal Procedure Code define what ‘compelling reasons’ are. However, in other jurisdictions, the term compelling reasons has been used to mean ‘exceptional circumstances’ or ‘unusual’ and ‘extraordinary circumstances.’
14. The, *Black’s Law Dictionary 10th Edition* defines ‘extraordinary’ as “beyond what is usual, customary, regular or common”. It also defines ‘a circumstance’ as “an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event”. The dictionary further defines “extraordinary circumstance” as “a highly unusual set of facts that are not commonly associated with a particular thing or event.”
15. In *Republic v Joktan Mayende & 3 Others* [2012] eKLR, *Mohamed Abdurrahman Said & Another v Republic* [2012] eKLR, *Wilson Thirimba v DPP* [2012] eKLR, among other cases, the Courts reverted to the meaning of the word ‘compelling’ as defined in the Concise Oxford Dictionary, 9th Edition which is defined as ‘rousing, strong, interest, attention, conviction or admiration’.
16. The Constitutional Court of South Africa in *Liesching and Others v S* (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (29 August 2018) quoted with approval the definition in *S v Petersen* 2008 (2) SACR 355 (C) and stated as follows:

“Meaning of “exceptional circumstances” (39)The phrase “exceptional circumstances” is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as “ordinary” in one case may be treated as “exceptional” in another. For instance, in *Petersen* a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court) observed in relation to an application for bail under section 60(11) (a) of the Criminal Procedure Act: “On the meaning and interpretation of ‘exceptional circumstances’ in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.”

17. Defining the term further, the South African Court in *S v Bruintjies* 2003 (2) SACR 575 (SCA) had the following to say:

“... What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional



nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail."

18. In *Republic v Pascal Ochieng Lawrence* [2014] eKLR the Court laid down the factors that must be considered in an application for bail pending trial and stated that:

"... It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the State. The Court in exercising its discretion as to whether or not to grant bond is, however, to be guided by the following parameters: -the seriousness of the offence although this carried greater weight under the old constitutional dispensation;the weight of the evidence so far adduced if the case is partly heard;the possibility of the accused interfering with witnesses;the safety and protection of the accused once he/she is released on bail/bond;whether the accused will turn up for trial;Whether the release of the accused will jeopardize the security of the community."

19. Further, in *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR, the Court in determining the criteria to be applied on whether to grant bail or bond cited the Supreme Court of Nigeria in *Alhaji Muiahid Dukubo-Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows:

"...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:

- i. The nature of the charges;
- ii. The strength of the evidence which supports the charge;
- iii. The gravity of the punishment in the event of conviction;
- iv. The previous criminal record of the accused, if any;
- v. The probability that the accused may not surrender himself for trial;
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- vii. The likelihood of further charges being brought against the accused;
- viii. The probability of guilty;
- ix. Detention for the protection of the accused;
- x. The necessity to procure medical or social report pending final disposal of the case". [Emphasis added]"

20. Having considered all the above, this court is alive to the fact that the accused is facing serious charges of alleged unlawful killing of another human being and the uncontroverted evidence on record that the



accused is in dire need of medical attention, now that the hearing of the case has been delayed owing to the unfortunate and untimely demise of the presiding Judge, which situation has no doubt led to the pile up of cases in the Court Station; and conscious of the accused person's right to bail and he remains innocent until proven guilty, I hereby allow the application and order that the accused person herein Jared Oloo Aluda may be released his own bond of Kshs 500,000 plus one surety of similar amount and that he shall not speak to or be in touch with any of the witnesses whether directly or indirectly while he is on bond.

21. Mention before the presiding Judge, Siaya High Court on 28th day of October, 2024 to fix a suitable the hearing date.
22. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF OCTOBER, 2024(VIRTUALLY FROM KISUMU HIGH COURT)

R.E. ABURILI

JUDGE

In the presence of:

Mr Ochanyo Advocate for the accused person(virtual)

N/A for the Prosecution

CA: Osir and Kasitet

