Director of Public Prosecution v Maero (Criminal Case E011 of 2022) [2025] KEHC 8194 (KLR) (4 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8194 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL CASE E011 OF 2022

S MBUNGI, J

JUNE 4, 2025

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC

AND

FERINE PINQUETT MAERO ..... ACCUSED

RULING

1. Upon this matter coming up in court on 19.05.2025 for directions under section 200 of the *Criminal Procedure Code*, defence counsel, Mr. Mango submitted that the defence wanted to start De Novo, on the basis that the court ought to observe the demeanor of the witnesses on order to assess their credibility. He further made an oral application to the court, praying that the accused herein be released on favorable bond terms.

2. Prosecution counsel, Ms. Osoro opposed both applications, stating that this is a 2022 matter, and that section 200 is not coached on mandatory terms. She submitted that it was mandatory that the accused be informed of the change in judicial officers, but it was up to the court to make a decision on how to treat the evidence of each witness. She further submitted that there was need for the family to get closure in this matter, since only two witnesses were remaining.

3. Ms. Mburu, counsel holding brief for the victim's family pointed out that the Defence had been making the application for the case to start De Novo, and for the accused to be released on bond every time the matter was handled by a different Judge. She opposed the application, submitting that calling witnesses again would traumatize the family further. She proposed that the matter be transferred to Hon. Lady Justice S.C. Chirchir for hearing and determination, or in the alternative, this court could hear the last two remaining witnesses and do the judgment.

4. In rebuttal, Mr. Mango submitted that section 200 of the CPC is coached in mandatory words. The word used is "Shall" which warrants all witnesses to be recalled as long as the accused person expresses the desire to do so, the court shall give that right to the accused person.

5. Counsel further averred that previous applications for bond were declined on the sole reason that the accused might interfere with witnesses and that she might abscond. He averred that the pre-bail report was favorable, and that this court is not led by what other Judges had ruled on the issue of bail.

6. Ms. Osoro submitted that the pre-bail report was not positive and that this was a matter that caught public interest. She submitted that if dissatisfied, the accused ought to have appealed against the ruling on Bond. She prayed that the accused person remain in custody since only one witness was left.

7. I have gone through the court record, and considered that oral submission by the counsels.

8. I isolate the key issues for determination to be:

    i. Whether the trial should commence De Novo (afresh) under Section 200 of the *Criminal Procedure Code*, following the change in the presiding judicial officer.

    ii. Whether the accused person should be granted bond/bail at this stage of the proceedings.

Issue 1: Whether the trial should commence De Novo

9. Section 200(1) of the *Criminal Procedure Code* provides as follows:

> "Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises such jurisdiction, the succeeding magistrate may—
>
> (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or, resummon the witnesses and recommence the trial."

10. Further, Section 200(3) provides:

> "Where a succeeding magistrate commences the hearing of proceedings and it becomes apparent that a conviction may be based wholly or partly on evidence recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard."

11. While the section gives the accused person the right to demand the recall of witnesses, the decision as to whether or not to recommence the trial lies within the discretion of the court. The use of the word "may" in Section 200(1) makes it clear that the trial court has a discretion to proceed from where the previous judicial officer left off, so long as the accused person is informed of the right to request for a recall of witnesses.

12. In the present matter, it is not in dispute that the accused was informed of the change in the presiding Judge. It is also noted that the accused, through counsel, has expressed a desire for the matter to start afresh. However, the court retains discretion under section 200(1)(b) to determine whether it is in the interest of justice to proceed from where the matter had reached or to commence De Novo.

13. In the case of Abdi Adan Mohamed v Republic [2017] eKLR, the Court of Appeal emphasized the principle that:

> " The purpose of Section 200 is to ensure that justice is not delayed by the mere fact of a judicial officer ceasing to exercise jurisdiction. It is not intended to give an accused person a second bite at the cherry or to occasion unnecessary delay in the criminal justice system."

14. Similarly, in Ndegwa v Republic [1985] KLR 534, the court held:

> " Section 200 should be used sparingly and only with caution. Each case must be considered on its own merits to determine whether it is just to proceed with the trial or start afresh."

15. In the instant case, the court notes that this is a 2022 matter, so far eleven (11) witnesses have testified. The prosecution has submitted that only two witnesses are yet to testify.

