

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL CASE NO. E035 OF 2021

ISAAC MUTUKU MBILO.....
.....APPLICANT

VERSUS

REPUBLIC.....
RESPONDENT

RULING

1. In the Notice of Motion dated 3rd June 2024, the accused person through his advocate, *Mr. Charles Ndonga* seeks to set aside or review the orders issued by this court (*Hon. Kimondo, J*) on 21st February, 2022 and prays that he be admitted to bail on favourable terms pending the conclusion of his trial.
2. The background against which the application was filed as can be ascertained from the record of this court, is that the accused was on 31st of January, 2022, arraigned before this court on a charge of murder, he denied the charges and subsequently, his advocate applied for his admission to bond pending trial.
3. The application for bail was contested by the prosecution. In a ruling delivered on 21st February 2022, Kimondo, J relying on the pre-bail report filed in court on 21st February, 2022, found that the accused security was not guaranteed as his family had received threats and also because there was still anger at the locus in quo regarding the accused.
4. *Kimondo J* also noted that there was a likely hood that the accused may interfere with evidence and also that the police

considered the accused to be a *flight risk*". Based on these factors, the learned judge found that there were compelling reasons to justify denial of bail to the accused person pending his trial. These are the orders the accused person is inviting this court to review or set aside.

5. In the affidavit sworn in support of the current application for bail, *Mr. Ndonga*, learned counsel for the accused avers that the conditions that the court relied on to deny the accused person bail are far different from those that exists now, as such, there is a need to review the ruling denying him bail. He asserted that the accused has a fixed place of abode in Murang'a Town with his family members, and that if released, the accused will not pose a danger to witnesses, his former co-workers or the victim's family, because the witnesses have relocated away from the jurisdiction of this court; and also, because once released, he will be pursuing employment elsewhere.
6. *Mr. Ndonga*, in his affidavit further averred that the court in denying the accused person bail, relied on unsubstantiated allegations made in the pre-bail report by the investigating officer, that the accused person was a flight risk and was planning to flee to Congo; and further that the allegation by the investigating officer that the accused was a known drug dealer was unsubstantiated and motivated by an intention to influence the court's ruling.
7. *Mr. Ndonga* urged this court to allow their application, as the accused has been languishing in jail from the time of his arrest.
8. The application is opposed by the state through the affidavit sworn on 14th July 2025 by *P.C Mohammed K Rono*, the investigating officer. *P.C Rono* deposed that the security of the accused may not be guaranteed as he has received

information from the area chief in Maragua, that the villagers have threatened to harm or kill the respondent in the event he is sighted within the area; that prior to his arrest, the accused had indicated that he wanted to escape to Congo to hide from arrest; that the accused has no formal permanent residential place, and it would therefore be hard to trace him in the event he absconds court; and that the report by the probation officer indicates that the accused is not a truthful person.

9. Mr. Rono further deposed that the release of the accused, who is a well-known criminal, is a threat to prosecution witnesses, more so, D-3, whom he was living with prior to the commission of the offence; and that the deceased family is still in pain and traumatized after the passing away of their daughter, hence his release would affect their healing process.
10. The application was argued orally before this court on 14th July, 2025. Mr. Njoroge, learned counsel for the victim contested the findings of the pre-bail report dated 3rd June, 2025, that the accused was suitable for bail or bond. He argued that the said pre-bail report, contained adverse factors that should be the basis upon which the accused is denied bail or bond pending his trial.
11. Mr. Mwangi, learned prosecution counsel opposed the application for bail on grounds that the application by the accused was res judicata as there is no new circumstance or change that has risen since his initial application for bail.
12. Mr. Mwangi contended that the compelling reasons that existed when Kimondo J denied the accused person's initial application for bail are the same ones that are still in existence; as such the present application for bail is res judicata as the accused has not indicated in his application

any change of circumstances that would warrant a change or a review of the orders of *Kimondo J.* Mr. Mwangi submitted that the correct forum for the accused was to appeal the earlier decision denying him bail.

13. Mr. Ndonga, learned counsel for the accused on the other hand submitted that the probation report filed before this court on 3rd June, 2025, indicates a change of circumstances, as it recommends that the accused can now be granted bail. Mr. Ndonga submitted that there has never been evidence that the accused has ever attempted to flee, given that he was arrested in Murang'a county at his home; and that the allegations that the accused wanted to flee to Congo or that he is a drug dealer are all fabrications.
14. Mr. Ndonga further submitted that the fact that the family of the accused lives in a rented house in an urban area is not enough grounds to state that the accused does not have a place of residence; and that whereas his parents exhibited concerns for him, the accused is an adult who lives on his own and works for gain.
15. Mr. Ndonga contended that there was no evidence adduced to show that the local community is hostile towards the accused, and that the statement of counsel, as regards the alleged hostility of the local community towards the accused is not evidence of hostility.
16. I have carefully considered the application and the affidavits sworn in support and in opposition thereto. I have also duly considered the oral submissions made by the learned counsels and the content of the pre-bail report filed before this court on 3rd June, 2025. Having done so, I take the following view of the matter:
17. First, the application by the accused invites this court to review the ruling of *Kimondo J* in which the learned judge

declined to admit the accused to bail or bond pending trial. In my view, this prayer is not only misconceived but also untenable, because this court lacks the jurisdiction to review orders made in criminal proceedings by a judge exercising concurrent jurisdiction. However, where an accused person is denied bond or bail, the accused can always make a fresh application for the court's consideration if circumstances that led to refusal of bail had changed.

