

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL CASE NO 31 OF 2021

**ELPHAS OTIENDE ADUNGU.....1ST ACCUSED
PERSON**

**LILIAN AGISO ROBERT.....2ND ACCUSED
PERSON**

VERSUS

**REPUBLIC.....
RESPONDENT**

RULING

INTRODUCTION

1. In her Notice of Motion application dated and filed on 2nd December 2025, the 2nd Accused person herein sought that she be admitted to bail pending the filing of the report by the Probation Officer and sentencing.
2. She swore an Affidavit in support of the said application on 2nd December 2025. She averred that she was the 2nd Accused person herein and that on 24th November 2025, this court had found them **(sic)** guilty of committing murder and cancelled her bond and directed that they be detained in prison pending the filing of the social report and sentencing on 12th February 2026.
3. She stated that that affected her well being as she was sickly and that her health would continue to deteriorate while in detention and thus urged the court to rescue her. She further said that she was a Pastor practicing Christian faith and that being granted bail would enable her continue administering the word of God to members of her church pending the report and sentencing.

4. She undertook to honour her appearance on 12th February 2026 if she was admitted to bail. She pointed out that while she was on bail pending the hearing of the case, she never violated any of the terms of the bond as was directed by the court. She stated that the events that unfolded on 24th November 2025 were alien to her as she had never found herself in such a situation before.
5. Faith Koech, Prosecution Counsel, swore a Replying Affidavit in opposition to the said application on behalf of the Respondent herein. Through its counsel, the Respondent averred that while it was not in dispute that bond/bail was a constitutional right, it could be denied where there were compelling reasons for such denial especially when the 2nd Accused person had been found guilty and convicted.
6. It asserted that all persons were equal before the law and that since the 2nd Accused person had been convicted, she no longer enjoyed the presumption of innocence. It was categorical that her previous good character during trial was not exceptional or an unusual factor to accord her preferential treatment. It added that her health or medical condition was also not an exceptional circumstance for the bond to be reinstated.
7. It pointed out that the medical report the 2nd Accused person had attached to her application was questionable as it was authored in Luanda Town, the same day she physically appeared in court for Judgment and her bond terms were cancelled.

8. It contended that through its Clinical Officer, Tony Nyadimo, who appeared before this court, the Prisons Authority confirmed that the 2nd Accused person's health condition could be managed while in custody and that it had an obligation to refer her or other inmates to a referral health facility for further check-ups, treatment and medication if need arose.
9. It argued that there was risk of the 2nd Accused person absconding court on the sentencing date having been convicted for a capital offence which attracted up to imprisonment for life. It averred that the application lacked merit and did not meet the threshold for the orders sought. It was emphatic that the 2nd Accused person had also not demonstrated any peculiar and exceptional circumstances to warrant her being granted the orders sought.
10. The 2nd Accused person's Written Submissions were dated and filed on 5th January 2026 while those of the Respondent were dated and filed on 13th January 2026. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

11. The 2nd Accused person submitted that as there was no express statutory provision governing bail pending sentencing and/or prohibiting the same, she had to resort to this court's constitutional inherent jurisdiction. She argued that Article 159 of the Constitution of Kenya provided for substantive justice and

expedition while Article 259 provided for progressive interpretation which advanced rights and permitted development of the law.

12. She argued that the High Court was, therefore, not rendered helpless by legislative silence and that it had the mandate to ensure justice did not collapse into procedural rigidity. She clarified that she was not seeking bail pending appeal but that her application was about managing the interim period between conviction and sentencing.

13. She asserted that her detention risked becoming anticipatory punishment not judicially sanctioned. She contended that she would remain in custody for over two (2) months awaiting a post-sentence report hence administrative delay which offended the proportionality rule. She added that fairness and constitutionality demanded that justice was not delayed.

14. She pointed out that she was asthmatic which was a chronic respiratory condition and that the custodial environment would exacerbate respiratory illness. She argued that the prison authority had admitted that her condition was made worse by the cold and crowded conditions within the prison environment. She added that even under the stricter test of bail pending appeal, medical vulnerability had been recognised as an exceptional circumstance.

15. She also explained that she was not asking this court to ignore her conviction but to manage a temporary procedural interval humanely. She added that she had demonstrated that she attended trial faithfully while on bond and was not a flight risk. She

acknowledged that murder was the gravest offence in our criminal law but the conditional release on her part pending sentencing would not erase conviction.