16. The continued requests for the matter to start afresh each time the presiding judge changes may cause undue hardship and delay, not only to the victim's family but to the administration of justice. The accused has been afforded the opportunity to challenge the evidence on record, and the credibility of witnesses can still be assessed through the totality of the evidence, including cross-examinations already conducted. Further, the court takes note of the need to shield the victim's family from repeated trauma and to safeguard the integrity of the trial process.

17. In the interest of justice, expeditious trial, and the need to bring closure to all parties involved, I decline the application for the trial to commence de novo. The case shall proceed from where it had reached.

Issue 2: Whether the accused person should be granted bond/bail at this stage of the proceedings.

18. On 10.06.2022, this court, through Hon. Justice Musyoka, denied an application for bond and stated that while the accused was presumed innocent until proven guilty, there were compelling reasons justifying continued detention. The court noted that this was a case involving allegations of double murder, and further, that the accused had been hospitalized after the incident, with concerns raised in the probation report regarding her psychological wellbeing. It was observed that the accused might be at risk of harming herself or others if released prematurely into the community, particularly given the highly emotive nature of the allegations and the involvement of children of tender years. For these reasons, the court held that the accused should remain in detention, primarily for her safety and that of the public, and directed that the matter be expedited.

19. Pursuant to another application for bond by then Defence counsel, Mr. Kituyi, the court again made a ruling on 23.12.2022 denying the accused person bond.

20. The court acknowledged the constitutional right to bail and considered the contents of the fresh pre-bail report filed on 31.10.2022. Despite the report being generally favorable, it highlighted the accused's confrontational attitude, which the court noted may hinder any potential benefit from release on bond. The court further held that, given the gravity of the charges(being of double murder), there was a real risk of absconding and possible interference with witnesses. Accordingly, the application was declined, and the court once again directed that the trial be fast-tracked.

21. When the matter came up in court before Hon. Lady Justice S. C. Chirchir on 17.10.2025, the Hon. Judge declined to revisit the matter and issued directions that this court was functus officio as far as the issue of bond is concerned, and that the recuse available to the accused person was to appeal to the court of Appeal.

22. This is the fourth time the application for bond is being renewed before this court. I have considered the submissions by the defence, the opposition by the prosecution and counsel for the victim's family, as well as the prior rulings on record. I am guided by the provisions of Article 49(1)(h) of *the Constitution*, which guarantees the right to be released on bond or bail unless there are compelling reasons not to do so.

23. Whereas bond is a constitutional right, it is not absolute. The right is subject to the existence or absence of compelling reasons, as emphasized in the Court of Appeal case of Republic v Danson Mgunya & Another [2010] eKLR, where the court stated:

> " The right to bail is not absolute. The court has discretion to deny bail where there are compelling reasons. What amounts to compelling reasons depends on the circumstances of each case."

24. In the present case, nothing has changed from the past rulings and determinations on bond. The accused is still facing serious charges of double murder, and some prosecution witnesses are yet to testify. The earlier concerns regarding the accused's psychological state, risk of self-harm or harm to others, and the highly emotive nature of the case within the community remain valid and have not been addressed or rebutted by any new material evidence.

25. I am also persuaded by the decision in Republic v Milton Kabulit & Another [2016] eKLR, where the court held:

> " Where there is a likelihood that the accused may abscond or interfere with witnesses, the court must err on the side of caution and deny bail, even as it upholds the presumption of innocence."

26. As the prosecution rightly submitted, there is no guarantee that the accused will attend court if released, given the gravity of the charges, the emotional toll of the proceedings, and the absence of any significant change in circumstance since the earlier applications. The court is not persuaded that any new or exceptional grounds have been presented to justify a departure from the earlier well-reasoned rulings.

27. In view of the foregoing, I find and hold that there are still compelling reasons for the denial of bond at this stage. The application for bond is accordingly declined. The accused shall remain in custody pending the hearing and determination of this matter.

28. The is at liberty to apply for a review of orders declining bail in there is a circumstances change at trial progresses.

29. The prosecution is directed to ensure that the remaining witness or witnesses are availed without further delay, so that the matter may be concluded expeditiously. Hearing on 3.7.2025.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF JUNE, 2025.

S.N MBUNGI.

JUDGE.

In the presence of :

Accused- present

Court Assistant – Elizabeth Angong'a

Court prosecutor- Ms Osoro.

Mr. Malala watching brief for the victim of the family, present online.

Mr. Mango for the accused, present online.