



**Republic v Muinde & 3 others (Criminal Appeal E059 of 2023)
[2024] KEHC 12204 (KLR) (Crim) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E059 OF 2023
LN MUTENDE, J
OCTOBER 7, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SHADRACK MUSYOKA MUINDE 1ST ACCUSED

ANTONY MULI 2ND ACCUSED

DAVID BENEDICT MUSEE 3RD ACCUSED

PAUL MUSYIMI 4TH ACCUSED

RULING

1. Shadrack Musyoka Muinde (1st Accused), Antony Muli (2nd Accused), David Benedict Musee (3rd Accused), and, Paul Musyimi (4th Accused) are charged with Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the offence are that on 2/10/2022 at around 0500hours at Transami stage Embakasi Sub-County within Nairobi with others not before court, murdered Timothy Sila Mwalimu.
2. The accused denied the allegations and now seek to be released on bail/bond pending trial. The 2nd accused represented by learned Counsel, Mr.Nyabuto, filed a formal application urging that he is presumed innocent until the contrary is proved and there is no compelling reason supported by evidence to deter him from being released on bond.
3. That: he has a fixed abode in Mukuru kwa Njenga where he will be staying during trial or such place as the court would direct; he has a young family which has been rendered destitute since his incarceration; his father is willing to stand surety; he is not a flight risk and does not have a passport; he is willing



- to comply with all conditions of the court; and, that he does not have capacity to interfere with or threaten witnesses or victims.
4. Learned counsel, Ms. Awour for the 1st Accused, Ms. Sifuna for the 3rd Accused, and Mr. Munga for the 4th Accused filed submissions, and / or opted to rely on the pre-bail reports filed.
 5. The application is opposed by the State through the affidavit of No. 89323 PC Patrick Akwiri, the Investigation Officer, who depones that prosecution witnesses are known to the accused having worked and interacted with them for over 5 years. That there is a likelihood that if released on bond or bail the accused will threaten or somehow influence witnesses.
 6. That: there is no proof that they have fixed places of abode as no documents have been provided; and, the severity of the offence and possibility of punishment is an incentive for the accused to flee from the court's jurisdiction.
 7. In order for the court to have views of victims, pursuant to an order given, social inquiries were conducted and pre-bail reports filed. The 1st accused children are under the custody of his mother in Kitui County. He was a *bodaboda* rider at Transami stage for 8 years. His grandmother is also willing to stand surety using her land Title Deed in Yatta as collateral and that the accused has a broken hand following an accident.
 8. The accused opts to relocate to his rural home where he has a permanent house. The area Chief of Thunguni Sub-location stated that the accused hails from the area and is a peace-loving person. The local community consider the accused positive social standing in the community and therefore vouch for his release on bail. The accused peers are *bodaboda* operators, they believe that the 1st accused is of good behavior.
 9. The 2nd accused, Antony Muli David is 31 years old and he comes from Kwamumo village in Kitui County. He relates well with the family, they also support his release on bail and the accused grandfather is willing to use his land Title Deed at Kitui to post bond. The accused will also be staying at the same area.
 10. The accused operated a *bodaboda* business at Transami stage, he broke his leg in 2019 following an accident. The wife Mary Nthenya is engaged in casual jobs at Mukuru area, they have three children together and their last born has not joined school. The accused is a responsible father and played a role in providing for the family. The last born is still at home due to lack of fees.
 11. The 3rd accused, David Benedict Musee's quest for bail is not opposed, but it is urged that it be deferred until key witnesses testify. The accused does not have strong family ties, but, the family is willing to bail him out and ensure he reports to court. They plead for cash bail since land is undergoing subdivision. The family stays at Kitui and would have the accused stay in Ruiru at his sisters place or Huruma at his aunt's place. The area Chief knows the accused family, he recommends that the accused stays in Kitui away from the witnesses.
 12. The 4th Accused, is from Ithummba Itaara village. His family is supportive, they pray that the court invokes the principle of presumption of innocence. He worked at Ken Tank Kenya Builders at Pipeline area where he was a cleaner. He was stated to have been injured in an accident at work, hence, resigned and started a charcoal business. He bought a motor cycle which was impounded over traffic offences. He resorted to do casual jobs. He is married with two (2) children and his wife is nine (9) months pregnant with their 3rd child. The accused family moved to his ancestral home at Makueni, while the accused was living at Mukuru kwa Njenga at the time of the offence.



