

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**

**CRIMINAL CASE NO E029 OF 2025**

**REPUBLIC .....** **PROSECUTOR**

**VERSUS**

**PHILIP AMBUNYA OMBACHI ALIAS TOTO.....**

**ACCUSED**

**RULING**

1. The accused faces a charge of murder contrary to section 203 as read with section 204 of the penal code, the particulars of which are that on the 26<sup>th</sup> February 2025 at Stima area along Mwirigo road within Kasarani Sub County of Nairobi County jointly with two others not before the court murdered Christopher Muyale Lubanga.
2. He pleaded not guilty to the charges and in compliance with the provisions of Article 49 of the Constitution, the State filed an affidavit sworn by CPL Joshua Sila in which it was deposed that the deceased was murdered while on his way to work and his mobile phone techno Camon 19 together with sim card stolen.
3. It was contended therein that investigations were still on going with the aim of arrested the other suspects who were still at large and therefore the accused if released on bond was likely to interfere with the on going investigations aimed at arresting and charging the accused accomplices and that the accused if

released on bond , was likely to interfere with two prosecution witnesses including a minor who used to work at his shop and his girl friend who were well known to him and were likely to be influenced by the accused person.

4. In compliance with the bond bail policy guidelines, the court called for pre-bail report, wherein it was stated that the accused father does casual work within babadogo while his mother was based at their rural home and that the same dropped out of school in form three due to financial constraints and took up practical training in electrical works as a technician as at the time of his arrest.
5. It was stated that he had previously being granted bond for the offence of breaking and entering, which bond was forfeited due to none compliance. He was known to the chief of his area of residence and the nyumba kumi leader of the area, while the investigating officer contended that he was a member of a gang who steals phones, though he had no objection to his being granted bond.
6. On the victims concerns, it was stated that the deceased was married with four children and was working as technician with ethics and Anti- corruption commission and was the sole bread winner of the family and that life without the deceased was difficult for the family, who objected to the release of the accused on

bond for fear of their safety since they come from the same rural area with the accused.

7. In conclusion it was stated that the accused had a supportive family with a fixed place of abode at Baba dogo but had no assets to use for bond and further that they were unable to raise any cash/bond.

### **SUBMISSIONS**

8. At the hearing of the application for bond, Ms Ogweno for the prosecution retreated the content of their affidavit opposing bail and stated that the accused was likely to interfere with two witnesses, a minor who used to work at his shop and his girl friend who was in charge of the stolen mobile phone/sim card and therefore the accused it was submitted, should be denied bond until the two witnesses had testified.
9. On behalf of the accused, Mr. Nyamanga submitted that the affidavit opposing bail did not raise any compelling reasons and that the court could take steps to make sure that there was no interference. It was submitted that the investigations had been on going since February 2025 while the accused was in remand custody without status report thereon. And that the court could impose conditions to ensure that there was no interference.

### **ANALYSIS AND DETERMINATION**

10. Bond is a constitutional right of every accused person, under Article 49 (h) (1) of the Constitution, which can only be limited where there are compelling

reasons advanced by the Prosecution to the satisfaction of the court on a balance of probability.

11. What constitute compelling reasons, are well captured in the Judiciary Bail and Bond Policy Guidelines at paragraph 49 thereof and have been authorities by the Court of Appeal in the Case of **Michael Oyamo & another versus Republic [2019] KECA 953(KLR)** thus 23. We have carefully considered the record of appeal, the submissions by counsel and the various authorities cited. **Article 49(1) (h)** of the **Constitution** states 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”**. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in **R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009** as follows:

*“..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent*

**grounds that meet the high standards set by the Constitution.”**

According to the recently launched publication, **Criminal Procedure Bench Book** at pages 48 - 51 paragraph 105, compelling reasons may include the likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused.

Further, **section 123 A(1)** of the **Criminal Procedure Code** which is to be read with **section 123** thereof provides as follows:

**“123A(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 and 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 having committed the offence.”**

Subsection (2) thereof stipulates that 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.”**

*This Court has had occasion to pronounce itself on all these constitutional and statutory principles regarding bail in **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR** where the Court stated,*

*inter alia:*

**“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”**

12. In this matter there are only two reasons advanced by the prosecution as compelling reasons, one being that the accused will interfere with the on-going investigations aimed at arresting his accomplices and with two witnesses who were known to him.

13. At the time of this ruling the court had taken and recorded the evidence of one prosecution witness, being a taxi driver who took the deceased to the hospital having found the same laying on the road.

14. For the court to deny an accused bail on the ground of witness interference, the nature of the said interference and the relationship between the accused and the said witnesses must be stated in clear terms as was stated in the Tanzanian case of **Panju versus**

**Republic [1973] E.A. 282 at page 283** the court expressed itself as follows:

***“It is clear that the magistrate could not accept that the allegation that the accused was to interfere with witnesses had any substance at all. The magistrate was right in discounting such allegations which are now becoming stock allegations against accused persons, as such allegations need to be substantiated by affidavits as it has often been held by the courts..... If the courts are simply to act on allegations, fear or suspicions, then the sky is the limit and one can envisage no occasion when bail will be granted whenever such allegations are made.”***

15. This position was restated in the case of **Republic versus Nahashon Muchiri Mutua [2015] eKLR** where the court stated that where credible allegations of witness interference are made, the court must consider the likelihood of such interference in determining whether bail should be granted a.

16. The prosecution concern of witness interference must have evidentiary support necessary to meet the threshold of compelling reasons stated under section 123A of the Criminal Procedure Code as substantiated through either affidavit or testimony.

17. In this matter the prosecution has failed to satisfy the above principles in that it was only contended that the accused was likely to interfere with the witnesses who were his employer and girl friend respectively but without stating the nature of the alleged interference

and the control the accused had over the said witnesses. The nature of the interference, either preventing, influencing testimony or preventing testimony has not been presented to court, thereby leaving it for speculation, which to my mind has not reached the threshold of balance of probability.

18. On the issue of the accused and the family of the deceased coming from the same area, I find and hold that the prosecution failed to connect the dots on how the release of the accused on bond will affect them and further the issue of the accused having breached bond terms is explained that the matter was settled and should not be held against the same.

19. On the issue of the investigation with the possible arrest of the accused accomplices, the prosecution has failed to give an account of what they have done in having the done suspects arrested since the 5<sup>th</sup> of may 2025 when the same was produced before court.

20. The upshot of this is that I find and hold that the prosecution has not established compelling reasons to enable the court deny the accused the enjoyment of his constitutional right to bond.

21. The accused shall be released on bond /bail on the following terms and condition:

a) Bond of Kenya shillings five hundred thousand together with one surety of similar amount.

- b) In the alternative, cash bail of Kenya shillings two hundred and fifty thousand together with one recognized person.
- c) The accused shall not interfere with the two named witnesses herein, one being his employee and one girlfriend by either influencing and or intimidating them.

22. And it is ordered.

**DATED SIGNED AND DELIVERED THIS 16<sup>th</sup> DAY OF  
OCTOBER 2025**

**J. WAKIAGA  
JUDGE**

In the presence of  
Court Assistant - Irene  
Ms Ogweno for the State  
Mr. Nyamanga for the accused