



**Republic v Atsulu alias Musa & 4 others (Criminal Case E039 of 2024)  
[2024] KEHC 13856 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13856 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E039 OF 2024  
AC BETT, J  
NOVEMBER 8, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**EVANS MOSES ATSULU ALIAS MUSA ..... 1<sup>ST</sup> ACCUSED**

**JOSEPH ABURILI MAPESA ALIAS JUNIOR ..... 2<sup>ND</sup> ACCUSED**

**HABIL OKUTOYI YATOLI ALIAS HERBIL OKUTOYI ALIAS ABEL AMANYA  
ALIAS ABILI OKUTOYI ..... 3<sup>RD</sup> ACCUSED**

**AGGREY PAUL ODUOR MUYAI ..... 4<sup>TH</sup> ACCUSED**

**KIPYEGON DAVID BROWN ALUKHABA ..... 5<sup>TH</sup> ACCUSED**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons were arraigned and charged before this court on 9<sup>th</sup> September 2024. Their plea was taken on 11<sup>th</sup> September 2024 after which the prosecution opposed their application for bond. The court therefore called for a pre-bail report. On 28<sup>th</sup> October 2024, at the instance of the prosecution, this file was consolidated with HCCR. Case No. E044 of 2024.
2. After the Accused persons took plea, the prosecution once again, objected to their release on bond and made an application based on an Affidavit sworn by Chief Inspector Nicholas Waringa that the Accused be denied bond. The grounds for the prosecution’s application is that the Accused fled their areas of residence after the offence and it took time to apprehend them. The prosecution further states that there is ongoing hostility in the area following the killing of the deceased and so the Accused person’s safety is uncertain. Further, the prosecution states that the key witnesses are well known to the Accused and although the Assistant Chief did not express reservations to the release of the Accused on bond, it is because he and the Chief are possibly the ones who instigated the mob justice as is evident



from the witness statement of one of the key witnesses. The prosecution urges the court to deny the Accused persons bond pending the hearing of the key witnesses.

3. The Accused persons' Counsel spiritedly defended their client's right to be released on bond arguing that it is a Constitutional right and that no proof was presented to court that the Accused persons are a flight risk. The Accused's Counsel further denied that there is hostility. It is submitted that the Accused persons do not come from the same area. They submit that all the pre-bail reports are in favour of the Accused persons being granted bail. For Accused 2, it is submitted that he is aged nineteen (19) years while Accused 4 is fifty two (52) years old and their respective ages should be taken into consideration. For the 4<sup>th</sup> Accused, it is submitted that he was not avoiding arrest as he was arrested on 2<sup>nd</sup> September 2024 and arraigned in Butere Law Courts on 3<sup>rd</sup> September 2024 as investigations were still ongoing. Accused 4 is a civil servant employed by the County Government of Kakamega and was at the place of work all along. The Accused persons contend through their Counsel that they have a right to be presumed innocent until proved guilty and since Accused 5 had already been granted bond in the earlier file on 23<sup>rd</sup> October 2024, his bond should be reinstated on the same terms as to deny him bond at this juncture is tantamount to the court going against its own orders and unfair to Accused 5.
4. In rejoinder, the prosecution submits that the Accused persons were arrested two months after the accident and that the Bail and Bond Guidelines are clear that where there are compelling reasons, the court ought to deny bail.
5. The right to bail is enshrined in Article 49 (1) (h) of *the Constitution* which states that an arrested person has a right to:

“(h) be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

Notwithstanding the provisions of Article 49 (1) (h) of *the Constitution*, it should be noted that bond is not an absolute right because there is a proviso that where there are compelling reasons, an Accused person may not be eligible for bond or bail. In Republic -vs- William Mwangi Wa Mwangi [2014] eKLR, the Court held thus:-

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail -See R VS Danson Maonya and another High Court of Kenya Mombasa Criminal Case No. 26 of 2008. *Republic VS Thomas Mutbus Nzii (Nrb) Misc. Cr. Appn No. 13 of 2010*, *Republic VS Daniel Musyoka Munya and two others High Court Criminal Case No. 42 of 2009*(Mombasa).

In this case, the only reason given by the state in opposing bail is that the accused is flight risk because his place of residence was unknown and that his safety would be at risk if released on bond.

That state did not however back this claims by any evidence since no replying affidavit was sworn by the investigating officer to substantiate the allegations.

Mr Sitati's submissions in this regard amounted to statements from the bar which had no factual basis.



The results is that the state failed to demonstrate that if released on bail, the accused is likely to abscond.

It is trite that the cardinal principle which the court should consider is deciding whether or not to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

6. Pursuant to the aforesaid proviso to Article 49 (1) (h), the onus of demonstrating that there are compelling reasons to justify the denial of bond or bail to an accused lies with the prosecution. It has been held by several courts that compelling reasons would include considerations such as whether the accused likely to attend court, whether the accused is likely to interfere with witnesses and whether the security of the accused is assured.
7. The statutes do not define the phrase “compelling reasons” but generally it refers strong, valid and sufficient reasons that persuade the court to deny bail. Each case is to be determined according to its circumstances with the primary consideration whether the accused will attend court.
8. The Kenya Judiciary’s Bail and Bond Policy Guidelines, 2015 sets out the 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.”
9. Counsel for Accused 5 argues that to deny Accused 5 bail at this juncture would be tantamount to the court reneging on its earlier orders given that Accused 5 had been granted bail before the consolidation of the two cases. However, the court is cognizant of the fact that bond can be cancelled at any time during trial depending on arising circumstances and where there are compelling reasons. Accused 5 was granted bond in Criminal Case No. E044 of 2024 on 23<sup>rd</sup> October 2024. This was before the



application for the 5<sup>th</sup> Accused person to be denied bond was filed. The said application has raised issues that the court must consider in its decision whether or not to grant bail.

