



REPUBLIC OF KENYA



KENYA LAW
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**Farah v Republic (Criminal Application E003 of 2023)
[2023] KECA 241 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 241 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E003 OF 2023
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
MARCH 3, 2023**

BETWEEN

MAHADH FARAH ALIAS ISSA APPLICANT

AND

REPUBLIC RESPONDENT

((Being an application seeking to set aside a ruling of the High Court of Kenya at Nairobi (Kanyi Kimondo, J.) delivered on 30th December 2022 in High Court Criminal Case No. E085 of 2022))

RULING

1. Before us is an application by way of notice of motion expressed to be brought under Articles 1(1), 159 and 164 (3) of the Constitution, Section 3 of the Appellate Jurisdiction Act, rule 1(2) of the Court of Appeal Rules, and all other enabling provision of law. The applicant seeks the following orders:
 - a)
 - b. That by a Ruling of the High Court, Criminal Division - Milimani in Criminal Case No. 085 of 2022 delivered on the December 30, 2022, in which the court declined to grant the applicant/accused person bail and or bond pending trial be set aside.
 - c. That the Applicant herein be released on bail pending trial upon such terms as the Honourable Court may deem fit.
2. By way of background, the applicant was charged on December 15, 2022 with the offence of murder contrary to Section 203, as read together with Section 204 of the Penal Code (Cap 63) Laws of Kenya. The particulars of the offence were that the applicant murdered one, Abdifathah Hassan Bare alias Mrefu on September 11, 2022 within Nairobi area.



3. On September 16, 2022, the applicant made an application for bail which was opposed by the state. The state sought time to file a replying affidavit and upon being granted leave, a replying affidavit was sworn by police constable Allan Achieno, the investigating officer, on December 23, 2022.
4. The family of the victim opposed the release of the applicant on bail. Hassan Abdifatah, a son of the deceased swore two affidavits on December 22, 2022 and December 28, 2022, opposing the release of the applicant on bail.
5. Upon hearing the parties, the High Court (Kanyi Kimondo, J.) dismissed the application. The relevant part of the ruling is as follows:

“ 12. I take the following view of the matter. No witnesses have taken to the stand yet. It follows that the accused is presumed innocent at this moment. Under Article 49(1)(h) of the Constitution, as read together with section 123 A (1) of the Criminal Procedure Code, he is entitled to bail unless there be compelling circumstances.

13. Regarding the phrase, compelling reasons, I am well guided by the decision of Gikonyo J in *Republic v Joktan Mayende & 3 others*, High Court, Bungoma Criminal Case 55 of 2009 [2012] eKLR where the learned judge stated:

“But more light is shed by the Black's Law Dictionary 7th Edition. And accordingly, the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not, therefore, be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.”

14. The overarching objective of bail is to ensure the accused attends trial. See *Michael Juma Oyamo & another v Republic* [supra]; *Muraguri v Republic* [1989] KLR 181; *R v Fredrick Ole Leliman & 4 others*, Nairobi High Court Criminal Case 57 of 2016 [2016] eKLR.

15. When I juxtapose those principles against the materials before the court, I find as follows. Firstly, the homicide occurred on September 11, 2022. The accused was only arrested on December 4, 2022 as deposed at paragraphs 5 and 6 of the affidavit of the investigating officer. Although the accused claims he surrendered to the police after the incident, there is a dearth of evidence about it and the timelines do not fully support his assertions.

16. Secondly, I cannot close my eyes to the serious allegations that the accused may be a Somali national. I say that very guardedly noting that he holds a Kenyan Identity Card; and, that the issue remains contested.

The allegations that he is the same person who faced a murder charge before the Banadir Regional Court has not been proved for now. But it is also a worrying matter.

17. Granted all those circumstances, I find that the likelihood to abscond is high. Paraphrased, the attendance of the accused at his trial has been cast into doubt.



