



**Komba v Republic (Criminal Case E024 of 2023)
[2024] KEHC 6791 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE E024 OF 2023
AK NDUNG’U, J
MAY 29, 2024**

BETWEEN

BENSON AMWAI KOMBA ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. This ruling resolves the question whether the Accused person should be released on bond pending trial.
2. The state is opposed to grant of bail and in an affidavit in opposition to bail, dated 15th March, 2024, Gladys Kariuki, a prosecutor, reiterated the contents of the pre-bail report and maintained that the Accused is not suitable to be released on bail.
3. She averred that should the accused be granted bond/bail at this juncture the chances of him breaching the bond/bail terms are high due to his criminal activities and of drunkenness/substance abuse. That his release on bond/bail will occasion a blow to the prosecution as the witnesses will not testify against him.
4. It is urged that release of the accused person on bail pending the hearing and determination of the trial is not absolute and is at the discretion of this honourable court. She prays that this honourable court does find that the above mentioned reasons compelling enough not to release the accused person on bail pending the determination and/or conclusion of this trial.
5. The accused through his counsel filed a replying affidavit in support of pre-trial release on bond dated 20th March, 2024. He stated that he has been in pre-trial detention for six months since 21st November, 2023, exacerbated by the absence of a Resident Judge in Nyahururu High Court, posing a risk of prolonged detention until trial without bond which will not only infringe upon his rights but also hampers his ability to adequately prepare for trial.



6. That the probation officer's report upon which the State relies, lacks credibility as it relies heavily on hearsay and veers into character assassination hence failing to provide any substantiated evidence to support its claims, rendering it unreliable and the same should not be used to deny him bail/bond.
7. The accused through his counsel Mr. Muchangi filed skeleton submissions in support to pre-trial bond/bail dated 17th March, 2024. The stated that the accused is entitled to the presumption of innocence until proven guilty beyond a reasonable doubt. This fundamental principle of justice, enshrined in numerous legal jurisdictions, emphasizes that an accused person should not be unduly detained before the determination of guilt. Reference is made to the case of *Woolmington v DPP* [1935] UKHL; *Republic v Mamush Hirbo Faja* [2014] eKLR and *The Bail and Bond Policy Guidelines* at page 9 paragraph 3.1. (d).
8. It is submitted that an accused person should not be subjected to pre-trial detention where the evidence against him or her is tenuous, even if the charge is serious and that while the rights and feelings of victims are important, they must be balanced with the accused's right to liberty and a fair trial. Ensuring justice for victims does not necessitate the indefinite detention of the accused. Reliance is placed on the case of *Republic v Robert Zippor Nzilu*, Criminal Case No. 4 of 2018.
9. While flight risk is a legitimate concern, conditions can be set to mitigate the risk without resorting to pre-trial detention. The constitution guarantees the right to bail unless compelling reasons exist to justify detention.
10. The concept of compelling reasons must be interpreted in light of the accused's rights and the overall interests of justice. It is not solely determined by the severity of the offense but considers a multitude of factors. Considering the above factors and legal principles, the court should grant bail to the accused subject to reasonable conditions that adequately address any potential concerns while preserving his right to liberty and a fair trial.
11. The State filed its skeletal submissions dated 6th May, 2024 in which it stated that Article 49(1) (h) of the Constitution of Kenya gives an arrested person the right to bond or bail on reasonable conditions pending charge or trial, unless there are compelling reasons not to be released.
12. On what are the compelling reasons for grant or denial of bail or bond, the State relied upon the following grounds;

The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty;

13. Where the charges against the accused person is serious, and the punishment heavy, it is assumed that there are more probabilities and incentives for the accused person to abscond.

Strength of the prosecution's case;

14. It is justifiable to subject an accused person to pre-trial detention where the evidence against the accused person is strong.

Character and antecedents of the accused person;

15. Although the character and antecedents of the accused person do not by themselves form the basis of denial of bail or bond, they may justify the refusal of bail or bond if they are coupled with other adverse factors.



Likelihood of interfering with witnesses;

16. Where there is a likelihood of accused's interference with prosecution witnesses if released, denial to bail or bond is justified especially if the court cannot impose conditions to the bail or bond to prevent such interference.

Public order, peace of security

17. Pre-trial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such that the release of the accused person would likely disturb public order or undermine public peace or security.
18. The above grounds are provided for in Section 123A (1) of the [Criminal Procedure Code](#), and paragraph 4.26 of the [Bail and Bond Policy Guidelines](#).
19. Further to the affidavit dated 16th March, 2024 opposing bail/bond, the State submitted that the accused herein has been charged with murder which is a felony and the prosecution through its decision to charge guidelines finds that there is sufficient evidence to sustain the charge of murder.
20. The character of the accused has been put to question by the chief's explanation in the pre-bail report. He poses a danger to the witnesses in this case and hence this will affect the case herein. The victim's family security is also not guaranteed as they have expressed their fear of the accused if he is released.
21. In light of the above, the State humbly prays that the court does find the above reasons compelling enough not to release the accused on bail/bond pending the determination of this case.
22. I have considered the application, the affidavits both in support thereof and in opposition thereto as well as the submissions made.
23. 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.
24. Compelling reasons are not defined in the [Constitution](#). A quick google search defines compelling as 'evoking interest, attention or admiration in a powerfully irresistible way, really convincing, not able to be refuted. From this plain meaning, it follows that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would jeopardize the trial by either having the Accused fail to attend court or would be contrary to the parameters set in Section 123A of the [Criminal Procedure Code](#). The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.
25. Section 123A of the [Criminal Procedure Code](#) gives the parameters for the grant of the right to bail as follows:
 - (1) Subject to Article 49(1)(h) of the 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;
- 26.



- (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.
27. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's *Bail and Bond Policy Guidelines*, March 2015 at p. 25 which sets out 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.
28. 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. What the compelling reasons are, however, depend on the circumstances of each case. 28. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however 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 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 the free and fair trial can be achieved notwithstanding the release of the accused on bond.
29. In determining whether or not a free and fair trial is possible the Court ought to take into account the circumstances of the accused as well as that of the potential witnesses. However, since the release on bond or bail is a constitutional right, it is upon the prosecution to satisfy the Court why a free and fair trial is not possible if the accused is so released.
- The imposition of terms of the 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. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. 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.



30. Bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. In *S vs. Nyaruviro & Another* (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), the Court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to abscond”.

31. I have carefully reviewed the material before court. More specifically I have had due regard to the bail report filed. This report is an important tool in adding the court appreciate the circumstances of the Accused and be in a position to determine his suitability to be granted bail.
32. It is clear from the report that the accused does not have a permanent place of abode. His own family acknowledges that there is bitterness in the community against the Accused and they have offered to relocate him to Nakuru. To which place and in whose custody, it is not stated.
33. With no fixed abode, the Accused becomes a flight risk. There is a real possibility of him disappearing into thin air and tracing him would be a gargantuan task for the police who would not have a bearing of where to start the search thus prejudicing the administration of justice. In the premises, there exists a compelling reason why the Accused should be denied bail. I associate myself with the view expressed by Muriithi, J in *Kelly Kases Bunjika vs. Republic* [2017] eKLR where he opined;

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

34. With the result that the application for bail is dismissed.

DATED SIGNED AND DELIVERED THIS 29TH DAY OF MAY, 2024

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A.K. NDUNG’U

JUDGE

