



ODPP & another v Lemarkelle & another (Miscellaneous Criminal Application E024 of 2025) [2025] KEMC 221 (KLR) (18 September 2025) (Ruling)

Neutral citation: [2025] KEMC 221 (KLR)

REPUBLIC OF KENYA

IN THE MARALAL LAW COURTS

MISCELLANEOUS CRIMINAL APPLICATION E024 OF 2025

AT SITATI, SPM

SEPTEMBER 18, 2025

IN THE MATTER OF AN APPLICATION FOR PRETRIAL DETENTION ORDERS

BETWEEN

ODPP 1ST APPLICANT

DCIO SAMBURU CENTRAL 2ND APPLICANT

AND

CHRISTOPHER AYOK LEMARKELLE 1ST RESPONDENT

LENADONKERE RUMEI 2ND RESPONDENT

RULING

1. This morning S/NO. 82xxx Police Constable Felix Mbuvi lodged a Notice of Motion application dated today praying for 14 days’ pre-trial detention of the 2 respondents above. He lodged a supporting affidavit to the said motion on notice.
2. In summary, PC Mbuvi deposed that on 12th September, 2025 3men in Samburu shukas each armed with AK-47 rifles raided Damiruki Minimart in the middle of Maralal town and stole cash Kshs 85, 000/= after shooting the cashier Doreen Mukami on the chest. The officer deposed further that the said Doreen Mukami is admitted in serious condition at the Samburu County Referral Hospital where she is undergoing surgeries to rescue her life.
3. Following the robbery, the report was lodged vide OB 38/12/209/2025 at 2100hours. The police visited the minimart and upon reviewing the CCTV footage picked out one suspect who was allegedly clearly seen and acting on intelligence arrested the 1st Respondent AYOK in Maralal town when he returned to the town. The police conducted a search at his rented house in Maralal town and recovered crucial exhibits believed to be relevant to the robbery investigation.



4. Further deposed by PC Mbuvi was that the 1st respondent named and led the police to the homestead of the 2nd respondent RUMEI who was arrested as it was believed that he was the mastermind of the robbery and firearms possession. 2 sons of the 2nd respondent escaped the police dragnet and the firearms were not recovered but are being pursued. The court was told that assorted police uniforms and government stores were recovered from the respondents.
5. In order to facilitate the ongoing intelligence led operation to trace and arrest the 2 fugitives from the law PC Mbuvi applied for 14 days pre-trial detention of the 2 respondents for the main grounds that: The 2 wanted fugitives linked to the 2 respondents were being hotly pursued; The 3 firearms were yet to be recovered; The complainant was at risk if the 2 were set free since she was in serious condition at the hospital undergoing surgeries The CCTV footages were yet to be fully analysed and reports prepared by DCI FORENSIC Laboratory in Nairobi and this will take time Witnesses statements are yet to be recorded; Police were yet to conduct identification parades for the 2 respondents.

The 1st respondent AYOK did not challenge the application.

6. The 2nd respondent through his advocate Mr. Lenkidi Mpapa challenged the application. Mr. Mpapa orally submitted that the application lacked merit. He told the court that his client had been brought to court outside the 24 hours following arrest. He pointed out that it was now 48 hours since his client was arrested initially and detained at the police station. He added that the 2nd respondent was an elderly man aged 69 years old, suffering from pneumonia and arthritis which will be aggravated if he is detained in the police cells which known to be cold and harsh. He added that being a father to wanted suspects was not enough grounds to detain his client.
7. The learned Counsel cited the authority of Oscar Kipchumba Sudi –v- Republic (2020) KEHC 3221 KLR (Ngugi J.) for the submission that an order for pre-trial detention ought only to be granted where the application has been made in absolute good faith and that the detention is the least restrictive measure available to the police. He pointed out that the deprivation of citizens’ liberties without evidence was unconstitutional. To this end, the counsel indicated that the police had arrested his client without first investigating him and are now seeking to investigate him after arrest. He urged the court to reject the application. He pointed out that his client was arrested while grazing his livestock and that since he had a fixed and known place of abode, he was not a flight risk.
8. In a brief reply, PC Mbuvi pointed out that the 2nd respondent was arrested at night and that the delay was attributable to the late hour of arrest. He pointed out that the 2nd respondent conducted surveillance at the Minimart moments before the robbery and the CCTV was critical evidence undergoing forensic analysis.
9. The DPP Peter Eysimkele supported the DCIO’s application. He told the court that public security and community safety was paramount and that in order not to expose the injured complainant to possible further harm, the detention of the 2 respondents was necessary. He affirmed that under Article 49(1)(h) of *the Constitution* this procedure was permissible and necessary. In addition, the learned prosecutor submitted that the use of offensive weapons namely AK-47 rifles which were yet to be recovered underscored the security threats in this case. In closing his submissions, the DPP told the court that the CCTV footage captured the suspects in the execution of the violent robbery at the minimart and the forensic analysis was ongoing.
10. The only issue for determination is whether the DPP and DCI have made out a compelling case for the pretrial detention of the suspects herein especially as regards the 2nd respondent since the 1st respondent did not contest the application.