18. Thirdly, from the two depositions by Hassan Abdifatah, a son of the deceased in this case, it appears that the accused has made serious threats to him or members of the family of the victim. The *Victim Protection Act* 2014 now requires that the views of the victim's family be considered at this stage. I have concluded that the security of such witnesses would be jeopardized by the release of the accused.
 19. Fourthly, the accused faces the grave charge of murder. The Director of public prosecutions informs the High Court that on the September 11, 2022 at Maida Apartments, Eastleigh Area, Starehe Sub-County within Nairobi he murdered Abdifatha Hassan Baare alias Mrefu.”
6. Aggrieved by this decision, the applicant lodged a notice of appeal on January 5, 2023 and annexed a memorandum of appeal stating that the learned Judge misdirected himself on the grounds: that his right and fundamental freedom guaranteed under Article 49(1) of the *Constitution* was violated; that the rights of the appellant and interests of justice versus the rights of the victim were not balanced; failing to uphold Article 27 (1) and (2) of the *Constitution* by pronouncing that the applicant might be a Somali citizen and therefore likely to abscond bail; by finding that there were prevailing reasons to deny him bail; relying on evidence of the investigating officer and the victim that had not been tested through cross-examination; and by stating that the applicant was facing a grave offence of murder.
 7. The applicant filed written submissions dated January 24, 2023, which were highlighted at the hearing through his advocate, Mr. Robert Amutallah. The main grounds raised in the submissions are that: bail is a constitutional right granted under Article 49 (1) of the *Constitution*; that the Judge relied on evidence of the investigation officer and the victim’s family without the same being tested on cross-examination; that the learned Judge misdirected himself by indicating that the applicant had threatened the victim’s family; and that the offence of murder is bailable like other serious offences and therefore the denial of bond by the Court violated Article 27 (1) and (2) of the *Constitution*.
 8. Ms. Margaret Matiru, for the State, opposed the application and filed a replying affidavit sworn on January 31, 2023. In her oral submissions, Ms. Matiru reiterated the averments in the replying affidavit and submitted as follows: that the applicant is facing a serious charge of murder and if found guilty can face up to a life sentence in prison; the right to bail though constitutional is discretionary and can be denied when an accused threatens witnesses; there is a high likelihood of the applicant absconding due to the serious offence that he is facing; and that the learned Judge rightly rejected the application for bail pending trial.
 9. The right for every accused person to be released on bond or bail on reasonable conditions is a constitutional right guaranteed by Article 49 of the *Constitution* which provides as follows:
 - “ 49 An arrested person has the right—
 - (1).
 - f. to be brought before a court as soon as reasonably possible, but not later than—
 - SUBPARA i.
twenty-four hours after being arrested; or
 - SUBPARA ii.



if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

.....

- (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.”

10. It is therefore clear that such a constitutional right can only be limited if the prosecution satisfies the Court that there are compelling grounds to deny such a right to the accused person. This question of bail pending trial has been argued over the years and more so after the promulgation of the Constitution 2010.

11. We quote with approval the case of *Republic vs. Danford Kabage Mwangi* [2016] eKLR where the Court held as follows:

“Article 49 (1) (h) of the *Constitution* of Kenya 2010 provides that an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. 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. Section 123 of the *CPC* [as amended by the Constitution of Kenya 2010 permits bail for all criminal cases] and makes bail available at all times - at any time while the accused is in custody or at any stage of the proceedings a court can grant bail.”

12. The court in the above cited case went ahead to define what compelling reasons were and stated:

“Since judicial determination of what constitutes “compelling reasons” entails determining the constitutional rights of a citizen and interests of the state, it is important to point out the test to be applied. In this regard I find the definition of “compelling-state-interest test” in the Black’s Law Dictionary[4] highly useful. It defines “compelling-state-interest test” in the following terms:

“A method for determining the constitutional validity of a law of law, whereby the government’s interest in the law and its purpose is balanced against an individual’s constitutional right that is affected by the law. Only if the government’s interest is strong enough will the law be upheld. The compelling state interest test is used e.g. in equal protection analysis when the disputed law requires strict scrutiny.”

