



REPUBLIC OF KENYA



**Republic v Too (Criminal Case E039 of 2021)
[2023] KEHC 1356 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE E039 OF 2021
AN ONGERI, J
FEBRUARY 16, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER KIMUTAI TOO RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated October 28, 2022 seeking the following orders;
 - i. That this court be pleased to review and set aside its orders issued on December 20, 2021.
 - ii. That upon granting the review orders the applicant herein be admitted on bond on such terms as the court may deem fit to grant.
 - iii. That any necessary directions be given.
2. The application is based on the grounds on the face of it and supported by the affidavit of Joseph Kiprotich Kirui sworn on October 28, 2022 in which it is deposed as follows;
 - i. That the applicant made an application for bond on October 12, 2021 through the firm of Mutai Kiprotoch & Co Advocates and the said application was rejected by the court by its ruling dated December 20, 2021.
 - ii. That the court relied heavily on the affidavit sworn by Francis Muchiri on April 14, 2021.
 - iii. That in paragraph 4 of the said affidavit, the said Francis Muchiri had stated that the accused person was a flight risk and that the ground was hostile.
 - iv. That the accused person made an informal application for the review of the said ruling and that he be released on bond and/or on such terms as may be deemed fit and just to grant.



- v. That the court gave directions that a formal application for bond be made by the applicant and that a pre-trial report be made by the probation officer of the court to find out if the situation has changed on the ground so as to warrant the accused person being released.
 - vi. That the court's probation officer one Christine Hamisi made a report in which she showed that the accused person was not a flight risk as he was a person of fixed abode.
 - vii. That the said probation officer recommended that the accused can be released on bond where he can stay in a family's separate farm located in Kipkelion sub-county.
 - viii. That in view of the entire circumstances, the court be pleased to allow the application and make an order for admitting the accused person to bond and upon such other terms that are fit to grant.
3. The application was canvassed by way of written submissions. The parties filed the following submissions:
 4. The applicant submitted that bond was a constitutional right under article 49(1) of the *Constitution* and urged the court to consider the circumstances of the case as spelt out in the pre-bail probation report filed by Christine Amisi dated May 28, 2022 favoring the accused person being released on bond. He relied on the case of *Republic v Evans Ochieng Rachar* [2019] eKLR Nairobi Criminal Revision 1214 of 2018 and *Mohamood Chute Wote & 2 others v Republic* [2021] eKLR Nairobi Miscellaneous Criminal Application E038 of 2021
 5. The applicant also relied on the provisions of section 123 (1) and (2) and article 50(2) in submitting that in fixing the bond amount, the court should take into account the circumstances of the case, the amount should not be excessive and that he should be presumed innocent until proven otherwise hence he should be subjected to favourable bond terms as he was a man of a fix abode and he will ensure that he appears to court when need be.
 6. The applicant reiterated that the court arrived at its ruling dated December 20, 2021 based on the pre-bail report filed by the investigating officer dated April 14, 2021 but the circumstances had since changed as evidenced by the latest probation report dated May 28, 2022 by one Christine Amisi warranting the need to revise the court's order regarding the issue of bail. He cited the case of *Daniel Kyalo Lua & 2 others v Republic* [2019] eKLR Machakos Criminal Revision 7 of 2019.
 7. The prosecution/respondent neither filed grounds of opposition, written submissions nor any response to the application.
 8. The applicant was denied bond on October 28, 2022 on the basis of an affidavit sworn by Pc Francis Muchiri who is the investigating officer (IO) in this case.
 9. The investigating officer stated in the said affidavit sworn on April 14, 2021 that the accused person's life was in danger since the members of the public might lynch him.
 10. The investigating officer further deposed in the said affidavit that the accused person is a flight risk and further that his flight might be triggered by the magnitude of the offence committed.
 11. The accused person's right to be granted reasonable bond is anchored in the constitution, under article 49 (1) (h) which states as follows: - "An arrested person has the right, to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."
 12. Odunga, J, (as he then was), in *Christopher Kyalo Kitila v Republic*(2021) eKLR stated as follows regarding an accused person right to bail:- "From the constitutional point of view, however, an accused



person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released.”

13. The only time the said bond can be denied is if there are compelling reasons not to grant the bond. The following are some of the reasons for denying an Accused person bail:-

- a. The likelihood of the accused failing to attend court when granted bail;
- b. The possibility of interfering with witnesses; and
- c. Detention for the protection of the accused.

14. Section 123 A of the [Criminal Procedure Code](#) states as follows: -

“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.”

15. Mativo, J, as he then was in [Republic versus Danford Kabage Mwangi](#)(2016) eKLR, stated as follows:- “The “relevant and sufficient” reasons which may permit the accused to be remanded in custody rather than being granted bail (also known as the “grounds for refusing bail”) are limited to: Risk that the accused will fail to appear for trial if they are released on bail;

- i. Risk that the accused will interfere with the course of justice while on bail (eg that he will destroy evidence that could be used against them at their trial or that they could interfere with witnesses who are due to give evidence at their trial);
- ii. Risk that the accused will commit further offences while on bail;
- iii. The accused would be at risk of harm (from himself/herself or from others) against which they would be inadequately protected if released on bail; or
- iv. Risk to the preservation of public order if the accused is released on bail.

At least one or more of the above grounds ought to be proved to the satisfaction of the court. Mere allegations or possibility is not enough.”



16. In the current case I find that the pre bail report filed by Christine Amisifiled in this court on May 28, 2022 gives a different scenario from the one filed earlier by the same probation on October 8, 2021.
17. I find that the circumstances on the ground have changed since the situation on the ground is no longer volatile and the life of the Accused is not in danger. The family of the Accused person has organized an alternative place of abode.
18. I grant the accused person a bond of Kshs 300,000 with one surety of similar amount.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