10. The prosecution avers that the Accused persons are likely to interfere with witnesses. However, C.I. Nicholas Waringa, who swore the Affidavit in support of the averments, only gave a blanket statement with no specifics as to how and where the Accused persons would interfere with the witnesses nor which specific witnesses were likely to be interfered with. Additionally, the prosecution avers that although the pre-bail reports are positive, the Area Assistant Chief and Chief, who are said to have instigated the mob justice that led to the demise of the victims herein are likely to have influenced the outcome of the pre-bail report. Again, these allegations were not deposed to in the Affidavit and the court finds that the allegations that the area Assistant Chief and Chief influenced the makers of the pre-bail report is speculative. None of the Accused persons swore an Affidavit to rebut the prosecution's allegations herein.
11. I have considered the pre-bail reports. The fear expressed by the victims' families must be treated carefully for it may be well-founded. The potential witnesses are from the same community as the Accused persons. They may not be comfortable seeing the Accused walking around knowing that their evidence is critical to the success of the prosecution case. That there is latent fear of witness interference is evident from the pre-bail reports in which the Probation officer urges this court to issue protection orders for the witnesses should the court grant bail. The possibility that the Accused may intimidate the witnesses and cause them to suppress their evidence is high considering that the Accused are five (5) in number and the murder is said to have been committed with others not before the court. The Accused persons numbers must in itself daunting to the ordinary man. Without going into the evidence, the murders were committed by a group in what is commonly referred to as mob justice. That the 5 Accused persons were the only ones arrested is most likely to be an incentive to the Accused to intimidate the witnesses. The victims have requested protection orders for the key witnesses.
12. With respect to the claim that the Accused persons are flight risks, it was deponed, and is evident from the proceedings that whereas the offence was committed on 5<sup>th</sup> July 2024, the Accused persons were arrested on 31<sup>st</sup> August 2024 which is almost two (2) months later. Accused 5 was arrested on 4<sup>th</sup> October 2024. The deponent averred that the reason for the delay in the arrests was that the Accused had been hiding from the police and operating from unknown locations. This averment was contested by the Accused persons who said that the matter was under investigations during the period before their arrest.
13. On the issue of the Accused person's safety, there is no material evidence placed before the court suggesting that any of the Accused persons' lives are at risk. If anything, the victim's families fear that the Accused may interfere with the witnesses and expressed their fears to the Probation Officer who compiled the pre-bail reports.
14. The other ground for the prosecution's application is the fear that the Accused persons may abscond, the court has to determine whether the Accused person's acts of evading arrest are a pointer to a likelihood of them absconding or failing to attend court if granted bail.
15. The prosecution did not adduce any evidence to support their allegation that the Accused persons had evaded arrest. As it is, the court cannot tell from where each of the Accused persons was arrested. This was important in view of the fact that the offence was committed by a mob and investigations were said to be ongoing and that is why Accused 5 was arrested long after his co-Accused. The Accused persons are residents of Kakamega County. Their homes are well known and their families were interviewed by the officers who prepared the pre-bail report. The fact that the Accused persons were the only ones arrested for the offence of murdering the three (3) deceased persons from amongst an unspecified



number of attackers may well be an incentive for the Accused persons to abscond. However, there was no concrete evidence to prove the likelihood that any of the Accused persons may abscond if released on bond.

16. The pre-sentence report calls for stringent bond terms with an order for regular reporting and an order for protection of the witnesses with respect to Accused 2, 3 and 4. There is no report in respect to Accused 5. The report in respect to Accused 1 does not make reference to the victims' fear of interference. In light of the pre-bail reports on record, the court is persuaded that there are no compelling reasons to deny the Accused persons bail.
17. Having carefully considered the prosecution's application, the Accused Counsels' submissions, the relevant case law and the Kenya Judiciary Bail and Bond Policy Guidelines, I find that notwithstanding the prosecution's objection and the fears expressed by the victims, there are no compelling reasons to deny the Accused persons bail.
18. The upshot is, each of the Accused persons shall therefore be released on a personal bond of Kshs. 700,000/= with one surety of a similar amount. There shall be no alternative cash bail. Additionally, the Court sets the following conditions:-
  - (a) The Accused persons shall not leave the jurisdiction of the court without leave of the court.
  - (b) The Accused persons shall also not contact either personally or through their agents or emissaries, any of the witnesses, victims' families or close associates.
18. The Accused shall each report to the Butere Police Station twice a month with effect from 15<sup>th</sup> November 2024 until otherwise ordered by the court. Any default on any of the conditions herein shall lead to cancellation of the bond. Those are the orders of the court.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.**

**A. C. BETT**

**JUDGE**

**In the presence of:**

Ms. Chala for the Prosecution

All the Accused persons

Mr. Achero for Accused 4

No appearance for Counsel for Accused, 1, 2, 3 and 5

Court Assistant: Polycap

