



**Republic v Matheka & 4 others (Criminal Case E024 of 2023)
[2024] KEHC 11959 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE E024 OF 2023
FR OLEL, J
OCTOBER 3, 2024
IN THE MATTER OF AN APPLICATION FOR REVIEW OF
BAIL AND BOND
AND
IN THE MATTER OF ARTICLE 49(H) OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE CRIMINAL PROCEDURE
CODE, CAP 75 LAW OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

MICHEAL KIILU MATHEKA 1ST ACCUSED

SAMUEL MUTNINDA MUKITI 2ND ACCUSED

VINCENT MUTINDA NGUMBA 3RD ACCUSED

JOHN MUSYOKA KIOKO 4TH ACCUSED

JULIUS NDOOTHY MUTUA 5TH ACCUSED



RULING

A. Introduction

1. Before the court for determination is the 1st accused/Applicant notice of motion application dated 16th May 2024 that seeks orders that; this Honourable court be pleased to review the bail/bond terms for the 1st Accused and grant him bail/bond on reasonable terms. The said application is supported by the grounds on the face of the said application and the supporting affidavit, sworn by the applicant dated 16th May 2024, where he depones that he had been charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code and had been denied bond based on the recommendations of pre bail report filed herein.
2. The appellant averred that he had since had a chance to read through the pre-bail report and noted that the said report did not give any concrete/compelling reasons as to why he should be denied bond. His family was willing to stand surety for him, and he would abide by the bond terms issued by this court. Further, the applicant also stated that, he would religiously attend court when required to do so, without interfering with potential witnesses lined up to testify in this case. The respondent, through counsel Ms Otulo stated that they did not oppose this application and left it for the court in its discretion to grant or not to grant bond.

B. Analysis of Law

3. I have considered the foregoing.
Article 49(1)(h) of *the Constitution* provides that:-
An accused person has the right ...
(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.
4. *The Constitution* does not define what qualifies under the term “compelling reasons”. The ordinary meaning according to Thesaurus English Dictionary of the word “compelling” is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning, it is apparent that the court can consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, the primary of which is whether or not the accused will attend trial.
5. Further, Section 123A of the Criminal Procedure Code gives the parameters for the grant of the right to bail as follows:
 - (1) 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.
6. The considerations in determining whether or not to grant bail are also set out in Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 at p. 25 which sets out judicial policy on bail 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.
7. The Appellants’ pre-bail report dated 08.12.2023 indicated that the applicant was a pastor at Jesus restoration church and had committed to adhere to bond terms if granted. His family too had indicated that they were willing to secure his bond and stand surety for him. The victim’s family and community on the other hand registered their opposition to the appellant being granted bond as he was not well known and therefore could jump bail. Further, they also noted that the applicant’s family and the victim’s family resided within the same vicinity and there was a strong likelihood of the applicant interfering with the crucial witnesses.

C. Determination

8. The pre-bail report contains contradictory findings as it confirms that the applicant’s family reside on a 10-acre piece of land and he had strong family ties at home. The applicant was married, blessed with two daughters and had relocated to Mbiuni, where he had built his home. On the same breath, the said report finds that the applicant has no fixed abode, and therefore a flight risk, which finding is not accurate.
9. Secondly, the victim’s family had raised genuine fear that the appellant might tamper with witnesses in this case. This fear/apprehension is based on strong suspicion, but in law suspicion however strong, cannot form the basis upon which the court can make a determination to deny the appellant bond, especially where proof or basis of such interference has not been laid out.



D. Disposition

10. I do therefore find that this application has merit and do order that the 1st Applicant/respondent be released on bond of Kshs.500,000/= plus one surety of a similar amount on condition that;
- a. The 1st applicant/ respondent during the pendency of this suit, will not contact any witness or potential witness either directly or indirectly.
 - b. The 1st applicant/respondent will endeavour to religiously attend court as and when required.
11. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 3RD DAY OF OCTOBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 3RD DAY OF OCTOBER 2024.

In the presence of;

Accused present in court

Ms Otulo for ODPP

Susan/Sam Court Assistant

