Republic v Mkowa alias Baabu (Criminal Case E015 of 2025)
[2025] KEHC 7802 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL CASE E015 OF 2025

OA SEWE, J

MAY 22, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

BONFACE OMORE MKOWA ALIAS BAABU ..... ACCUSED

RULING

1. The accused person was arraigned before the Court on 14th May 2025 on a charge of Murder. The Information dated 24th April 2025 states that on the night of 31st January/1st February 2025 at Miramba Village in Nyandiwa Sub-location in Suba South Sub-County within Homa Bay County, jointly with others not before the Court the accused person murdered Benson Okoth Masara alias Ondiala. He denied the charge and applied for release on bond pending his trial.

2. The application was opposed by the Prosecution Counsel on the ground, inter alia, that the accused is a flight risk. Reliance was placed on the affidavit sworn by one of the investigating officers in the matter, Detective Romana Oduor, sworn on 24th April 2025. The investigating officer averred that the investigations have unearthed credible evidence linking the accused with the murder in question; and that after committing the offence, the accused went into hiding.

3. The investigating officer further averred that, upon the accused's arrest on the 9th March 2025 he managed to slip away from the police while the police were busy preparing an inventory of a recovered mobile phone. At paragraph 11 of the Prosecution's Affidavit, it was deposed that the accused escaped while handcuffed; and that the pair of handcuffs is yet to be recovered.

4. The Prosecution further averred that the accused was later traced to his hideout in Rangwe and was re-arrested on the night of 13th and 14th March 2025; and that in the process of his re-arrest, the accused extensively damaged the ceiling board of the room in which he was found in a bid to escape. Therefore,

the Prosecution is apprehensive that he is a flight risk with a high possibility of absconding if released before the hearing and determination of this case.

5. The investigating officer also averred that two of their witnesses are close relatives of the accused person; and therefore stand the risk of intimidation and threats from the accused person. Reference was also made to incidents of rape allegedly committed by the accused as the basis for the assertion by the Prosecution that the accused is a security risk.

6. Lastly, the investigating officer pointed out that the deceased was a well-known person in the County of Homa Bay and that his murder elicited immense anger and consternation. Therefore, the Prosecution posited that since the community is yet to come to terms with the incident, the life of the accused may be imperiled if released on bond.

7. In response, Counsel for the accused submitted that the evidence alluded to by the Prosecution is yet to be tested under the rigours of cross-examination. He pointed out that the accused has already recanted the confession made to the Police and therefore the confession ought not to count for purposes of the bail application. He further submitted that the allegation that the accused might interfere with witnesses has not been proved; and added that the particulars of the rape case referred to at Paragraph 16 of the affidavit have not been given. Accordingly, counsel urged the court to disregard the averments made in opposition to the accused's application for admission to bail.

8. The right to bail is enshrined in Article 49(1)(h) of *the Constitution*, and therefore, unless there is some compelling reason, an accused person ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. It provides that:

   An arrested person has the 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."

9. Moreover, by dint of Article 50(2) of *the Constitution*, every accused person is entitled to the presumption of innocence until proved guilty. Hence, in the Judiciary Bail and Bond Policy Guidelines, it is recommended that:

   The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts."

10. Accordingly, Section 123A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, stipulates that:

    (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. And, in the Bail and Bond Policy Guidelines, it is restated as a general guideline in Paragraph 4.9 that:

> " In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of *the Constitution* of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences."

12. The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

(a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

(b) The strength of the prosecution case.

(c) The character and antecedents of the accused person.

(d) The failure of the accused person to observe bail or bond terms.

(e) The likelihood of interfering with witnesses.

(f) The need to protect the victim or victims of the crime.

(g) The relationship between the accused person and the potential witnesses.

(h) The best interest of child offenders.

(i) The accused person is a flight risk.

(j) Whether the accused person is gainfully employed.

(k) Public order, peace and security.

