



REPUBLIC OF KENYA



KENYA LAW
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**Ndapash & 2 others v Republic (Criminal Revision
E010 of 2025) [2025] KEHC 8426 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E010 OF 2025**

**AC BETT, J
JUNE 16, 2025**

BETWEEN

JOSEPHAT GICHOHE NDAPASH 1ST APPLICANT

NATHAN KITUI NDAPASH 2ND APPLICANT

DUNCAN MWANI KITUI 3RD APPLICANT

AND

REPUBLIC RESPONDENT

*(Being a revision of the decision dated 20.2.2025 by Hon. J. N.
Maragia, PM in Butali PM's Criminal Case No. E150 of 2025)*

RULING

1. The Applicants were arraigned in Butali Law Courts and charged with the offence of attempted murder contrary to Section 220(a) of the [Penal Code](#) the particulars being that on the 20th day of September 2024 at Mbagara village, Martuma location, Lugari Sub-county within Kakamega County, jointly with others not before the court, they attempted unlawfully to cause the death of Henry Miwani by maiming the said Henry Miwani.
2. In the second count, the Applicants were charged with assault contrary to Section 251 of the [Penal Code](#) whereby it was alleged that on 20th day of September 2024 at Mbagara Village, Martuma location, Lugari Sub-county within Kakamega County jointly with others not before the court, they assaulted Moses Muneria thereby occasioning him actual bodily harm.
3. When the Applicants appeared before the trial Magistrate on 18.2.2025, they pleaded not guilty to the two charges after which the Prosecution submitted that they were opposed to their admission to bond as they were a threat to the complainants and that they would interfere with the witnesses. Further, it



was submitted that the Applicants had assaulted a police officer in the cause of their arrest which they had attempted to evade.

4. The Prosecution placed reliance on an affidavit sworn by PC Job Kipngetich Force No 21863 on 18.2.2025 in which he stated that the key witnesses are relatives to the Applicants and that their release on bond would likely cause fear and anxiety among the witnesses and make it difficult for the deponent as the investigating officer to bond or summon them to give evidence in court.
5. Additionally, he deponed that the 1st and 2nd Accused were under investigations for threatening to kill one of the witnesses, an incident which was reported at Turbo Police Station vide OB No 07/17/2024. He further stated that the 2nd and 3rd Applicant had threatened to kill and bury the complainant through text messages from their mobile phone numbers. Further the investigating officer was threatened and thereafter assaulted by the 2nd Applicant who is a police officer and the assault was booked at Tala Police Station Wote OB 22/15/02/2025. That the Applicants, who were said to be extremely violently assaulted Nelson Miwani, a relative to the complainant while in handcuffs at Lumakanda Police Station upon arrival from Machakos County as evidenced by OB 23/16/02/2025. It was also deponed that the Applicants had fled to Tala Township in Machakos after they got wind of the ODPP's recommendation that they be arrested and charged. It was further averred that the Applicants were also suspects in other cases reported at Turbo Police Station and it was in the public interest that the Accused persons be denied bond or bail until key witnesses testify.
6. In response, Counsel for the Applicants submitted that bond is a constitutional right and that the deposition of P.C Kipngetich could not be relied upon as the Applicants had never threatened the witnesses, because they did not know who they were. In regard to the threat to lawful enforcement, the Applicants' Counsel dismissed the allegation as farfetched at best. On the allegation that they were violent while being arrested, he submitted that it was an allegation for which they should be presumed innocent until proven guilty. It was their contention that the deponent was not being honest and since the Applicants were willing to abide by any bond terms set by court, they should be admitted to bail.
7. The Applicants' submissions were that since the 2nd Applicant was a police officer, he understands the rules and procedure of bond and additionally the 1st and 2nd Applicants did not live at home while the 3rd Applicant could be guided.
8. In a ruling delivered on 20.2.2025, the trial magistrate denied the Applicants' prayer for bond on the ground that violence was likely to be occasioned to the witnesses by the Applicants if released on bond.
9. Being dissatisfied with the denial of bond, the Applicants filed an application for review of the ruling pursuant to Section 362 and 364 of the Penal Code and the Constitution of Kenya.
10. Before considering the application, I called for the lower court's file to assist the court in its decision-making process. However, I do not see any copy of the ruling on bond in the court file.
11. On 4.3.2025 when the matter came up for hearing of the application the state did not oppose bond but the court was of the opinion that the lower court file should first be availed to enable it make a decision. On 7.3.2025 upon perusal of the lower court file, I noticed that there were weighty issues raised that led to the denial of bond to the Applicants and directed that the Probation Office file a pre-bail report before 17.3.2025 when the application was coming up for further mention. On the scheduled date, the two victims and their advocate were present.
12. Mr. Nyaberi for the Applicant then submitted that since the state had not filed an affidavit in response to the application, then the application was unopposed and ought to be allowed. Secondly, he submitted that the prosecution had earlier unequivocally stated that they had no objection to the



