



**Mussoko v Republic (Criminal Case E003 of 2023)
[2023] KEHC 20368 (KLR) (Crim) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL CASE E003 OF 2023

DR KAVEDZA, J

JULY 21, 2023

BETWEEN

MARY IKALA MUSSOKO APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

1. The accused is charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code* (Cap 63) Laws of Kenya, in respect of the deceased Martin Muthusi Mbalu. She pleaded not guilty to the charge. On March 29, 2023, this court dismissed her application for bail pending trial. She has filed the present application dated April 26, 2023 seeking to be released on bail/bond on reasonable terms as the court may determine. She also prayed for unconditional access to her home in Riverine Estate through her mother Jane Mwalimo Mwandacha Mussoko and her lawyers for purposes of securing personal documents and crucial information that would assist her in preparing for her trial.
2. The application is supported by an affidavit of a similar date sworn by the applicant. The averments made are that: She has been struggling with illness and requires specialised treatment which is not available in prison. Unless granted bail, her condition will worsen leading to other health complications. That in denying her bail, the court was persuaded by the victims' objection which was exaggerated and not objective. She is not a flight risk and will stay with her parents during her trial. She will not interfere with the prosecution witnesses who are mainly state officers and adults. She will provide sureties who will ensure she attends court when required. There are no exceptional circumstances demonstrated by the prosecution to warrant the denial of bail. In addition, there is no reason to deny her access to her home and her property. Particularly, she sought access to her motor vehicle registration number KCD 346V. She maintained that she was willing to abide by the conditions set for her release.



Issues for Determination.

3. Having considered the application, and the applicable law, the issue for determination is whether the court should grant the bail/bond review orders sought.

Analysis and Determination.

4. 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.
5. 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 defendants 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.”
6. The Constitution specifically requires under Article 49(1)(h) 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 (h) of the Constitution places the burden of proof on the State to demonstrate compelling reasons.
7. In the instant application, the applicant was denied bail by this court on March 29, 2023. The reason for the denial of bail at the time was the likelihood of interference with witnesses. This is because some of the witnesses are closely related to her. In particular, one of the witnesses is the applicant’s son aged nine (9) years old. This court was of the view that she has authority over the said child and as such could influence his testimony in court. The issue is whether the applicant has established the existence of changed circumstances to warrant the grant of bail pending trial.



8. In *Republic vs Francis Maina Wairimu* [2020] eKLR, Wakiaga J held that:

“In an application for review for denial of bail, the applicant is under a duty to convince the court that there had been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders”.

9. While the burden of proof with regard to changed circumstances may appear to fall on the accused as the applicant for bail review, it is a matter that falls for consideration under the general principle that an accused person is entitled to bail unless compelling reasons exist for refusal. Since the denial of bail in March 2023, the circumstances of the case have not changed. The accused’s trial is set for hearing on September 26, 2023. To my mind, the compelling reasons that were demonstrated by the prosecution leading to the denial of bail by this court still exist. It is therefore apparent to this court that the applicant has not established the existence of changed circumstances. Consequently, this court has no reason to interfere with the orders issued on March 29, 2023 on the denial of bail pending trial.

10. The applicant also prayed for unconditional access to her home in Riverine Estate through her mother Jane Mwalimo Mwandacha Mussoko and her lawyers for purposes of securing personal documents to enable her to prepare for her trial. She also sought possession of motor vehicle registration number KCD 346V. These two prayers were specifically pleaded by the applicant and this court made a determination in its ruling delivered on March 29, 2023. The applicant through her mother was given conditional access to her residence. Similarly, this court also made a determination on the use of the motor vehicle.

11. The upshot is that the application dated April 26, 2023 is dismissed for lacking in merit.

12. It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JULY 2023.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mulama and Ms. Parklea for the State

Dr. Khaminwa together with Nakel h/b for Dr. Khakula for the accused

Ms. Matu h/b for Dr. Musau for the victims

Habiba C/A

