



REPUBLIC OF KENYA



**Republic v Mutungi (Criminal Case E009 of 2022)
[2023] KEHC 20933 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE E009 OF 2022
TM MATHEKA, J
JULY 25, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ALEX NZIMBI MUTUNGI ACCUSED

RULING

1. The accused person Alex Nzimbi Mutungi is charged with murder contrary to section 203 as read with 204 of the Penal Code.
2. It is alleged that in 2017 on an unknown date and time at Iiani village Kilome location, Mukaa sub-county Makueni county he with others not before court killed Kelvin Mwendwa Michael.
3. Plea was taken on September 19, 2022, he pleaded guilty to the charge. He was represented by Mr Mwinzi holding brief for Ms Munyao – later his counsel was present and plea was taken afresh. He still pleaded guilty.
4. For some reason not on record – both the State and the defence counsel sought to defer plea.
5. On October 3, 2022 plea was taken afresh and he pleaded not guilty to the charge. No orders were made on the issue of bond.
6. On May 3, 2023 I sought Pre Bail Report. It was filed on May 16, 2023.
7. The probation officer came back with the conclusion that the accused was unsuitable for bail because he was a flight risk and due to his previous antecedents
8. The only issue is whether there are compelling reasons to deny the accused bond as guaranteed by article 49(1) (h) of the Constitution to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released



9. I have carefully considered the report.
10. In the first instance there was no objection to bond.
11. In the 2nd instance the only antecedent against the accused was that he was held at Shimo La Tewa Borstal for an offence committed while he was a minor and released on licence on supervision by the probation officer. The [Borstal Institutions Act](#) cap 62 provide at Section 26 for release on licence:
 - "1. The superintendent, on the recommendation of the After-Care Committee, may by licence under his hand permit any inmate who has been detained in a borstal institution for a period of not less than twelve months to live under the charge of a named trustworthy and respectable person who is willing to receive and take charge of him and to supervise, guide and advise him.
 - (2) A licence shall remain in force until the expiration of the period for which the inmate has been directed to be detained, or until cancelled under section 27.
 - (3) The time during which an inmate is absent from a borstal institution in pursuance of a licence shall, except where the licence is cancelled by reason of his breach of licence be deemed to be part of the time of his detention in the borstal institution.
- "27. Revocation of licence
A licence may be revoked by order in writing of the Commissioner—
 - a. if the person to whom it was granted has broken any condition of the licence; or
 - (b) if the Commissioner and the After-Care Committee consider revocation of the licence to be in the best interests of the person to whom it was granted.
12. The probation officer now states in the report that the accused did not do well on licence supervision however the officer never complied with the law by bringing that failure on the part of the accused to the court or the Commissioner of Prisons for the proper legal process to be followed. As a result, this revelation at this stage in this manner can only be prejudicial on the accused without his being heard. In any event he was a minor and that record ought not to be held against him when clearly it is the Probation Office that failed him by not making the requisite negative report on his conduct while on licence. Perhaps if the issue had been dealt with then we would not be here.
13. There are allegations that he was a thief – but other than the inadmissible antecedents for the period when he was a child there is nothing else in the report concrete to support this allegation.
14. It is also alleged that the accused has been acting insanely. There is no reference to the other justice agencies e.g the hospital for purposes of medical treatment. I note that the psychiatrist's report – that although he had mental illness at the time of the incident the accused was found to be competent to stand trial.
15. The accused person's mother vouches for the accused person should he be released on bond that she will ensure he comes to court and more importantly that that she will ensure that he take his medicine.



16. I have carefully considered the report and while Pre bail reports ought not to be ignored – the report paints the accused as a person who ought not to be released yet the family of the victim are not fearful of him, and have no problem with his release.
17. I am also concerned as to why the probation officer is painting the family as very poor yet they have property and most of the family members have a source of income, however small. The probation office must refrain from painting families as very poor when such families are self-reliant and taking care of themselves and their families. Having money/cash cannot be the measure of a person’s worth especially when determining the issue of bond. Instead of looking at what the family lacks there ought to be a deliberate effort to highlight what they have in their social standing. Otherwise always stating that people are poor because their ancestral land has not been subdivided to give each a title deed of their small portion is not good. It creates a poverty mindset that does not exist.
18. In the circumstances and to that extent I am not bound by the report. Taking into account the seriousness of the offence, the accused may be released on a bond of Kshs 100,000/= with similar surety of same amount.
19. In the alternative he may be released on cash bail of the same amount ie Ksh 100,000 with his mother as the contact person to deposit in court: letter from the area chief or assistant chief, full photo of the mother and copy a copy of Identity Card.
20. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH JULY 2023

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MUMBUA T MATHEKA

JUDGE

Court Assistant: Mwiwa

Accused: Present

Mr. Tanui for state

N/A for Counsel for accused due to boycott by pro bono advocates.