Applicants being released on bond. He submitted that the Applicants are entitled to bond as provided by Article 49 of the Constitution and that they were entitled to a presumption of innocence until proven guilty. Further, Counsel for the Applicants urged that under Article 23 of the Constitution the bias of the court should be aimed at promoting constitutional rights and not hampering them. Additionally, he submitted that a perusal of the pre-bail reports gave a clear indication that this case sprouts from a multiplicity of civil cases that are pending in court with the blood and the soul of the conflict being a dispute over family land. The Applicant's are apprehensive that the court could be lured into a scheme that is well calculated to subjugate the Applicants/Accused persons and cause them to give up their fair rights over their ancestral land.

13. Mr Nyaberi faulted the pre-bail reports and said that they lacked specificity as to why the Applicants should not be granted bond as they only talk of a complex family matter and tension that has been ongoing for a long time. He submitted that in any event the court ought to take judicial notice that there are legal apparatus to address any issues likely to emerge including the police. He further submitted that the 1st Applicant is nursing gunshot wounds that were inflicted by Henry Miwani the first complainant and needed specialized attention to heal while the 2nd Applicant needed to go back to his work place. Finally, he submitted that there were no compelling reasons to deny the Applicants bond.
14. Since the Applicants' Counsel objected to the state's attempt to tender their submissions in opposition to the application on the grounds earlier stated hereinabove, I allowed the victims' Counsel Mr. Ayieko to submit on their behalf.
15. Mr. Ayieko opposed the application and submitted that the right to bond is not absolute. He argued that the victims are living in fear due to constant threats by the Applicants as demonstrated in the affidavit that was sworn by the investigating officer in the lower court. He submitted that one of the victims is old and on a wheelchair and is therefore unable to defend himself. He further submitted that the only suit pending in court is the one relating to the attack on his client either via actual attacks or efforts to forcibly evict him from his lawful land. He argued that since the Applicants are related with the victim with one of them being his son, it is possible for them to access the victim due to proximity. He further submitted that though it is claimed that the victim is influential, he is only a prominent farmer and businessman who yields no influence beyond that.
16. In regard to the claim that the 1st Accused has gun shot wounds that need specialized attention Mr Ayieko referred to the case of Ferdinand Waititu v Republic where he said it was held that medical attention is not a conclusive ground to grant bond as medication can be accessed in prison. On the pre-bail reports, he said that the same demonstrated that the ground is volatile and therefore the court needs to look at public security as it considers the weight of the case against the Applicants who are charged with attempted murder an offence that attracts life imprisonment. Mr Ayieko further stated that one of the Applicants being a police officer could be in a position to interfere with witnesses. In conclusion, he stated that the rights of the Accused must be balanced with the rights of the victims to safety and that if the Applicant intended to challenge the pre-bail reports, they ought to have applied for a second report from a qualified probation officer.
17. In rejoinder, Mr. Nyaberi urged the court to consider Article 50 of the Constitution which presumes that an Accused person is innocent until proven guilty as the rights of the Accused person are paramount. He also submitted that the court can cancel bond any time it deems necessary.



18. Under Section 123(3) of the *Criminal Procedure Code*, the court has a wide and unfettered discretion to revise the decision of the subordinate court in regard to bond and provides that:-

“The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

19. The jurisdiction to revise the decisions of the subordinate court is derived from Section 362 of the *Criminal Procedure code* which provides that:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

20. The right to bail is one of the foundations of fair trial and is embedded in Article 49(h) of the *Constitution* which provides: -

“(1) 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.”

21. In light of the Constitutional guarantee, the only time that an accused person can be denied bail is where there are compelling reasons. In the case of *Republic v Danson Ngunya & another* [2010] eKLR, it was held as follows:-

“I have carefully considered the aforesaid arguments and submissions. The counsel for the 1st Applicant Dr. Khaminwa referred to a decision of the Supreme court of Nigeria *Alhaji Mujahid Dukubo – Asari v Federal Republic Of Nigeria* S.C. 20A/2006; in which the said court set out some essential criteria on the issue of whether to grant bail pending trial of an accused by the trial court. Justice Ibrahim Tanko Muhammad J.S.C. held that:-

“...When it come to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- (i) The nature of the charges
- (ii) The strength of the evidence which supports the charge
- (iii) The gravity of the punishment in the event of conviction
- (iv) The previous criminal record of the accused if any
- (v) The probability that the accused may not surrender himself for trial
- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him
- (vii) The likelihood of further charges being brought against the accused.