Determination

11. The factual deposition by PC Mbuvi is that the 2 respondents were arrested without warrant by the DCI on 16th September, 2025. First to be arrested was AYOK (1st respondent) when he returned to Maralal town 4 days after the robbery. He was arrested after the police received intelligence and made a preliminary review of the CCTV footage which allegedly captured him. A search at his house led to recoveries of exhibits reasonably believed to be linked to the robbery. As such, in the court's view there is a prima facie cause for his detention by the police.
12. Upon the arrest of the 1st respondent, he was interrogated whereupon he named the 2nd respondent and led the police to the Manyatta of the 2nd respondent since the 2nd respondent was disclosed to be the mastermind. At the manyatta, 2 suspects who are sons to the 2nd respondent escaped the intelligence led police dragnet and vanished. Thereupon, the 2nd respondent was booked in together with the present 1st respondent vide OB 51/16/09/2025 at 2120 hours.
13. From the foregoing, the court makes a preliminary finding that the police exercised their powers correctly since they have power to arrest without warrants for any "cognizable offence". A cognizable offence means an offence for which a police officer may, in accordance with the First Schedule of the Criminal Procedure Code or under any law for the time being in force, arrest without warrant;
14. In the present case, Damiruki Minimart in the middle of Maralal town was raided by 3 men armed with AK-47 rifles where cash Kshs 85, 000 was stolen and during the commission of the said robbery, the complainant was shot on her chest and seriously injured. While the degree of injury is yet to be established, these facts constitute prima facie evidence that robbery with violence contrary to section 296(2) Penal Code, attempt to murder contrary to section 220 Penal Code and doing grievous harm or maim contrary to section 234 of the Penal Code have been committed. In the First Schedule to the Criminal Procedure Code, robbery with violence, attempt to murder and/or grievous harm are cognizable offences for which the police may arrest without warrants.
15. Additionally, the alleged capture of the 1st respondent in the CCTV probably underpinned his possible link to the robbery and the police need to have the CCTV forensically analysed to be satisfied on what prosecutorial action to take or not to take. The court takes judicial notice that Samburu County is remotely and distantly located from the DCI Forensic Laboratory in Nairobi and this poses logistical challenges to the police requiring more than ordinary timeliness to complete the processes and comply.
16. This coupled with his possible link to the 2 wanted fugitives which needed to be fully investigated gives the DCI and DPP solid ground to have him detained. To this extent, the tests set out in the correctly cited authority of Oscar Sudi(supra) have been met and the court grants 13 days pre-trial detention of the 1st respondent since he was in police custody for at least a day now.
17. As for the 2nd respondent, he was arrested because the 1st respondent named him and led the police to his homestead. This did not diminish the possible role of the 2nd respondent. As a possible mastermind which is what the police are investigating, he bore similar culpability as the actual robbers who struck Damiruki Minimart and shot the cashier seriously injuring her and she is admitted at the Samburu County Referral Hospital.
18. In law, a mastermind is known as a procurator or counsellor to a crime under section 20 of the Penal Code which provides as follows:
 20. Principal offenders



- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
 - (a) every person who actually does the act or makes the omission which constitutes the offence;
 - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - (c) every person who aids or abets another person in committing the offence;
 - (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
- (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
- (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

21. Joint offenders in prosecution of common purpose

19. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence Sections 20 and 21 Penal Code were discussed in Republic v Tabiro alias Moses Nandwa [2023] KEHC 18764 (KLR) as follows:

21. It is the finding of the court, therefore, that the accused, even in the absence of evidence of him actually cutting the deceased, acted in concert with the person who cut the deceased, and is therefore, in terms of section 21 of the penal code, deemed to have had a common intention with that other person. Under that provision, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. In applying and interpreting that provision, the court in Liningushu & others v Republic [2005] 1 E.A 229 held, and was upheld by the Court of Appeal, of a wife who organized for the killing of her husband whose defence had been that she did not participate in the killing;

“She was the mastermind of the operation to eliminate her husband. She procured the killers and agreed to pay for their services. At the scene, she directed the operations although she did not strike the fatal blow. She paid part of the agreed price after the work was done. She was a principal offender and therefore guilty as charged.”