13. The accused stated that he will live in his ancestral home at Makueni where he has a fixed abode and where his family also resides. That he will attend court out of his own recognizance. The accused siblings and mother are willing to be listed as contact persons and the maternal grandfather will use his title deed for 10 acres of land at Makueni area to stand surety for him. The accused is not known within Mukuru area, but the local administration of his rural home stated that they do not have negative reports about him.
14. The victim family oppose the release of the accused on bond. They are apprehensive that the accused are flight risk they will interfere with witnesses and generally frustrate trial as they allegedly threatened witnesses. It is stated that the deceased brother Obadiah Mutiso has received threats and the family has also received calls from private numbers which makes them insecure and vulnerable. That releasing them on bail will give them a chance to flee the jurisdiction of the court. That the 4th accused went into hiding after the offence and it took several months before his arrest. It is recommended that the question of bond be deferred to a time when the witnesses will have testified.
15. The application was canvassed through written submissions that I have considered, alongside authorities cited. The accused right to bail pending arrest and trial is guaranteed under the Constitution; this is pursuant to Article 49 (1) (h) of the Constitution and Section 123 of the Criminal Procedure Code as read with the Judiciary Bail and Bond Policy Guidelines.
16. The right to bail can however be limited where the prosecution proves existence of compelling grounds requiring the accused to be incarcerated during trial. Such grounds are not defined by the Supreme law but caselaw has set the threshold to be: persuasive,convincing or forceful grounds that are proved beyond doubt.
17. In R v Joktan Mayende and 3 Others [2012] eKLR it was held that :

“...The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.”
18. The Bail and Bond Policy Guidelines, 2015, at page 25 require the prosecution to adduce compelling reasons to justify denial of bail. It states as follows:

“The following procedures should apply to the bail hearing:

 - a. The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:
 - a. That the accused person is likely to fail to attend court proceedings; or
 - b. That the accused person is likely to commit, or abet the commission of, a serious offence; or
 - c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
 - d. That the accused person is likely to endanger the safety of victims, individuals or the public; or



- e. That the accused person is likely to interfere with witnesses or evidence; or
- f. That the accused person is likely to endanger national security; or
- g. That it is in the public interest to detain the accused person in custody.”

19. In the instant case, grounds raised by the prosecution are that the accused are likely to interfere with or threaten witnesses, the accused do not have a fixed place of abode and that the severity of the offence is an incentive to abscond trial.
20. A likelihood of interference with witnesses by the accused is a good ground for denial of bail such that mere allegations should be disregarded. It is deponed that the prosecution witnesses are known to the accused. That the witnesses worked with the accused for over 5 years.
21. The accused confirmed that they operated their *bodaboda* business at Transami stage area at the time of the offence, the accused have also been residents of the place for a long period. The chances that the accused would interact with the witnesses from the area are augmented by this interaction and long-term association. However, the prosecution have to prove their argument beyond speculation such that conditions imposed would not prevent interference.
22. It has been stated now and again that the specific instances of likelihood of interference with witnesses must be laid before the court with such succinct detail or evidence as to persuade the court to deny the accused bond. The fears expressed by the deceased family and threats to the deceased brother have not been reported and there is no proof that the accused are responsible for the alleged threats.
23. The accused have also stated that they have other residences or are able to relocate to other areas away from the witnesses. The accused were residents of Embakasi area where they operated businesses, however, upon arrest and arraignment it cannot be stated that they will go back to the same place of residence. The pre-bail report confirms that their families support their release and would be willing to stand surety for them. They have also decided to live with the accused while others will reside at their rural homes. The prosecution has not proved that the accused will not be able to turn up for trial if they relocate. Further, sureties will be vetted and if approved they should be able to guarantee the accused turn up for trial.
24. Lastly, the severity of the offence is a ground to be considered by the court under Section 23 A (1) (a) of the *Criminal Procedure Code* as an independent ground.
25. In *Dr. Ismail Kalule & 3 Others v Uganda* [2011] UGCC 184 Owiny-Dollo J (As he then was) stated that;

“ There are well established guidelines Court should adhere to, in the exercise of its discretion, in considering the issue of bail...

These include nature or gravity of the offence the accused is charged with, the severity of the sentence that could result therefrom if conviction is secured.”
26. Murder is a serious offence which carries severe sentence of up to death penalty and may influence the accused ‘s mind, these form an incentive to abscond trial. In *Republic v John Kabindi Karisa & 2 Others* [2010] eklr, M K Ibrahim J (As he then was) stated that:

“ Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being”.



27. Notably, an accused is presumed innocent until proven otherwise. However, the charges have not been proved and the accused should benefit from the presumption of innocence provided under the Constitution. Stringent bond terms can also be incorporated to prevent the accused from absconding trial.
28. Conversely, the accused personal circumstances should also be considered, there is need to balance the scales of justice. The decision reached in conclusion calls to mind fairness. The accused are presumed innocent until proven otherwise. It has been established following inquiries conducted that the accused are breadwinners and their children have been left destitute, yet, they are presumed innocent.
29. In the upshot, I find the prosecution having failed to put forth compelling grounds to deny the accused bail. In the result, I grant each accused bond of Ksh. 500,000/- with two (2) sureties of a similar sum. Upon release the accused shall relocate and not go back to the place of the incidence; and, they should not interfere with witnesses either directly or indirectly through proxy.
30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 7TH DAY OF OCTOBER, 2024.

L. N. MUTENDE

JUDGE

