



**Director of Public Prosecutions v Maero (Criminal Case E011 & E012 of 2022  
(Consolidated)) [2022] KEHC 13808 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13808 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E011 & E012 OF 2022 (CONSOLIDATED)  
WM MUSYOKA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC**

**AND**

**FERINE PINQUETT MAERO ..... ACCUSED**

**RULING**

1. When the hearing, that was scheduled for July 27, 2022 floundered, on account of the State not having made a full and complete pre-trial disclosure to the defence, of the evidence it proposes to adduce at the trial, Mr Kituyi, advocate for the accused, renewed his application for bail/bond, on grounds that the resultant adjournment and delay would prejudice the accused, and release on bond would, somewhat ameliorate the prejudice. He also raised issue with publication, in the media, of matters relating to the case, which, he submitted, was torturing the accused psychologically.
2. Ms Kagai, for the Republic, took the view that the issue of bond had been disposed of the court, based on the pre-bail report. She asserted that the defence had a lodged an appeal against the ruling on bond, which act had rendered the court *functus officio*, so far as reconsideration of bond was concerned. On the media publication, she submitted that the case generated public interest, for it was double murder of minors of tender years, allegedly by their biological mother.
3. Dr Malala, advocate watching brief for the family, submitted that the defence ought to file a formal application on the matter of bond. He submitted that, if the circumstances had changed, to make the case for grant of bond favourable, then a second pre-bail report ought to be filed. On the media publication, he stated that the avenue open to the defence was to sue the offending publication.
4. The starting point should be that the right to be admitted to bail/bond pending a criminal trial is a constitutional right, stated in article 49(1)(h) of the Constitution, save where compelling reasons exist. The decision as to whether an accused person can be admitted to bail/bond is not a one-off. It does



not mean that once a decision to grant or deny bail/bond has been made it cannot be revisited. It is not a final order. It is open to review, during the course of trial. Bail/bond can be cancelled, and an accused person who had been denied bail/bond initially may subsequently be admitted to it. It all depends on the circumstances of the case. It would not be unusual, then, for the defence to urge the court to revisit the issue, and for the court to reconsider. Whether the accused is ultimately admitted to bond will depend on the material placed before the court, and principally on whether the circumstances will have changed from the time when the same was denied.

5. I was told by the State that the court is *functus officio*, on account of a notice of appeal having been filed with respect to my ruling, where I denied the accused bail/bond. No authority was placed before me to support that proposition. The mere filing of a notice of appeal, in my view, does not take away the jurisdiction to revisit the issue the subject of the notice of appeal, whether on revision or review, should the same be raised by the same party. I would only stay away from the issue, if an appeal is in fact lodged at the Court of Appeal, as the superior court would be seized of the matter, and I, sitting as a lower court, should not be seen to be proceeding to deal with issues that are pending in a court above me. There is no evidence that an appeal has been lodged at the Court of Appeal, and, therefore, there would be no reason for me to shy away from the issue of bail/bond.
6. Dr Malala submitted that the defence ought to file a formal application. He did not cite any statutory provision nor place any caselaw before me to support that assertion. I am not aware of any provision in the *Criminal Procedure Code*, cap 75, Laws of Kenya, which requires the filing of a formal application with respect to that. Indeed, unlike the civil process, the criminal process is fairly liberal, it leaves room for the parties to make all manner of applications orally in open court. Where proof of something is required, then the parties may file an affidavit, without necessarily filing any application. The court may exercise discretion, and require parties to file a formal application. For the purpose of revisiting orders made earlier with respect to bail/bond, there would be no need to make a formal application. It would suffice for the parties to raise the issue orally. If some evidential material is required, the court may direct production of some document or report, or examination of a person on oath, or the filing of an affidavit.
7. With respect to bail/bond, trial courts act mainly on reports from probation officers. There is no requirement for the filing of a formal application before the trial court directs that a pre-bail/bond report be filed. There is equally no requirement that an affidavit should be sworn and filed in court to place such report on record. I agree with Dr Malala, a pre-bail/bond report would be necessary before there can be reconsideration on the matter of bail/bond, to provide a basis, essentially to assess whether or not circumstances have changed since the issue was considered last by the court.
8. On the issue of media publicity, I will start by stating that criminal law falls in the realm of public law. Matters criminal are of public interest because criminal conduct is averse to public good. Conduct is criminalised by the State to protect what is considered to be public good. Criminal laws are made by Parliament, at the behest of the Executive, all public organs, and guardians of public good. They are enforced by the police and the Director of Public Prosecutions, through the Judiciary, all of which are public bodies. Criminal trials, according to the *Constitution* and the *Criminal Procedure Code*, must be conducted in open court, in the full view of the general public, as a measure of achieving accountability, openness, fairness, transparency and justice. A criminal trial should, by law, be public. Media publicity cannot, therefore, be limited when it comes to criminal trials, except in those restricted aspects of the trial, in respect of which the law allows courts to exclude the public, by holding sessions in camera.
9. However, media publicity does not grant the practitioners a carte blanche, or field day, to engage in publications that go beyond what is decent. With respect to matters in court, the media ought to confine itself to covering events that actually happen in court. It should report, at the very basic, on



