



**Mulwa v Republic (Miscellaneous Criminal Application E087 of 2024)
[2024] KEHC 12644 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E087 OF 2024**

**DR KAVEDZA, J
OCTOBER 22, 2024**

BETWEEN

ASHA NTHENYA MULWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Asha Nthenya Mulwa is facing a charge of trafficking in narcotic drugs contrary to section 4(a)(ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994. After her arraignment she applied for bail pending trial. In a ruling delivered on 17th May 2024, the trial court dismissed her application for bail pending trial. She has filed the present application dated 21st June 2024 seeking a review of the orders of that court denying her bail. She prayed that she be released on reasonable terms as the court may deem fit.
2. The application is supported by an affidavit of a similar date sworn by the applicant. The averments made are that: She is a law-abiding citizen and the sole breadwinner in her family. Her continued incarceration has resulted in great suffering both physically and economically. The offence she is facing is a bailable offence. She is innocent until proven otherwise. There were no compelling reasons for her denial of bail. She is not a flight risk and has a fixed abode. She urged the court to review the decision of the trial court and grant reasonable bail/bond terms.
3. The application was not opposed by the respondent.
4. The revisional jurisdiction of this court is donated by Section 362 of the *Criminal Procedure Code*. The court can only revise orders or decisions of the lower court if it is satisfied that the decision, order or finding is tainted with illegality, errors of law, or impropriety or that there was irregularity in the proceedings that gave rise to the impugned order, finding or decision.



5. Having considered the application, the written submissions of the applicant, and the applicable law. The issue for determination is whether the court should review the orders denying bail and grant reasonable bail terms.
6. Article 49(1) (h) of the [Constitution](#) guarantees 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 for the person not to be released. The onus of proof in bail applications in respect of compelling reasons is borne by the state under section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya. The right for an accused person to be released on bail is not absolute.
7. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of the [Constitution](#), the courts are to be guided by the provisions of section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

 - (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendant’s record in respect of the fulfilment of obligations under previous grant of bail;
 - (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 if released on bail, it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own good.
8. The constitution specifically requires under Article 49 (1) (h) of the [Constitution](#) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the [Criminal Procedure Code](#), Article 49 (1) (h) of the [Constitution](#) places the burden of proof on the state to demonstrate compelling reasons.
9. The trial court’s record indicates that on 13th May 2024, the applicant was arraigned and pleaded not guilty to the charge against her. Following her plea, the court heard an application for bail pending trial. On 17th May 2024, the court denied the applicant bail/bond, on the ground that she was a flight risk. The denial was based on the fact that she was arrested in a border town and found in possession of an Ethiopian identity card. The court held that these circumstances constituted a compelling reason to deny her the constitutional right to bail.
10. The prosecution, in opposing the grant of bond, relied on an affidavit sworn by PC Gabriel Leparachau, who argued that the applicant posed a flight risk, particularly given the porous nature of the country’s borders. The prosecution further highlighted that the applicant was arrested in Moyale, a border town, and had been uncooperative following her arrest. Additionally, the applicant was found



with an Ethiopian identity card. Based on these facts, the prosecution asserted that the applicant lacked a permanent fixed abode, thus increasing the risk of absconding from the court's jurisdiction.

11. The state's primary contention was that the applicant was unlikely to attend trial. However, at this stage, the standard of proof is based on a balance of probabilities. I am not persuaded that the circumstances of the applicant's arrest suggest an intention to flee the court's jurisdiction. The mere fact of being arrested in a border town does not, by itself, demonstrate an intention to abscond. Moreover, it is doubtful that the applicant, being a Kenyan citizen and resident, lacks a fixed abode.
12. Furthermore, the trial court did not call for a pre-bail report to assess the applicant's social background. Such a report would have provided insight into whether the applicant has a fixed abode and meaningful ties within the community, thereby verifying the claims made by the investigating officer. Without this crucial report, the trial court lacked sufficient evidence to conclusively determine whether the applicant had a permanent residence or not.
13. From the foregoing, I find merit in the application and it is hereby allowed on terms that the orders made by the trial court in the ruling delivered on 17th May 2024 denying the applicant bail is hereby set aside. Subsequently, I hereby make the following orders:
 - i. The applicant Asha Nthenya Mulwa is granted a bond of Kshs. 300,000 with one surety of a similar amount.
 - ii. In the alternative, the applicant Asha Nthenya Mulwa is granted a cash bail of Kshs. 200,000
 - iii. The applicant is directed to deposit her passport (if any) with the trial court.
 - iv. The Director General Immigration is directed not to issue a passport to the applicant and/or replace it.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF OCTOBER 2024.

D. KAVEDZA

JUDGE