18. That said, it is evident, that in filing the current application for bail or bond, the accused's counsel was of the view that he could only apply for renewal of his client's application for bond by applying for review of the orders of Justice Kimondo in his ruling delivered on 21st February, 2022; that notwithstanding, I find that it would be in the best interest of justice to treat the current application as one renewing the accused's bail application. I'll therefore proceed to treat it as such and consider it on its merits.
19. Having stated that, it is trite that in a renewed application for bail, the onus is on the accused to show that there is a change of circumstances that would warrant his admission to bail or bond pending trial.
20. This position was restated by the court in **Prosecution versus Kamotho (2025) KEHC 9923 (KLR)** as follows:
“A renewed application for bail happens when an original bail application has been denied. In such a case, the initial burden of proof is on the accused person to show that there has been a change of circumstances. If the prosecution opposes the change of circumstances, the burden then shifts to the prosecution to demonstrate why the Court should not grant bail despite the change of circumstances.”

21. Similarly, the court in Republic versus **Diana Suleiman Said & Another [2014] KEHC 3724 (KLR)** stated as follows regarding the changed circumstances test:

“The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.”

22. The learned prosecution counsel in his oral submissions before court had alleged that the current application for bail has not disclosed a change of circumstance that should warrant the admissions of the accused to bail or bond pending his trial, as such, his application is res judicata. The accused on the other hand has stated that the pre-bail report dated 3rd June, 2025, has indicated that he is suitable to be released on bail, and that this recommendation by the probation officer, is a change of circumstance, warranting his release on bail.
23. It is important to state at this juncture that a pre-bail report is not binding on the court. It merely serves as a guide to assist the court in assessing the suitability of an accused person for bail or bond. Therefore, in seeking to renew his application for bail, the accused cannot simply rely on the

probation officer's assertion in the pre-bail report that he is suitable for release. He must demonstrate that the circumstances which existed at the time of the initial bail application and which led to the denial of bail have since changed, and that it is this change in circumstances that justifies his admission to bail or bond pending trial.

24. The court in **Republic versus Aiyeko & 2 others [2025] KEHC 9095 (KLR)** stated as follows regarding a pre-bail report:

“While the court may seek a pre-bail report for further insight, it is not binding and should not be treated as definitive proof for denying bail. Unlike an affidavit, which is sworn evidence, a pre-bail report consists of untested assertions and is largely based on perceptions and apprehensions rather than concrete evidence. Therefore, while it may assist the court in assessing the circumstances, it cannot independently justify the denial of bail or bond.”

25. Regarding the allegations made by the learned prosecution counsel that the fresh application for bail by the accused is res judicata, I associate myself with the decision of the court in **Republic v Diana Suleiman Said & another [2014] KEHC 3724 (KLR)** where the court expressed itself as follows:

“I find nothing in the provisions of Article 49 (h) of the Constitution or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling

reasons for refusing bail. The accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated.”

26. Having stated that, in the previous ruling by Kimondo J, delivered on 21st February, 2022, this court had found that there were compelling reasons warranting the denial of bail or bond to the accused pending his trial. The compelling reasons that were shown to exist, were that the security of the accused was not guaranteed, that the accused was likely to interfere with the prosecution witnesses and that the accused had no fixed place of abode and was a flight risk.
27. One of the main grounds that the learned prosecution counsel has relied on in opposing the fresh application for bail by the accused, is that his safety is not guaranteed, as the investigating officer received information from the local administration, being the area Chief of Maragua, that villagers have threatened to harm or kill the accused in case he is sighted within the area. This claim by the prosecution that the security of the accused is not guaranteed has found support in the pre-bail report filed before this court on 3rd June, 2025.
28. As per the said report, it is the accused person’s own family that has opposed his release on bail or bond on grounds that they have received threats regarding the wellbeing of the accused should he be released on bail. According to his family members, the security of the accused is assured when he is in custody, as such, they are not in support of his release on bail.
29. ***Section 123A (2) (b)*** of the ***Criminal Procedure Code***, makes it clear that:

“a person who has been arrested or charged with any offence shall be granted bail, unless the court is

satisfied that the person should be kept in custody for his own protection.”

30. Based on the above, and considering also that the accused has not demonstrated that he has secured an alternative fixed place of abode, away from the locus in quo, where his safety can at least be guaranteed, I am of the view that there exist compelling reasons warranting the denial of bail or bond to the accused person.
31. Having found that the security of the accused may not be guaranteed should he be released on bail, and having also found that the accused has not demonstrated that he has an alternative fixed place of abode away from the locus in quo, it is clear that the circumstances of the accused has not yet changed, as the compelling reasons this court relied on in denying his initial application for bail are the same ones that are still in existence in the present application.
32. ***I therefore find that the present application lacks in merit and is hereby dismissed.***
33. ***Taking into account that the accused has been denied bail, it is only prudent that his trial be expedited, by the prosecution ensuring the availability of witnesses on hearing dates, which dates shall be taken on a priority basis.***

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH OCTOBER, 2025.

**HON. T. W. Ouya
JUDGE**

**FOR APPELLANT.....Ndonga
Njoroge HB for the Estate of deceased.**

COURT ASSISTANT...Brian

ORIGINAL