what is said and done in court, including reciting or commenting on the contents of any documents that are made public in the course of the trial. There should be no discussion of the matter in a manner that prejudices the trial, by prejudging the guilt or otherwise of the accused person. There is a thing called sub judice, which guards against commentary on pending criminal cases in a manner that is prejudicial to the case and to the parties involved. The rule is that the media should confine itself to reporting only on the events or happenings in court, inclusive of the documents made public, and nothing more. Anything that goes beyond that would be against the rules, it would be prejudicial, and against public interest. An accused person is, by dint of the Constitution, presumed innocent until proven guilty, and the duty of proving him guilty lies with the police and the Director of Public Prosecutions, and that of determining the guilt lies with the court. The media should not overstep these bounds, by making it its business to prosecute a case, pending in court, in the media-sphere, and pronouncing itself on the guilt of the accused person, or speculating on it, in that space.

10. I have read through the media report in the publication that was placed before me, the Weekly Citizen, of 20<sup>th</sup> to June 26, 2022. The report is not about events that occurred or happened in court, rather it is about how the accused person is allegedly being haunted by the spirits of the victims of the alleged murders. The reporter quotes anonymous sources from the remand facility where the accused is being held. The reportage in this case goes beyond what the media should report with respect to cases that are pending in court. The slant in that story suggests that the accused is guilty of the offence that she faces, hence the spiritual challenges that she is having in remand. The Weekly Citizen is, no doubt, by this kind of reportage, subjecting the accused person to a trial, parallel to that the court is conducting, and it is condemning her before the trial in court even begins in earnest. This is irresponsible journalism, which should be avoided. The Weekly Citizen, and any other media for that matter, should hold its horses, wait for the prosecution and the courts to discharge their constitutional, statutory and public duty of trying the accused person, and at the conclusion of the trial, it will at liberty to report on the case from whatever angle it will be pleased to, subject to media ethics. The accused person is entitled to the constitutional right of presumption of innocence, and no one, including the media, should go into the market place with unsubstantiated allegations on her guilt. The statutory duty to make those allegations, I repeat, lies with the prosecution, who have a statutory duty to prove the allegations in a court of law.
11. The right to presumption of innocence, until proven guilty in a court of law, is in the Bill of Rights in the Constitution, specifically at article 50(2)(a). The accused is entitled to enjoy that right during the pendency of the trial, until the trial court establishes otherwise, from evidence to be adduced by the Republic. The right to presumption of innocence, being a constitutional matter, is something that should not be trivialised by anyone. I say so because it was submitted that the Weekly Citizen belongs to a class of media outfits referred to as gutter press. It is not within my province to categorise media players. The Constitution enjoins me to treat all persons and parties equally and fairly, be they mainstream or gutter. The point is that all are equal before the law, and the law requires them to observe and obey it in equal measure. Operating outside of the mainstream, if that is where the Weekly Citizen belongs, does not give it the license to flout the *sub judice* rule and the constitutional imperative that accused persons are innocent until a court rules otherwise on the basis of concrete evidence.
12. The other aspect to this is invasion of the privacy of accused persons by those under whose care they are placed, by way of pre-trial detention or remand. The right to privacy is a constitutional right, by dint of article 31. Certain constitutional rights are restricted when the accused is placed in remand custody, but that does not mean that he or she is stripped of all their constitutional rights. The report in the Weekly Citizen is founded on information alleged to have been sourced from within the Kakamega GK Women Prison, where the accused is remanded. That would mean that someone within the remand facility has been talking to the media and conveying information about the persons held in that facility.