- (viii) The probability of guilty
- (ix) Detention for the protection of the accused
- (x) The necessity to procure medical or social report pending final disposal of the case.”

It therefore follows that I need to determine whether there were compelling reasons to deny the Accused person’s bond.

22. The Supreme Court in *Ferdinand Waititu v Republic* petition No 2 of 2020 cited with approval the case of *Republic v Pascal Ochieng Lawrence* [2014] eKLR where the court set out the parameters guiding a court in exercising its discretion in an application for bond and where the court held that:-

“It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the state. The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:-The seriousness of the offence although this carried greater weight under the old constitutional dispensation; The weight of the evidence so far adduced if the case is partly heard; The possibility of the accused interfering with witnesses; The safety and protection of the accused once he/she is released on bail/bond; Whether the accused will turn up for trial; Whether the release of the accused will jeopardize the security of the community.”

The Supreme Court further rendered itself thus:-

“Similarly, the High Court in the case of *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR in determining the criteria to be applied on whether to grant bail or not relied on the decision by the Supreme Court of Nigeria in *Alhaji Mu'abid Dukubo – Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows:“... When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- i. The nature of the charges;
- ii. The strength of the evidence which supports the charge;
- iii. The gravity of the punishment in the event of conviction;
- iv. The previous criminal record of the accused, if any;
- v. The probability that the accused may not surrender himself for trial;
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- vii. The likelihood of further charges being brought against the accused;
- viii. The probability of guilty;
- ix. Detention for the protection of the accused;



- x. The necessity to procure medical or social report pending final disposal of the case”.
23. The exceptions to the right to bond are further codified in section 123A of the *Criminal Procedure Rules* which provides:-
- “ (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 fulfillment 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.”
24. In the instant case, the Applicants were charged with bailable offences. The circumstances under which the offences were alleged to have been committed point to a family dispute so vicious, that an arresting officer was assaulted while in the process of arresting one of the Applicants/suspects.
25. Be that as it may, the pertinent issue is whether the grounds advanced by the prosecution for opposing bond constitute compelling reasons to deny the Applicants bond. Whereas the term “compelling reasons” is not defined by the *Constitution* and the *Criminal Procedure Code*, various courts have relied on the dictionary meaning of the phrase leading to an array of possibilities including various versions which define compelling as strong evoking interest, attention, conviction or admiration; gripping, forceful, potent and well founded.
26. In his affidavit, in objection of bond, PC Job Kipngetich made some two dichotomous averments. firstly, that the Applicants, complainants and witnesses live in close proximity and secondly, that the Applicants have no known fixed abode. These averments which are at odds, point to a concerted effort to ensure the Applicants are denied bond, as is the averment that if released on bond, the Applicants may influence the other suspects who were yet to be arrested, to flee.
27. In regard to the threat and assault of the investigating officer by the 2nd Applicant, and the assault of a relative at Lumakanda Police Station, the presumption of innocence under Article 50(2)(a) of the *Constitution* comes to mind. The alleged threat and assault of the investigating officer does not comprise a compelling reason for the Applicants to be denied bond.
28. The principles underpinning the right to bond are the right to a fair hearing and the right of an Accused to be presumed innocent until proved guilty.



29. The Applicants were arrested on 15.2.2025 which is four months ago. Even if there was volatility on the ground at the time of the arrest, the situation should have changed by now for it is expected that tempers would cool, and hostility would dissipate over time. Moreover, the four month's incarceration of the Applicants ought to have taught them a lesson as regards any intentions they may have harboured to interfere with witnesses or to commit any other related offences.
30. I have noted the sentiments in the pre-bail report but I must take the same with caution considering the generalized reference to a "complex family matter". The alleged "complex family matter" is apparently a land dispute pitting the Applicants and the Complainants against each other. In the premises, the court has to be careful lest parties use the criminal process to settle scores that stem from the land dispute.
31. After carefully weighing the entire circumstances herein, I am of the view that there are no compelling reasons to deny the Applicants bond as the concerns of the prosecution can be addressed by imposing strict bond terms on the Applicants.
32. Consequently, the application for revision must succeed. I now review the decision of the trial court and admit the Applicants to personal bond of Kshs 300,000/= each with one surety of similar amount subject to the following terms and conditions:-
- (a) The Applicants shall keep off the disputed land pending determination of the case.
 - (b) The Applicants shall not interfere with the witnesses or contact them directly or indirectly through agents until finalization of the case.
 - (c) In the event of breach of any of the above conditions, the bond shall be cancelled.
33. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Ngaira and Mr. Mbetera holding brief for Mr. Nyaberi for the Applicants

Ms. Chala for the Respondent

No appearance for Mr. Ayieko for the Complainants

Court Assistant: Polycap