13. On the issue of threatening the victims, we cite with approval the case of *Republic vs. Joktan Mayende & 3 Others* [2012] eKLR where the court stated:

“All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses



or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

14. On compelling reasons, we cite with approval the case of *Republic vs. Johana Munyao Mweni* [2015] eKLR where it was held:

“In that case the fourth accused was denied bail after the court found that accosting a witness is a compelling reason. However, in that case evidence was adduced in court. The witness had been physically assaulted by the accused person. In this case, the threat is alleged to be by way of uttered words to the effect that the accused knew where Levis Murigi Ngugi lived and he (accused) will send young men to deal with him firmly. The two witnesses who recorded these statements did not testify to allow cross examination. However, it is my view that threatening a witness is a serious matter and cannot be ignored by the court.

Granting or declining to grant bail is the prerogative of the court after taking into account all relevant factors. Strong evidence is not a compelling reason. The laws of this country presume an accused person innocent until proof to the contrary is presented. The conditions for bail set by the court are meant to ensure attendance of an accused person in court this being the paramount consideration.”

15. We also note that section 123 A (1) of the *Criminal Procedure Code* which is to be read with section 123 thereof provides 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 fulfillment 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.”

16. Turning to the impugned ruling, we note that the learned Judge found that there were compelling reasons to deny bail to the applicant. The reasons given by the learned Judge were as follows: that the offence occurred on September 11, 2022 and the applicant was arrested months later, on December 4, 2022; that the allegation by the applicant that he voluntarily surrendered to the police was not supported by the evidence before the Court; that there was a high likelihood that the applicant would



- abscond; that there were two depositions by the son of the deceased, that the applicant had threatened witnesses; and that the applicant is facing a serious offence of murder.
17. We are alive to the fact that there is no criminal case that is on all fours with another. What amounts to compelling reasons will vary from one case to another. The right to bail is a constitutional right and what the Court is required to do, is to consider whether there are compelling reasons to limit this right. However, the constitutional right under Article 49 (f) is not a blank cheque to be filled by every accused person. It is a right to be enjoyed and which the courts should guard jealously, but where there are compelling reasons to limit the right, courts should do so without hesitation.
 18. It is common ground that the applicant is facing a serious offence of murder. That alone is not a ground to deny him bail. In this case, we note that the applicant is alleged to have committed the offence on September 11, 2022 and was arrested on December 4, 2022. The applicant alleges that he surrendered to the police but the learned Judge found that, that was not the case.
 19. It is also a fact that there are two affidavits sworn by a son of the victim that the accused had sent threatening messages to the witnesses. We note from the record that the compact disc containing the threatening messages, together with a certificate of electronic recording was placed before the trial court by the investigating officer. The only answer to this issue by the applicant, is that the evidence of the investigating officer was not tested through cross-examination.
 20. We note that there was no request for cross - examination that was made by the applicant when that issue was raised in the trial court. It is also important to appreciate that when a court is determining whether there are compelling reasons to deny bail, the court is not conducting a trial within a trial but it is evaluating and weighing the evidence that has been adduced by the prosecution on why bail should be granted or not.
 21. Upon careful examination of the record before us, it is our finding that the learned Judge properly addressed himself to the relevant principles and took into account: the nature of the offence; the circumstances in which the applicant was arrested; and the threat to the victim's family. We must say that a threat to witnesses in a case like this, where evidence was tendered is not an issue that a court will take lightly.
 22. Before we conclude, we wish to address the issue the applicant raised, that the learned Judge failed to uphold Article 27 (2) of the *Constitution* by pronouncing himself on the claim that the applicant was a Somali national and therefore likely to abscond. The relevant part of the ruling reads as follows:

“

“ 16. Secondly, I cannot close my eyes to the serious allegations that the accused may be a Somali national. I say that very guardedly noting that he holds a Kenyan Identity Card; and, that the issue remains contested.

The allegations that he is the same person who faced a murder charge before the Banadir Regional Court has not been proved for now. But it is also a worrying matter.”
 23. We note that this is not the reason, the applicant was denied bail. The learned Judge only noted that it was a worrying matter. Whereas that statement was not necessary in view of the fact that the applicant had a Kenyan identity card that had been authenticated by the relevant authorities, it is clear that when all the reasons for granting or denying bail are considered in totality, this is a case where the prosecution had demonstrated that there are compelling reasons to deny bail.
 24. In conclusion, it is our finding that this application has no merit and it is hereby dismissed.



DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

