



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Babu (Criminal Case E122 of 2021)  
[2025] KEHC 16097 (KLR) (4 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE E122 OF 2021**

**AC BETT, J**

**NOVEMBER 4, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ROSE BABU ..... ACCUSED**

**RULING**

1. The Accused who is charged with murder was arrested on 13<sup>th</sup> June 2021. She was to attend court and take plea on 1<sup>st</sup> July 2021 but on that date, she was absent due to Covid 19 restrictions. However, her Advocate applied that she be released to her family on the ground that she appeared mentally challenged, was under medication and needed to be under the care of her family.
2. The court allowed the application and directed that the Accused first undergo mental assessment by a Psychiatrist at Kakamega Central Hospital to determine whether, since she was unfit to stand trial, she could be released to her family for care and attention.
3. From the records, the Accused was subjected to mental assessment and on 22<sup>nd</sup> July 2021, the court noted that there were two reports in which the conclusion was that the Accused was fit to take plea. The Accused took the stand and pleaded not guilty to the charges facing her and the matter was scheduled for hearing on 12<sup>th</sup> August 2021. The said date fell on vacation and so the matter did not proceed to hearing.
4. On 4<sup>th</sup> October 2021, the Accused was released on bond pending hearing of the case. Thereafter, the matter proceeded to hearing on 5<sup>th</sup> May 2022 when one witness testified.
5. On 6<sup>th</sup> July 2022, the prosecution informed the court that there was a mental assessment report indicating that the Accused was not mentally fit to take instructions. Ms. Masakhwe for the Accused also asserted that the Accused did not appreciate what was going on.



6. On 1<sup>st</sup> November 2022, the court ordered that the Accused be taken for treatment under the supervision of her brother. This was after the prosecution had pointed out that the Accused was still mentally unstable but having been out on bond and taking care of her children committal to Mathare Hospital may not be a prudent move.
7. On 20<sup>th</sup> October 2023, the court was informed that the most recent mental assessment report showed that the Accused was still not mentally fit to plead. On 25<sup>th</sup> June 2024, the court directed that the Accused undergo another mental assessment and on 23<sup>rd</sup> September 2024, the court received a report from Kakamega County General Hospital which indicated that the Accused was still mentally unfit to stand trial.
8. On 16<sup>th</sup> September 2025, the office of the Director of Public Prosecution (ODPP) presented a Nolle Prosequi dated 11<sup>th</sup> September 2025 in which they sought to terminate the proceedings against the Accused.
9. The Director of Public Prosecutions requires the leave of the court in order to terminate criminal proceedings.
10. Article 157 (6) (c) of *the Constitution* provides:-

“

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

Article 157 (8) and (9) provide:-

“(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”

11. While exercising his powers to enter a Nolle Prosequi, the Director of Public Prosecutions is guided by Article 157 (11) of *the Constitution* which states:-

“(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

12. From the legal provisions set out in *the Constitution*, whereas the Director of Public Prosecutions has discretion as to when to enter a Nolle Prosequi, the discretion must be exercised with due regard to the interest of the public. The Director of Public Prosecutions should also observe due care lest he applies the powers donated to him by *the Constitution* to protect suspects or frustrate the cause of justice. The decision to enter a Nolle Prosequi must therefore be well thought out and should not be capricious, irrational, unreasonable, nor arbitrary. It must be demonstrated that there are cogent reasons for



seeking the termination since the Director of Public Prosecutions is enjoined by the Constitution to act justly and fairly.

13. The circumstances under which the court can grant leave to enter a Nolle Prosequi were considered by a three Judge Bench in the case of Republic v. Assa Kibagendi Nyakundi (Criminal Revision 524 of 2020 [2023] KEHC 1063 (KLR) when the court held as follows:-

“80. We hold that, in considering whether to grant the application for discontinuance of the proceedings, the trial court needed to consider primary the threshold set under article 157(11) of the Constitution as to whether the applicant was acting in public interest, the interests of the administration of justice and to prevent and avoid abuse of legal process.

81. In that case to determine whether the applicant complied with the aforesaid threshold the court will consider inter alia: -

- a) Whether the application is brought in good faith.
- b) Whether matter in issue is a matter in which the society has a stake.
- c) Whether the party against whom the proceedings are to be discontinued will suffer any prejudice if the application is allowed or denied.
- d) Whether the reasons advanced for the application are reasonable, sufficient and/or adequate.
- e) Whether the matter to be withdrawn has commenced hearing or is fresh matter.
- f) Whether there has been inordinate delay in making the application for withdrawal.
- g) The sentiments of the respondent to the application.”

14. It is evident from the record that the Accused was of unsound mind from the outset. She was reported to be a known psychiatric patient and the Consultant Psychiatrist from Kakamega County General Hospital recommended close psychiatric follow up in the nearest facility.

15. The Accused has been out on bond since September 2021. She has been under the supervision of her brother Enock Babu. Despite her mental illness, she has faithfully attended court on the scheduled dates without fail.

16. On 2<sup>nd</sup> May 2025, the Probation After Care Service department filed a social inquiry report in compliance with the court’s order issued on 25<sup>th</sup> February 2025. The Probation Officer established that the Accused who is now 47 years old has suffered mental instability since her teenage years. The report recommended continued psychiatric treatment noting that the Accused’s family and community have expressed support for measures that will aid in rehabilitation and reintegration into society.

17. I have considered the application by the prosecution. I have taken into account the fact that the Accused has been out on bond for the last 3 years and that she has a strong family support from her brothers. I am satisfied that the Director of Public Prosecution has not exercised his powers arbitrarily and in contravention of Article 157 (II) of the Constitution. I am also satisfied that the intended



withdrawal is in the interest of the Accused who would otherwise be faced with an indeterminate period of a pending murder trial.

18. The Accused and her family have demonstrated that she is able to maintain her course of treatment and live peacefully with her family. The Accused's family has been closely monitoring the Accused and ensuring she is on her medication. The court is satisfied that the Accused is not a danger to herself or to the society.
19. Ultimately, I am inclined to allow the prosecution to enter a Nolle Prosequi as prayed. However, I have noted that the Accused is a widow and it is her siblings who have demonstrated the most concern for her welfare. The court is aware that persons with mental challenges require continuous medication to avoid relapses. Any gap in the medication must be sealed. In order to avoid such lapses, the court invokes its inherent jurisdiction and appoints a Legal Guardian for the Accused. The duties and responsibilities of the Legal Guardian shall be to take care of the welfare of the Accused and more specifically to guarantee that she is on continuous uninterrupted medical treatment.
20. The upshot is that the application to enter a Nolle Prosequi is allowed. The court now proceeds to make the following orders:-
  - a. That the case against the Accused is terminated pursuant to Article 157 (6) (c) of *the Constitution* and the Accused discharged accordingly.
  - b. That Enock Babu and Ernest Temba Babu are jointly appointed Legal Guardians of the Accused.
  - c. The Guardians shall have the responsibility to jointly and severally manage the Accused's affairs and ensure continued and uninterrupted medication.
  - d. In the event of change of circumstances, the Guardians or any other person is at liberty to make an appropriate application.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4<sup>TH</sup> DAY OF NOVEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

No appearance for Ms. Masakhwe for the Accused

Accused present in person

Court Assistant: Polycap

