



Opollo & another v Republic (Miscellaneous Criminal Application E099 of 2024) [2024] KEHC 12058 (KLR) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E099 OF 2024**

DR KAVEDZA, J

OCTOBER 4, 2024

BETWEEN

MARY ADHIAMBO OPOLLO 1ST APPLICANT

CHARLES KIMANI WANJIKU 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed a chamber summons dated 10th July 2024, seeking an order to review the rulings delivered by the trial court on 16th February 2024 and 20th March 2024 denying them bail pending trial. The application is supported by an affidavit sworn by the applicants of even date.
2. The averments made in support of the application are that they applicant are jointly charged with two counts of trafficking in narcotic drugs contrary to section 4(a)(ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994. They pleaded not guilty and applied for bail pending trial. The trial court denied bail on the ground of public interest. The court pointed out that the applicants were involved in a drug syndicate, which allegations they claim are unfounded. In addition, there were no compelling reasons to deny them bail pending trial. That the first applicant has a fixed abode along Thika road next to Garden City while the second applicant resides at Huruma Corner, Lagos House Numbers 30 and 36. They undertake to attend court when required. She is the sole caregiver of her elderly mother.
3. The issue to be determined is whether the order of denial of bail by the trial court should be revised.
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 pursuant to 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 (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 [Criminal Procedure Code](#) and the [Constitution](#) places the burden of proof on the state to demonstrate compelling reasons.

7. In the instant application, the applicants were denied bail by the trial court 16th February 2024 and the decision was affirmed on review on 20th March 2024. The reason for the denial of bail at the time was on the grounds of public interest.

8. The consideration of public interest in national security and public safety as a compelling reason for bail is undeniable, grounded in both the essence of Article 24 limitations, which justify actions in the interests of others within an open and democratic society. It then becomes crucial to strike a proper balance between individual rights and societal interests, ensuring individuals enjoy their rights to the fullest extent while respecting the rights and interests of others or the public interest in specific cases. The interest of justice involves balancing the accused's right to bail with society's interests on one hand, and on the other hand, the accused person's rights to presumption of innocence and release on bail.

9. The trial court denied the applicant bail, referencing the case of [Republic v Stephen Lelei & Franklin Leliman](#) [2020] eKLR. Unlike the [Leliman](#) (*supra*) case, which involved a serious crime; the alleged killing of an advocate by police officers and allegations of witness intimidation and significant public outcry, this case does not involve public outrage or similar factors.

10. It is important to note that in the affidavit opposing the bond, sworn by CPL Luke Washiko dated 15th February 2024, the respondent did not cite public interest as a reason to oppose the applicants' bond. It is therefore unclear what evidence the trial court relied on to consider public interest as a



ground for denying bail. Public interest must be contextualised and demonstrated in the affidavit of the investigating officer. It is not for the court to take judicial notice and infer public interest.

11. That notwithstanding, if indeed public interest was a ground, the same public interest wanes. In *Republic v Danson Ngunya & Another* [2010] eKLR, Makhandia J, (as he then was) brought in a further consideration that if the state wants the accused persons to be deprived of their right to be released on bond, then it must satisfy the court that it would not be in the interest of justice to make an order granting bond. That means that in addition to giving reasons for denial of bail, those reasons will be weightier if they are premised on public interest.
12. I have carefully considered the application before me. The trial court was told that the applicants were a flight risk. No evidence was placed before the court in that respect. They are Kenyan citizens residing within the jurisdiction of the court. As observed earlier, compelling reasons required to deny bail should be real and cogent and should be such as would convince the court that it would be against the public interest to grant bail. The respondent did not raise any compelling reasons for the denial of bail.
13. Having carefully considered the application, I find no compelling reason to deny them the prayer for bail pending trial. Accordingly, I grant the application for bail on the following terms:
 - i. The applicants are each granted a bond of Kshs. 2,000,000 of a fixed asset with one surety of similar amount.
 - ii. The applicants are each directed to provide two contact persons one of whom is to be an adult blood relative.
 - iii. The applicants are to deposit their passport in court and shall be retained during the period of her trial.
 - iv. The applicants shall not be issued with any new passport and or any temporary travelling documents of whatever nature.
 - v. This order shall be served upon the Immigration Department in compliance with order (iv) above.
 - vi. The applicants shall report to the investigating officer every month until the conclusion of the trial.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Omuyoma for the Applicants

Maroro for the Respondent

Nelson Court Assistant.