That would amount to a vagrant violation of the constitutional right of those persons to privacy. I have in mind the right stated in article 31(c)(d). These provisions are about information relating to their families or private affairs unnecessarily being revealed, or the privacy of their communications infringed. No one has any right to do any of the above, with respect to anyone, including accused persons in remand, and remand authorities should not allow themselves to be conduits of information on private matters or affairs of inmates under their care.

13. Article 31(c)(d) says as follows:

“Every person has a right to privacy, which includes the right not to have –

- a. ...
- b. ...
- c. information relating to their family or private affairs unnecessarily required or revealed; or
- d. the privacy of their communications infringed.”

14. The report in the *Weekly Citizen* reads as follows:

“According to our source within the prison, at times Pherine Maero just starts crying silently calling the names of her two dead sons. At night, she has sleepless nights as the two’s images are said to visit her forcing the accused Maero to wake up from her sleep.

To complicate matters, the family and friends have deserted her.

At one time she surprised a relative who visited her by saying she is better off dying and joining her two sons as her life is miserable with nobody to fall to.”

15. That report dwells on private affairs relating to the family and the accused herself. It is about her alleged private thoughts and dreams, and communication with her relatives and friends. This is information that the officials at the remand home have no right, by dint of the provisions of the *Constitution*, to disclose to anyone, for it relates to the family or private affairs of the accused person. If the information came from the sources within the remand facility, then it was utterly irresponsible of those in charge. It amounts to a violation of the accused person’s rights as enshrined in article 31(c)(d) of the *Constitution*. It also underlines the irresponsibility of the *Weekly Citizen*, of disclosing or publishing material that touched on the privacy of the accused person. The said media entity had no right to do what it did.

16. Overall, the issues raised by Mr Kituyi are not idle, for they revolve around the constitutional rights of the accused person. Being in remand does not mean that a citizen of Kenya loses their constitutional rights. The *Constitution* protects the rights of all resident within the territory called Kenya, whether they be free or in bondage. It would be a shame if public entities, like prisons and remand homes, become entities through which constitutional rights are violated with impunity, instead of being bastions of protection of such rights. I understand Mr Kituyi to be saying that if the constitutional rights of the accused cannot be guaranteed in remand, and if being in remand in fact provides a platform for that violation, facilitated by the officers in charge of her custody at the facility, then it would be better if the accused is admitted to bond, and released into the bosoms of persons who would not divulge very private and intimate details about her life, person, communication and affairs. The court should be a protector of the *Constitution*, and violations of constitutional rights of a person who is a ward of the court should not be countenanced.

17. I believe that I have said enough to justify making the following orders and directions:



- a. That I direct the Kakamega County Director of Probation and Aftercare Services to conduct a fresh assessment/evaluation of the circumstances of the accused person, for the purpose of assisting the court consider whether to admit her to bail/bond or not;
- b. That a pre-bail/bond report shall, thereafter, be filed in court within thirty (30) days;
- c. That I shall allocate a date for mention of the matter to receive the pre-bail/bond report, and to give further directions on that issue;
- d. That I direct the *Weekly Citizen*, and the media in general, to report on the instant criminal matter, and anything connected with it, with sensitivity to the rules relating to *sub judice*, and the accused person's constitutional rights to presumption of innocence and privacy;
- e. That I direct the Kakamega GK Women Prison remand facility to desist from divulging information relating to the private life or affairs of the accused person to the *Weekly Citizen* or any other media or any other person or entity in violation of article 31(c)(d) of the *Constitution*; and
- f. That I direct the Deputy Registrar to cause a certified copy of this ruling to be made available to the officer in charge of the Kakamega GK Women Prison.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2022**

**WM MUSYOKA**

**JUDGE**

**Mr Erick Zalo, Court Assistant.**

**Ms Kagai, instructed by the Director of Public Prosecutions, for the Republic.**

**Mr Kituyi, Advocate for the accused person.**

**Dr Malala, Advocate watching brief for the family of the victims.**

