



**Republic v Yusuf (Criminal Case E004 of 2024)
[2024] KEHC 10715 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E004 OF 2024
JN ONYIEGO, J
SEPTEMBER 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ABDULLAHI OMAR IMAN YUSUF ACCUSED

RULING

1. Accused is charged with the offence of murder contrary to section 203 as read out with Section 204 of the penal code. Particulars are that on 20-07-24 at Athelema village, Buwa location, Bangal sub-county within Tana river county unlawfully murdered Abdullahi Mohamed Aden.
2. Having been arraigned before court for plea taking, he pleaded not guilty and a plea of not guilty accordingly entered. Consequently, through his counsel m/s Omwega, he applied for his release on bail citing his constitutional right to be released as such.
3. However, prosecution opposed the application citing grounds that; accused is a flight risk; the community is still bitter with what accused did and therefore not safe for him to be released on bond as the family of the victim is likely to revenge; some of the close relatives are not for his release and that he has no fixed place of a bode.
4. A perusal of the pre-bail report returned a negative report advising that it was not save to release the accused on bail given the prevailing tension within the community against his release. That accused has no fixed place of a bode as he was engaged in nomadism hence on the move with his wife while looking for grass for his livestock.
5. I have considered the application herein together with counsel’s submissions. The only issue for determination is; whether the applicant ought to be admitted to bail and/ or bond pending trial.



6. The rationale behind release of an accused person on bail in Kenya is premised on the constitutional provision under Article 50(2)(a) of *the Constitution* which stipulates that an accused person is presumed innocent until the contrary is proved.
7. In the same breadth, article 49(1)(h) of *the Constitution* does guarantee the right of an arrested person “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” Therefore, the only issue in the matter before me is whether the prosecution has demonstrated compelling reason(s) as to why the applicant should not be released on bond or bail.
8. Section 123A (1) of the Criminal Procedure Code provides factors to be taken into consideration in determining an application for bail. Those factors are; the nature or seriousness of the offence; the character, antecedents, associations and community ties of the accused person; the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and, the strength of the evidence.
9. According to Sub-Section (2) of the aforesaid Section, an accused person can only be denied bail if he has previously been granted bail and failed to surrender to custody or if it is necessary for him to be kept in custody for his own protection. 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].
10. It is trite that in granting bail, the trial court is called upon to exercise its discretion judiciously and not whimsically or capriciously. If there are compelling reasons to deny an accused person bail or bond, the court will have to state the specific reasons for such denial to avoid a situation of detention before trial or mere speculation. However, it should not be lost that the right to bond is not an absolute right.
11. The above notwithstanding, the primary consideration must always be the ability of the accused person to attend trial. As already mentioned, the only exception remains where compelling reasons are demonstrated. Ibrahim, J (as he then was) in *Republic vs Danson Mgunya & Another* [2010] eKLR described the right to bail as an “inalienable right” by holding 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.” [Also see the case of *Republic vs Joktan Mayende & 3 Others* [2012] eKLR, *Mohamed Abdurrahman Said & Another vs Republic* [2012] eKLR, and *Wilson Thirimba vs DPP* [2012] eKLR].
12. It therefore follows that a Court while exercising its discretion in dealing with a bail application must ‘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’. At the same time, the court must also balance “between the liberty interests of the accused person and the societal interest in denying the accused person bail.
13. As already stated, it is important that the said compelling reasons must be demonstrated. It is the prosecution’s case that accused is a flight risk capable of absconding court proceedings as he faced serious charges. It was emphasized that the applicant has no fixed place of abode and that the community is still bitter and that for his own safety he should remain in custody.
14. From the pre-sentence report, it is palpable that tension is still high in the village where accused comes from. Further, it was not controverted that the accused has no place of fixed abode as he lives a mobile lifestyle in this case pastoralism which involves movement from place to place. Of importance to note is the fact that family members are against his release considering that he had killed one of the family members.



15. Whereas bail is a constitutional right, the same is not absolute hence a matter of discretion by the trial court. Taking into account the pre-bail report, it is my finding that it is not safe to release the accused at this early stage for his own safety. To me that is a compelling reason to deny him bail. He shall however renew the same application after some reasonable time when perhaps tension would have eased. Accordingly, accused shall remain in custody until further orders.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF SEPTEMBER 2024.

J. N. ONYIEGO

JUDGE