(l) Protection of the accused persons.

13. Having taken into consideration the foregoing parameters in the light of the averments set out in the affidavit of Detective Romana Oduor as well as the submissions made by learned counsel, it is plain that no adverse allegation was made about the character or antecedents of the two accused person prior to the alleged offence. There is no assertion that the accused had previously failed to observe bail or bond terms. In the premises, the key issues raised by the Prosecution; and which now arise for consideration in connection with the instant bail application are:

(a) The nature of the charge or offence; the seriousness of the punishment to be meted if the accused person is found guilty and the strength of the prosecution case.

(b) Whether or not the release of the accused person on bond would work against the public order, peace and security; or otherwise expose them to peril.

(c) The likelihood of the accused person interfering with witnesses and the need to protect the victim or victims of the crime.

(d) Whether indeed the accused person is a flight risk.

14. As to the nature of the offence and the seriousness of the punishment likely to be meted if the accused persons are ultimately found guilty, there is no gainsaying that the offence of murder is one of the most serious offences in the land; and that it entails the death penalty. Thus the approach previously taken, before the mandatory aspect of the death penalty was done away with by the Supreme Court of Kenya in Francis Karioko Muruatetu & Others v Republic [2017] eKLR, was that, given the seriousness of the charge and the possible outcome of a conviction, the temptation to jump bail if released on bond was a key consideration. Thus, in Watoro v Republic [1991] KLR 220, it was held thus:

> "The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody ... the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases...the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction..."

15. However, in the current constitutional order, murder is bailable; and therefore, a bail application in a murder case, has to be balanced with the rights of an arrested person as set out in Article 49(1)(h) of the Constitution. I therefore find apt the expressions of Hon. Ibrahim, J. (as he then was) in Republic v John Kahindi Karisa & 2 Others [2010] eKLR that:

> "This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the *Criminal Procedure Code* which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these cases, the mandatory sentences provided by law is Death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any offence under the *Penal Code* including those that attract the death sentence e.g. murder, the same is bailable. A murder suspect has a Constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released."

16. In the premises, the fact that an accused person is charged with the offence of murder, per se, is no reason to deny him/her bail.

17. The Court was also urged to take into account the strength of the prosecution case as disclosed at paragraphs 9 and 10 of the Affidavit of Detective Oduor. It is noteworthy however that Section 123A(1)(d) of the *Criminal Procedure Code* makes reference to "...the strength of the evidence of his having committed the offence..." and for purposes of the *Evidence Act*, Chapter 80 of the Laws of Kenya, "evidence" denotes:

the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity.

18. Thus, such evidence, to my mind, can only be that which has been duly proved, tested and formally admitted before the Court by way of viva voce evidence. I find succor in the decision of Hon Ngugi, J. (as he then was) in Republic v Jane Muthoni Mucheru & Another [2017] eKLR, that:

SUBPARA 22.

In the ruling of 20/12/2016, I explained the proper context of when the strength of the prosecution case can be a legitimate factor in denying bail. The Bail/Bond Policy Guidelines at p. 16 (Paragraph 4.9(b)) is couched in the following language:

An Accused Person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence of the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is aware of the weight of the prosecution's case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.

SUBPARA 23.

The Policy Guidelines cited R v Margaret Nyaguthi Kimeu [2013] eKLR for the last proposition. Ms. Mwaniki has argued that at this point the instant case is on all fours with the Margaret Nyaguthi Kimeu Case. This is because, she argued, the Court has now heard key Prosecution witnesses and has a sense of what direction the trial is taking."

19. Hence, the court proceeded to hold that:

> " 25. In the present case, after hearing ten witnesses, I am prepared to say that the prosecution case is not tenuous. I do not wish to say more for the fear of embarrassing the remaining trial and pre-judging issues. This in itself would not be sufficient reason to deny bail as I stated above. However, here, it is coupled with the unresolved question of Mr. Nelson Njiru who is a fugitive of justice in this case. Both direct evidence received in Court as well as the statement by the 1st Accused Person establish a connection between Mr. Njiru and both Accused Persons. The almost literal vanishing of Mr. Njiru into thin air should give us pause about the real possibility that the two Accused Persons could follow suit hence subverting justice in this case."