20. Therefore, the lead being pursued by the police about the principal procurator/counsellor and joint offenders in the execution of a common intention of a criminal enterprise is a solid one and empowers



the police to request for the needed time to complete their inquiries and report to the court with outcomes. He has already been named by the 1st respondent as the mastermind and this entitled the police to verify since this accomplice evidence generally requires corroboration which comes only after comprehensive investigations: *Karanja & another v Republic* [1990] KECA 50(KLR) :

Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution – see *Asumani Logoni s/o Muza v Rex* (1943) 10 EACA 92.

An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it. The corroboration which should be looked for is, as laid down in the case of *R v Baskerville* [1916] 2 KB 658, some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime.”

21. That being so, and noting the prima facie evidence against the 1st respondent, the application by the police is founded on good faith and is allowed. If the mastermind is set free yet the police have not excluded him from being connected to the 2 fugitives, a serious miscarriage of justice might arise including security exposure to the injured complainant admitted in hospital.
22. The court does not fail to take note that the complainant is required to participate in an identification parade of the suspects. It was deposed that prior to the robbery, the respondents conducted surveillance at the supermarket and so this buttresses the application.
23. If the police have arraigned the 2nd respondent outside of 24 hours, the counsel can file an application for the prosecution of the police before the High Court for the award of the necessary reliefs for breach of constitutional rights if any.
24. As the superior courts have held, upon arrest the suspect has to be presented to court, informed of the reasons for arrest and detention and/or continued detention. In *Betty Jemutai Kimeiywa v Republic* [2018] KEHC 5642 (KLR) (Murithi J.) the court explained thus:
 7. The provision bringing the accused before the court within 24 hours is not an either or else position where the prosecution is validated or invalidated by such presentation. Article 49 (1) (g) and (h) itself gives four scenarios on presentation of an arrested person before the court, namely, that the arrested person may-
 - i. "be charged"
 - ii. "be informed of the reason for the detention continuing";



- iii. "be released"; and
- iv. "be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

So that upon being brought before the court, an arrested person may be charged; or he may be informed of the reasons for detention being continued say to facilitate completion of investigations or his presentation for assessment of fitness to plead before plea is taken; or he may be released if the court for example found no reasonable grounds for his continued detention; or he may be released on bond pending formal charge and or trial. *The Constitution* does not say that the police may only arrest a person when there is prima facie evidence of an offence. It must, of course, require a probable cause for an arrest but not prima facie case in its technical acceptance of evidence upon which a court may convict, if no evidence is given on behalf of an accused person. See *Ramanlal Trambaklal Bhatt v. R* [1957] EA 332, where it was held that a prima facie case is 'one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence'. A police officer cannot be required to make a sort of judicial determination of existence of prima facie case. That is the province of the trial court at the stage of consideration whether a case to answer is established against the accused. A reasonable suspicion of commission of the offence based on the available evidence would suffice to give a probable cause for an arrest"

- 25. Again, if the police cells happen to be dirty or uninhabitable as suggested by the counsel for the respondent, an application for legal redress can be lodged before the High Court for breach of constitutional rights by the OCS of Maralal Police Station if at all – see *Preston Kariuki Taiti & 9 others v Chief of the Kenya Defence Forces & another* [2021] KEHC 3854 (KLR) where damages were awarded for various constitutional infringements including being detained in overcrowded and filthy cells. As for his arthritis and other conditions, the 2nd respondent can always be escorted to hospital for medical attention as the case may demand.
- 26. In the result, the court orders 13 days pretrial detention of the 2 suspects for 13 days from today and be produced in court on the next day following. It is so ordered.

DATED READ AND SIGNED AT MARALAL THIS 18TH DAY OF SEPTEMBER 2025

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present: Both Respondents, DPP Eysimkele, PC Mbuvi, C/asst Mburu

