



**Mugure v Republic (Criminal Case 18 of 2019)
[2024] KEHC 311 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL CASE 18 OF 2019
M MUYA, J
JANUARY 25, 2024**

BETWEEN

PETER MWAURA MUGURE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application dated 23rd March 2023 seeks the following order:-
 1. Spent
 2. That the honourable court be pleased to review the denial of bail to the Accused person, and to release him pending the hearing and determination of the case on such reasonable terms or conditions as the Court in its discretion may deem fit and just for ends of Justice to be met.
 3. That the court be pleased to grant an order for restitution of the applicant's personal items in the custody of the investigating officer.
2. The grounds are that:-
 - a) The applicant is a Kenya citizen subject to the [Kenya Defence forces Act](#) number 25 of 2012 (revised 2018).
 - b) That at the time of his arrest by Civil Police on 15th November 2019 he was of the rank of Major with Kenya Defence forces.
 - c) That the KDF under Section 140 thereof expressly directs the persons subject to [KDEFA](#) should not be placed in custody for more than 42 days in aggregate pending trial.
 - d) The applicant has been in custody since 15th November 2019.



- e) That the KDFA Section 146 expressly directs that persons subject to the KDFA can only be detained in civil custody upon the written committal order of their commanding officer.
 - f) That the applicant has been in Civil Custody since 15th November 2019 without a written order from the commanding officer.
 - g) That the detention in civil custody even with a written order from the Commanding officer can only be for a maximum of 21 days at any one time subject to the maximum of 42 days.
 - h) That the detention and continued retention of the applicant in custody and especially civil custody is a gross violation of his constitutional right to freedom and security of the person under article 29, constitutional right to equality before the law and equal protection and benefit of the law under article 27 and constitutional right to human dignity under article 28.
 - i) That the right to bail is a constitutional right under article 49 (1) (h) of the constitution.
 - j) That no compelling reasons to deny the applicant the grants of bail pending determination of this instant criminal matter.
3. It is instructive to note that this application for review of bond is largely hinged on the Kenya Defence Forces Act.
 4. In the preamble the applicant's first ground is that he is a Kenyan citizen subject to the Kenya Forces Act number 25 of 2012 and that at the time of his arrest by civil police he was of the rank of Major with Kenya Defence forces.
 5. The application proceeds to give and highlight the rights of an arrested person under the Kenya Defence forces Act and in particular the rights under Section 140, 146 of the Act. Rights under article 28, 29 and 49 (1) (h) of the constitution of Kenya 2010.
 6. A perusal of Part V of the Kenya Defence Forces Act indicates that it provides for limitation of rights and fundamental freedoms of persons subject to this Act.
 7. Article 24 of the Constitution provides for limitation of rights and fundamental freedoms.
 8. Sub article 6 provides:-

“Despite clause 1 and 2, a provision in legislation may limit the application of the rights of fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the national Police Service.

 - a) Article 31 – Privacy
 - b) Article 36 – Freedom of association
 - c) Article 37 – assembly, demonstration, picketing and petition.
 - d) Article 41 – Labour relations
 - e) Article 43 – Economic and Social rights and
 - f) Article 49 – Rights of arrested persons.
 9. Section 54 of the Kenya forces, Defence Act provides for limitation of rights of an arrested person thus:-
 - 1) The rights of an arrested person in article 49 of the constitution may be subject to limitation in respect of a person to whom this Act applies as set out in subsections 2 and 3.



- 2) Nothing contained, in or done under the authority of this Act shall be held to be inconsistent with or in contravention of the right of an arrested person in so far as the Act permits –
 - (a) a) The holding of an arrested person jointly with the persons serving a sentence.
 - (b) The holding of an arrested person without bail or
 - (c) The holding of an arrested person in custody, notwithstanding that the offence is punishable by a fine only or imprisonment for a term not exceeding six months.
3. An accused person shall not be held in custody for more than eight days before she/he is arraigned before a commanding officer or a court martial unless the commanding officer for reasons to be recorded in writing is satisfied that the continued arrest of the accused person is necessary.
10. The applicant in this review for bail places reliance on Section 140 of the [KDF Act](#). The sub heading of this section is:- Provisions for avoiding delay after arrest.
11. Section 140 (1) of the Act provides:-

“The allegations against a person arrested under sections 137 or 141 shall be investigated without unnecessary delay and as soon as practicable thereafter either proceedings shall be instituted to deal with the allegations or the person be released from arrest.

 - (2)
 - (3)
 - (4) Notwithstanding the extension granted under subsection (2) circumstances under subsection (3) on limitation of rights of an arrested person provided under Section 54 a person shall not at any given time, whether in active service or not be held in custody for a period exceeding 42 days in aggregate
 - (5) where the summary disciplinary proceeding have not commenced or the court martial has not been convened after the expiry of forty two days, the commanding officer shall hold the accused person under open arrest on such conditions as the commanding officer may determine.”
12. It is the contention by the applicant that section 140 of the Act expressly provides that persons subject to the Act should not be placed in custody for more than 42 days. That is correct but in reference to the period before being arraigned in court, before the Commanding officer or before a court martial. That is why Section 140 (5) provides where summary disciplinary action has not commenced or the court martial has not been convened after expiry of 42 days the accused should be held under Open Court. It does not refer to the period after Commencement of trial.
13. Section 146 of the [Kenya Defence Act](#) provides for persons under Service custody. Part VI provides for Service offences.
14. Service custody is defined under the [KDEFA](#) to mean the holding of any person under arrest or in confinement by the Defence forces including in a service prison.
15. The applicant herein is not charged with a service offence and nor is he under Service custody or in a service prison. He is in civil custody hence there is no requirement for a committal order of his commanding officer.



16. Section 54 of the *Kenya Defence Forces Act* specifically limits the rights of an arrested person found under article 49 of *the constitution* in respect to those persons the Act applies to.
17. Article 24 of *the Constitution* provides for limitation of rights and fundamental freedoms but only to the extent that the limitation is reasonable and justifiable in a democratic society based on human dignity equality and freedom bearing into account all relevant factors including:-
 - a. The nature of the right or fundamental freedom.
 - b. The importance of the purpose of the limitation.
 - c. The nature and extent of the limitation.
 - d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and
 - e. The relation between the limitation and its purpose and whether there are less restrictive freedoms or other means to achieve the purpose.
18. It is noted that this is a 2019 matter. The accused has been in custody since. He has made several applications for bond before different judges but all in vain.
19. It is further noted that twenty three witnesses have so far testified and only three are remaining.
20. The matter has a hearing date in the month of February 2024 which date is not far.
21. The grounds and reasons for the review on the rulings on bond severally given by this court do not meet the threshold required under the Kenya Defense forces Act and *the constitution*. I find no merit on the application which is hereby disallowed.
22. The matter to proceed to hearing on 28th and 29th February 2024 as earlier ordered.

RULING READ AND DELIVERED IN OPEN COURT THIS 25TH DAY OF JANUARY, 2024

HON. JUSTICE M. MUYA

JUDGE

In the presence of:-

Gori: Applicant

Kaniu: Respondent

Court Assistant: Ndung'u

