

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO E019 OF 2023

PROSECUTOR.....REPUBLIC
C

VERSUS

ABDI HUSSEIN SULTAN.....
APPLICANT

RULING

- 1.The Accused herein has been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars of the charge are that on 16th March 2023 at Yaamin Estate in Mlolongo Township in Athi River County, he murdered **Subhaan Mahmoud Sultan**.
- 2.On 10th May 2023, he pleaded not guilty to the charges, and the court ordered for a pre-bail report before determining his bond application. From the record of proceedings, the Prosecution Counsel on behalf of the State, on 24th February 2025 and 25th March 2025 indicated that they would not be opposing the Application.
- 3.In urging the application, the accused's counsel informed court that the accused will live with his friends who indicated willingness to accommodate him since he is not a

bad person. It was proposed that the accused can be committed to reporting to the nearest police station.

4. The Court notes that on record is an Affidavit dated 27th April 2023 deposed by Wahida Begum, the wife of the accused and mother of the deceased on behalf of the victims. They are opposed to the accused being granted bail on ground that the accused is a violent man, aggressive, with ill motives and intentions. That he is not remorseful and that after he allegedly murdered her son, he also threatened to kill her and her other son. It was contended that the accused had no fixed abode, was not welcomed in their house and was a flight risk.
5. The court also notes that there are two pre bail reports on record; one dated 30th May 2023 and the other dated 28th April 2025 both prepared by the Probation Service.
6. The first report recommends that the grant of bond be deferred until his situation and state of his family changes. It states that the accused's life was at risk given the hostility in his family; the safety of the rest of the family members is not guaranteed given his mental state; the victims are opposed to him being granted bond; the community did not give adverse report about him and the investigation officer is not opposed to the accused person being granted bond. The report recommended that subject to the court's discretion, the granting of bond be deferred until his family situation changes.

7. The second report provides that the accused is willing to abide by the bond terms; that the family did not divulge any information about the accused or comment on their commitment for the accused to be released on bail or bond; there is deep resentment from the family against the accused and releasing him on bond may spark off some more violent reaction; one of his friends has promised to provide security for purposes of meeting his bond security. The report recommended that the accused is not suitable for release on bond terms for the time being.

8. 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. (Emphasis added).

9. The compelling reasons are espoused in Section 123A of the Criminal Procedure Code which 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.

10. The Kenya Judiciary's Bail and Bond Policy Guidelines, March 2015 at page 25 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.

11. In the case of **Republic v Pascal Ochieng Lawrence 2014 (KEHC) 6587 KLR** the court held as follows;

“It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the State. The court in exercising its discretion as

to whether or not to grant bond is however to be guided by the following parameters:-

- the seriousness of the offence although this carried greater weight under the old constitutional dispensation;***
- the weight of the evidence so far adduced if the case is partly heard;***
- the possibility of the accused interfering with witnesses;***
- the safety and protection of the accused once he/she is released on bail/bond;***
- whether the accused will turn up for trial;***
- whether the release of the accused will jeopardize the security of the community.***

12. The Applicant bases his application on the grounds that he is unwell, has gastritis, prostate enlargement and was booked for view by a urologist. He has produced a medical report from Machakos Level 5 Hospital. He further states that he is in need of medical attention. He indicates that he will live with a friend, as the wife and other children have cut ties with him and their residence remain unknown.

13. The application for bail/bond is not opposed by the prosecution. The probation report does not provide any compelling and or cogent reason as to why the accused should not be granted bail. The court notes that the difference in time between when the first probation report

and the 2nd was filed and notes that the failure of the family to divulge information and or comment about the accused is not sufficient ground the deny an accused bail/bond. Additionally, there are no recorded adverse reports from the community, nor has any evidence been presented to suggest that the accused poses a risk of interfering with the witness or the court proceedings. Moreover, the investigating officer handling this matter has not expressed any concerns or objections.

14. In the case of **Republic v Selote (Criminal Case E020 of 2023) [2024] KEHC 1314 (KLR)** *Chepkwony, J* stated as follows;

***“There is no denying that the liberty of an individual is precious, hence the need for the courts and Constitution to jealously and zealously guard or protect the same. This is because an accused person is presumed innocent until proven guilty through a trial process. However, this precious right of liberty of an individual must be balanced against the public or societal or community interest.*”**

15. I also take note of the case of **Republic vs. William Mwangi Wa Mwangi [2014] eKLR** where Muriithi, J held that:

***“...It is trite that the cardinal principle which the court should consider in deciding whether 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.”

16. I have also noted the contents of the victims' affidavit in opposition to grant of bond and am cognizant of the need to have their rights protected under the Victim Protection Act. Indeed, the court is mandated to balance the rights of the accused persons vis a vis those of the victim. I have thus considered their sentiments as indicated in their affidavit. Before issuing my final orders, I would like to emphasize that the criminal case falls under the prosecution's responsibility, and they have a duty to assist the court in making decisions, including whether to grant bond. Simply stating that they do not oppose bond without addressing the pre-bail reports or the victims' affidavit already on record, did not provide sufficient guidance to the court.

17. Be that as it may, in the circumstances of this case, and after considering the submissions presented before court, I do not find any compelling, exceptional circumstance to warrant the denial of the bail/bond application. In the circumstance I make the following orders:

- a. The accused person may be released on bond of Kshs.1,000,000.00 with two sureties of similar amount, to be approved by the Deputy Registrar of this Court.**
- b. The accused to deposit his passport in Court during the pendency of the case or until further orders of this Court.**

- c. He shall attend the Court whenever required to do so without fail.
- d. The Accused person shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that have been supplied by the State to the defence.
- e. In the event that any of these conditions are violated, he is liable to have his bail cancelled and he shall proceed with the case while in custody.

18. Orders accordingly.

Dated, signed and delivered at Machakos this 29th day of May, 2025.

RHODA RUTTO
JUDGE

In the presence of;

.....Applicant

.....ODPP

Sam Court Assistant