



REPUBLIC OF KENYA



**Republic v Mogaka (Criminal Case EO76 of 2021)  
[2023] KEHC 361 (KLR) (Crim) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 361 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL CASE EO76 OF 2021**

**JM BWONWONG'A, J**

**JANUARY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**VINCENT MOGAKA ..... RESPONDENT**

**RULING**

1. The accused under certificate of urgency has applied for bail pending his trial on a charge of murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya, pursuant to article 49 (1) (h) of the 2010 *Constitution of Kenya* and section 123 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
2. The application is supported by nine grounds that are set out on the face of the notice of motion, with the major grounds being the following. The accused is a young man who is an artist and a painter. He was supporting his family including the deceased wife, prior to his arrest. The accused was critically injured in the night of September 27, 2021 following knife stab wounds on the neck and stomach. He is lucky to be alive. He is not receiving proper medical care, since he was injured and is currently suffering and his life is in danger. The accused has not had bowel movements for over one week to date and is unable to eat.
3. The accused did not commit the offence. The accused prays that he be released on bail to enable him receive proper medical care.
4. In addition to the foregoing, the accused has deponed to an 18 paragraphs supporting affidavit, whose major averments are as follows. He comes from Charachani village, Keera Location, Kisii North in the County of Nyamira.



5. The accused has also deponed that he is currently admitted at Mbagathi District hospital, but he still requires specialized medical care. He has further deponed that he did not commit the offence for he himself was the victim of the attack that caused the death of the deceased. He has also deponed that prosecution witnesses are personally not known to him and he undertakes not to interfere with them.
6. The remaining averments are a replica of the matters that are set out as grounds on the face of his notice of motion and I hereby decline to reproduce them herein.

### **The case for the republic/respondent**

7. The respondent through the investigating police officer (No. 81316 Cpl Stephen Malele) has deponed to a 12 paragraphs affidavit in opposition to the application; whose major averments are as follows. The accused and the deceased were living as husband and wife at Pipeline Kware in Embakasi within Nairobi County. He does not qualify to be admitted to bail because the prosecution has a strong case and irrefutable evidence that points to his guilt. The conduct of the accused of attempting to commit suicide by stabbing himself in the stomach and neck after the commission of the alleged murder, illustrates the accused person's guilt and built-up malice.
8. Furthermore, the accused was not in gainful employment, since he was a self-employed artist. Therefore, the chances of being traced in the event of absconding are diminished. The accused was living in a rented house and he has no known place of abode.
9. He is also likely to interfere with witnesses, who are his neighbours and two other witnesses who are members of the victim's family, who are well known to him. These relationships create legitimate anxiety about the influence of the accused over the witnesses. He is likely to intimidate the said witnesses.
10. The accused is charged with an offence that carries the death penalty, which is an incentive for him to abscond if released on bail.

### **Issues for determination**

11. I have considered the affidavits of the parties and the applicable law. As a result, I find the following to be the issues for determination.
  1. Whether the accused is likely to interfere with witnesses.
  2. Whether the accused has a place of fixed abode.
  3. Whether the conduct of the accused in attempting to commit suicide justifies the denial of his bail.

### **Analysis and determinations.**

#### **Issue 1**

12. I find that the prosecution has not adduced any evidence that the accused is likely to interfere with the prosecution witnesses. The opposition of the prosecution to the release of the accused on this ground is based on speculation and conjures; which are impermissible in law. I therefore reject this ground of opposition for lacking in merit.



## **Issue 2**

13. The prosecution has also opposed the release of the accused on account of lacking a fixed place of abode. The prosecution avers that the accused lived in a rented a house. On the other hand, the accused avers that if he is released on bail, he intends to go and live in his rural home in Charachani village, Keera Location, Kisii North in the County of Nyamira. On the basis of this averment, I find that the accused has a known place of abode. For this reason, I reject the prosecution averment to the contrary.

## **Issue 3**

14. I find that the conduct of the accused in attempting to commit suicide following the alleged murder of his deceased wife warrants denial of his bail. If he is released on bail, the court will thereby be granting him more opportunities and conducive circumstances to commit suicide. It therefore follows that it is in the interests of the safety of the accused that he be denied bail. He is safer in prison than out there.
15. Furthermore, the averment of the accused that he be released to enable him secure specialized medical care is without merit for the prison authorities have got internal referral mechanisms of referring the accused for specialized treatment to an appropriate hospital facility, when need arises.

## **Objectionable averments**

16. I find that the averments of the investigating police officer (No. 81316 Cpl Stephen Malele) that the conduct of the accused in attempting to commit suicide points to his guilt is highly prejudicial and inadmissible in evidence. Only a court of law may make finding of guilt or innocence, after the accused has undergone a full trial. It is not open to the investigating police officer to make such an assertion. An investigating police officer is only allowed to depone to matters of fact that he has gathered in the course of his investigations. He is also not allowed to depose to matters of law, since theses are natters that a court may take judicial notice, if it is necessary. I therefore reject those averments for being prejudicial and inadmissible.
17. In the premises, the application fails and is hereby dismissed.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2023.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

**Mr. Kinyua: Court Assistant**

**Ms Peris Maina for the Republic/Respondent**

**Mr Ondieki for the accused/applicant**

