



**Republic v Lepalo (Criminal Case E014 of 2023)
[2024] KEHC 14243 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL CASE E014 OF 2023
AK NDUNG’U, J
NOVEMBER 14, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAM LEPALO ACCUSED

RULING

1. The Accused persons in this case, Sam Lepalo is charged with murder contrary to sections 203 and 204 of the Penal Code. It is alleged in the information dated 21/12/22 that on 4/12/22 at Tiamamut Area in Laikipia North Sub-County within Laikipia County jointly with another not before court murdered Nkodila Simiren.
2. On 18/01/2024, he pleaded not guilty to the charge. The Republic has now opposed bail by an affidavit dated 25/01/2024 sworn by one of the Investigating Officers IP. Maxwell Ogutu. The reasons advanced for opposing bail are-
 - i. That the investigations by DCI Laikipia North revealed sufficient evidence to support the charge of murder that the Accused is facing before this Honourable Court.
 - ii. That although the *the Constitution* makes provision in Article 49(1)(h) for an Accused Person to be released on bond or bail on reasonable conditions, the right is not absolute but a matter of discretion on the part of the court.
 - iii. That the Accused fled from his known place of abode in Ilmotiok area and the investigating team had to engage local informers and the Intelligence Agency where they finally got information that the Accused had relocated to Kiandutu Area Murang’a County where he was eventually arrested on 1st December, 2023 one year later.



- iv. That by fleeing from his known place of abode to evade arrest the Accused has demonstrated that he is a flight risk and given the opportunity he will flee from the jurisdiction of the court.
 - v. That other than the place he fled from while evading arrest the Accused does not have any known place of abode or any known familial or economic ties and should he be released on bail or bond it would be impossible for the Investigating Officers to trace him should he be required to do so.
 - vi. That the offence was witnessed by several people who are very well known to the Accused Person and who have recorded statements and are lined up to be state witnesses.
 - vii. That through investigations it is believed that the Accused is in possession of or knows where he can obtain AK 47 Rifles and thus there is a reasonable apprehension that if he is released, he will use the firearm to threaten and intimidate the state witnesses with an aim of preventing them from giving their testimony in this court.
 - viii. That this Honourable Court has a Constitutional duty to balance the rights of all persons and it is our humble submissions that this court can protect the right that was lost under Article 26 “Right to Life” by providing an enabling environment for the Prosecution Witnesses to testify without any fear or interference by declining to allow the Accused Person bail or bond.
 - ix. That investigations show that the Deceased was attacked by two people and thus the Accused had an accomplice who is still at large and concerted efforts are being made by the investigations team to arrest the said accomplice.
 - x. That there is a high probability that if the Accused is released on bail or bond, he will interfere with the ongoing efforts to arrest his accomplice and to retrieve the AK 47 Rifles that were used during he commission of the offence.
 - xi. That there is a high probability that if the Accused is released on bail or bond he will go back to conspiring with his accomplices and commit further crimes of a similar or equal grievous nature.
 - xii. That the Accused Person herein has been charged with the offence of murder and if found guilty the punishment meted out could be that of the death penalty and therefore there are more probabilities and incentives for the Accused Person to abscond if released on bail or bond pending trial.
 - xiii. That the Prosecution has overwhelming and irrefutable evidence that points to the Accused’s guilt, thus there is a high probability that the Prosecution will secure a conviction. The Prosecution is apprehensive that if the Accused is released on bail or bond, he may flee the jurisdiction of the court in fear of being sentenced.
3. In response to the prosecution’s application opposing bail, the Accused filed a replying Affidavit dated 15/02/2024. In his affidavit, the Accused states that the Prosecution has only made mere allegations of his conduct and has not provided any proof that he is in possession of or knows where to acquire firearms, or further in any way interfere with the witnesses if released on bond pending trial; that he is sickly and his continued incarceration is detrimental to his health which could further lead to fatality and in essence defeat the very hope of having his day in court and a chance to prove his innocence.
 4. He reiterates the constitutional guarantee to bail under Article 49(I)(h) and he pleads the presumption of innocence.



5. A pre-bail report has been filed to aid the court appreciate the circumstances of the accused in determining his suitability to bail.
6. The application was canvassed by way of written submissions. The State maintained that the Accused is likely to interfere with witnesses; he is a flight risk; that the Accused will interfere with ongoing investigations; that the nature of the charge and the seriousness of the punishment and the strength of the Prosecution case is an incentive enough for him to abscond. Reliance is placed on the case of Republic v Ahmed Mohammed Omar & 6 Others (2010) eKLR where the court held that, whereas the Applicant is still presumed innocent, if he were to be convicted for murder, there is a possibility that the trial court could sentence him to death. Therefore, the severity of the sentence remains a significant factor for consideration in an application for bail pending trial.
7. In response, the Accused counsel argued that *the Constitution* grants the Accused persons right to be released on bond or bail unless there are compelling reasons not to be released.
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.
9. From the text of *the constitution*, it does not define nor specify what qualifies under the term “compelling reasons”. The ordinary meaning according to Thesaurus English Dictionary of the word “compelling” is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would militate against the grant of bail to an accused person informed by the provision of Section 123A of the Criminal Procedure Code and the Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015.
10. 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 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.
11. The Kenya Judiciary’s Bail and Bond Policy Guidelines, March 2015 at P. 25 sets out judicial policy on bail as follows:



- a. 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.
12. It is trite 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 and these circumstances are to be considered cumulatively and not in isolation. 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 a free and fair trial can be achieved notwithstanding the release of the accused on bond. I associate myself with the view expressed by Muriithi, J in *Kelly Kases Bunjika vs. Republic* [2017] eKLR that:
- “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.”
13. In determining whether or not a free and fair trial is possible, it is the duty of this court to take into account the antecedents of the accused (his bail history) where available, the circumstances of the accused as well as that of the potential witnesses, whether he has a fixed abode, severity of sentence, familial ties as well as the accused’s own safety.
14. Any terms of bail to be imposed by court must again 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. Thus, the grant of bail and the setting of terms is at the discretion of the court.



15. I have considered the facts placed before me in support of and in opposition to bail. I have had due regard to the pre-bail report which is a useful independent tool in assessing suitability to bail.
16. I have considered the opposition to bail and the response thereto. While alive to the fact that the important element for consideration is that the accused shall attend his trial, the circumstances of the accused as captured in the affidavit evidence and in the pre-bail report are such that he is a likely flight risk. He hails from a pastoralist background and he has no fixed abode. The nature of the offence and the likely severity of sentence if convicted is a high incentive for the accused to abscond. It is not lost on me that the offence involved the killing of a senior administrator, a chief and the gravity of the matter must weigh heavily on the accused who may be tempted to flee.
17. In the circumstances, am satisfied that good ground exists for the denial of bail to the accused. The accused is to remain in custody during the pendency of the trial. In the interest of justice the matter shall be expedited.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF NOVEMBER 2024.

A.K. NDUNG’U

JUDGE

