



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ali & 2 others (Criminal Case E002 of 2024)  
[2024] KEHC 14381 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14381 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MANDERA  
CRIMINAL CASE E002 OF 2024  
JN ONYIEGO, J  
NOVEMBER 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ABDIWAHAB NOOR ALI ..... 1<sup>ST</sup> ACCUSED**

**ABDIRAHMAN ADAN IBRHAIM ..... 2<sup>ND</sup> ACCUSED**

**YAHYA MAALIM ABDISHAKUR ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The ruling is in respect to an application for the accused to be released on bail pending trial having been jointly charged of the charge of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars of the offence are that on 20.09.2024 between 0200hrs and 0300hrs at Kamor Location within Mandera East Sub-county, Mandera County they jointly murdered Ahmed Hajiow Ahmed.
2. Having pleaded not guilty, the applicants/accused persons through their legal counsel Mr. Nyipolo sought to be released on bail on grounds that bail is a constitutional right and that they were not a flight risk.
3. The prosecution opposed the application vide an affidavit, sworn on 22.10.2024 by PC Samson Jindwa, the investigating officer who gave detailed reasons as to why the accused should be denied bail/bond at this stage of the trial.
4. It was deponed that there are sufficient compelling reasons to deny the applicant bail/bond for the reasons that; immediately after the commission of the offence, the 1<sup>st</sup> and 2<sup>nd</sup> accused fled the country for Ethiopia where they hid in a town known as Dollow, 40km away. That it took law enforcement officers a lot of effort and resources to engage with their counterparts from Ethiopia to locate the two



- accused persons from their hideout. He deposed that upon the accused being presented at the border crossing point at River Daua, the members of public bayed for their blood.
5. It was further stated that it took the law enforcement officers a lot of effort to receive the two and thereafter guard them as the members of the public wanted to lynch him. The deponent urged that should the two be released, the same will jeopardise the integrity of investigations and at the same time, they are a flight risk owing to the seriousness of the offence they are facing. The officer further stated that the security of the accused is at stake and they risk being killed by the members of the public.
  6. As regards the 3<sup>rd</sup> accused, it was alleged that he comes from Arabia a volatile place bordering Somalia which is known to be extremely insecure and that if released, he is likely to disappear hence very difficult to trace him. That when he was arrested by the officers, he was under attack by members of the public who wanted to lynch him.
  7. On the other hand, the accused through Mr. Nyipolo argued that the accused are entitled to the presumption of innocence until proven guilty beyond reasonable doubt. Learned counsel stated that an accused person should not be unduly detained before the determination of his guilt. He thus urged this court to consider admitting the accused into reasonable bail/bond terms.
  8. Prior to canvassing the application, the court had ordered for pre-bail reports in respect of the accused from the probation department. The report in respect of the three is not favourable. The accused's families do not want them back at home. The community is very bitter hence ready to revenge if the accused are released on bond.
  9. I have considered the application, oral submissions by the parties and the affidavit in opposition thereto.
  10. 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.
  11. Compelling reasons are not defined in the [Constitution](#) in as much as Section 123A of the [Criminal Procedure Code](#), provides 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 fulfillment 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.
  12. The considerations in determining whether or not to grant bail are also set out in the Kenya Judiciary's [Bail and Bond Policy Guidelines](#) and in the same breadth, it is not in doubt that the rationale behind any release of an accused person on bail or bond in Kenya is premised on the constitutional provision



under Article 50 (2) (a) of the Constitution that an accused person is presumed innocent until the contrary is proved.

13. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail.
14. The question that seeks to be addressed is ‘what is the meaning of compelling reasons.’ In the case of Republic v Joktan Mayende & 3 Others [2012] eKLR, Mohamed Abdurrahman Said & Another v Republic [2012] eKLR, Wilson Thirimba v DPP [2012] eKLR, among others, the respective Courts reverted to the meaning of the word ‘compelling’ which is defined in the Concise Oxford Dictionary, 9<sup>th</sup> Edition as ‘rousing, strong, interest, attention, conviction or admiration’.
15. However, ‘compelling reasons’ is relative as it depends on the circumstances of each case. As such, the mere fact that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond from appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial and whether or not a free and fair trial can be achieved notwithstanding the release of the accused on bond.
16. The imposition of terms of bail, if necessary, must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. See Republic v Wycliffe Nyakwana Nyamweya (Criminal Revision 135 of 2016) (2016) KEHC 7930 (KLR) (Crim) (28 July 2016) (Ruling) where the court held that;

“It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial”.
17. Similar position was re-emphasized by the court in Republic v Danson Mgunya & Another [2010] eKLR where M. K. Ibrahim J (as he then was) held thus;

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”
18. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. However, where the prosecution satisfies the Court that there exist compelling reasons which justify the denial of bail or bond, then the Court will deny the same.



19. In the instant case, the prosecution deponed that the 1<sup>st</sup> and 2<sup>nd</sup> accused are not only a flight risk as they previously fled to Ethiopia but also that they stand a risk of being lynched by members of the public. Additionally, that it took a lot of effort and resources to liaise with officers from Ethiopia in the quest of arresting the accused. In the same breadth, that in the interest of their safety, they should not be released on bond/bail. [See *S v Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262]
20. As already noted, the primary consideration for bail is whether the accused will attend court for his trial. Therefore, if a compelling reason is demonstrated that the accused person is likely to fail to attend court proceedings, then the discretion should be denied. [See *Kelly Kases Bunjika v Republic* [2017] eKLR].
21. Taking into account the averments by the investigating officer which are not controverted and further, considering the negative pre-bail report, am persuaded to believe that the accused persons stand a high chance of absconding court hence a flight risk. Secondly, given the conduct of the community who wanted to lynch the accused while in the hands of the police and further taking into account the prevailing bitterness in the community, it is apparent that accused person's security is at risk.
22. In view of the above holding, I am inclined to uphold the objection against the release of the accused on bail. Accordingly, the application for release of accused on bail is dismissed. They shall remain in custody pending trial unless otherwise directed.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**J. N. ONYIEGO**

**JUDGE**