20. Likewise, in Republic v Joseph Kuria Irungu [2020] eKLR the strength of the prosecution evidence was appraised from the backdrop, not of assertions by way of an affidavit, but on the basis of tested evidence adduced before the trial court by a good number of the key prosecution witnesses. Hence in reviewing its decision on bail, the trial court held thus:

> 12. In this matter the court was clear in its mind, that the application for review shall be considered when all those witnesses who were under protection, whose evidence the court ought to preserve had testified. It is clear that the said witnesses have now testified and their evidence preserved. The prosecution's fear that the applicant might interfere with them, now has no foundation at all. The applicant has further provided the court, by way of affidavit evidence of the place where he shall reside during the remaining period of trial and what he shall be doing. I am therefore satisfied that there has been change of circumstance from the time the applicant was first denied bond to the time of this ruling. It is therefore clear that he is entitled to review of the orders denying him bond, having placed adequate material on the change of circumstances as stated herein.

13. The only issue which the court now has to determine, is whether having heard and recorded the evidence of fifteen (15) prosecution witnesses, there now arises the issue of the strength of the prosecution case as a compelling reason, to enable the court deny the same bond, on account that having known the case against him, there is real likelihood and or temptation to abscond, so as to defeat the course of justice.

14. Whereas it is clear that the court has discretion to grant bail at any stage during trial, when the application for bail is made during the course of trial, one of the compelling reasons which the court has to take into account is the strength of the prosecution, as provided for under the Bail and Bond Policy Guidelines at 4.9 (b) ..."

21. It is no wonder then that, before the formulation of the Bond and Bail Policy Guidelines, the view propounded, for instance in Republic v Danson Mgunya & Another [2010] eKLR, was that:

> " ...criteria (ii) ... (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that shows that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."

22. In the premises, it is my considered view that it is premature, if not impossible at this stage of the proceedings, to engage in an appraisal of the prosecution evidence and determine which direction it will lead to. I agree with the defence counsel that since the evidence alluded to at paragraph 9 of the investigating officer's affidavit is yet to be presented and tested by way of cross-examination, there is need to treat the same with caution.

23. I also find no basis for concluding that the accused is likely to intimidate or interfere with the prosecution witnesses. In any case there are other less restrictive ways of dealing with such a situation, say, by imposing appropriate conditions. I share the viewpoint expressed in Republic v Robert Zippor Nzilu [2018] eKLR by Hon. Odunga, J. (as he then was) that:

> " ...in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of *the Constitution*, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to Thesaurus English Dictionary is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons."

24. The foregoing notwithstanding there is a valid concern that the accused person is a flight risk and therefore unlikely to turn up for his trial. In the affidavit of Detective Oduor, it was averred that after the subject incident, the accused person disappeared and went into hiding in Sindo and other islands of the Suba archipelago. He was arrested on 9th March 2025 but managed to slip away from the Police

and escaped in handcuffs. When he was ultimately traced, he again attempted to escape through the ceiling of his hideout.

25. Further to the foregoing, the investigating officer pointed out that, presently, the accused has no fixed place of abode, his house in Sori having been closed for non-payment of rent.

26. Taking all the foregoing factors into account, I am satisfied that the accused person is indeed a flight risk; and that the likelihood of his jumping bail is real. (See Republic v Fredrick Ole Lelman & Others [2016] eKLR

27. It is therefore my finding that a compellable reason has been given for the continued incarceration of the accused person. Consequently, the application for his release on bond is declined. He will remain in custody pending his trial.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 22ND DAY OF MAY 2025.

OLGA SEWE

JUDGE