16. On its part, the Respondent placed reliance on the case of **Dancil Dominic Karanja vs Republic Nairobi Criminal Application No 4 of 1986** (eKLR citation not given) where it was held that an 2nd Accused person's health and/or medical condition was not an exceptional circumstance for purposes of an application for bail/bond pending appeal. It also cited the case of **Daniel Dominic Karanja vs Republic Criminal Appeal No 14 of 1986** where it was held that the previous good character of an 2nd Accused person was not exceptional or unusual factor. It submitted that the 2nd Accused person had not illustrated grounds to convince this court to reinstate the bond terms.

17. In determining whether to grant an accused person bail/bond terms the court was guided by Article 49 (1) (h) of the Constitution of Kenya, 2010 which 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 not to be released
(emphasis court).”

18. Article 50 (2) (a) of the Constitution of Kenya further stipulates that:-

“(2) Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.”

19. In addition, Section 123 of the Criminal Procedure Code Cap 75 (Laws of Kenya) empowered the court to admit an accused person to bond or bail on reasonable terms.

20. Finally, Paragraph 4.9 of the Kenya Bail and Bond Policy Judiciary Guidelines provided the factors to be considered by the court when deciding with whether to grant or deny bail/bond and which included:-

a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person was found guilty.

b. The strength of the prosecution case.

c. Character and antecedents of the accused person.

d. The failure of the accused person to observe bail or bond terms

e. Likelihood of interfering with witnesses.

f. The need to protect the victim or victims of the crime from the accused person.

g. The relationship between the accused person and potential witnesses.

h. Where the accused person was a minor, the denial of bail or bond was considered not to be in the best interests of the accused person, who was a minor.

- i. **The accused person was a flight risk.**
- j. **Whether accused person was gainfully employed.**
- k. **Whether the release of an accused person would disturb public order or undermine public peace or security.**
- l. **Whether pre-trial detention was necessary to protect the accused person.**

21. While dealing with the issue of bail and/or bond, this court had due regard to the case of **Michael Juma Oyamo & Another vs Republic [2019]eKLR** where the Court of Appeal reaffirmed that such constitutional right could only be limited if the prosecution satisfied the court that there were compelling grounds to warrant denial of bail/bond to an accused person.

22. This court associated itself with the holding in **Republics vs Joktan Mayende and 3 Others [2012] KEHC 5551 (KLR)** where it was held that compelling reasons included the likelihood of an accused person failing to attend court, committing or abetting the commission of, a serious offence, endangering the safety of victims, individuals or the public, interfering with witnesses or evidence, endangering national security or public safety, and where it was necessary, it could be denied to protect an accused person.

23. Pursuant to the aforesaid legal principles, this court considered the 2nd Accused person's application and noted together with her Co-Accused person were convicted of the offence of murder on 24th November 2025. The offence of murder was serious and it

could attract the death sentence. It was normal practise for courts to cancel bail/bond pending sentencing so as to secure the availability of the accused person at the time of sentencing.

24. It was evident that although bail/bond was a constitutional right under Article 49(1)(h) of the Constitution of Kenya, it could be denied if there were compelling reasons not to grant the same. The 2nd Accused person had enjoyed this constitutional right throughout her trial as she had demonstrated that she was not a flight risk and had met all the conditions of being granted bail/bond.

25. It was also clear that bail/bond was a right that was given to an accused person to guarantee his or her right of fair trial in an ongoing trial. Indeed, Article 49(1)(h) of the Constitution of Kenya provided that that right could be granted pending a charge or trial. Whereas there was no clear provision of when bail/bond could be cancelled, this court was persuaded to find and hold that that right ceased immediately an accused person was convicted as trial would have been concluded.

26. Cancelling of bond after a conviction was, therefore, not unusual and was actually the norm as the accused person was no longer deemed to be innocent. Once convicted, such accused person became a guest of the State. He or she could also be released on a non-custodial sentence during Sentencing depending on how the Pre-Sentence Report, if at all had been directed to be filed, had recommended. A conviction was, therefore, a compelling reason to cancel bail/bond after conviction. This very court made a

similar finding in the case of **Aluse vs Republic (Criminal Miscellaneous Application E058 of 2025 [2025]KEHC 15470 (30 October 2025) (Ruling)** which was on all fours with this case.

27. This court was thus not persuaded to find that the 2nd Accused person could be granted bail/bond pending sentence due to her good character as she had already been convicted. Indeed, there was a high likelihood of her being a flight risk as she had been convicted of a serious offence, a factor that would negate the granting of bail/bond terms under the Judiciary Bail/Bond Guidelines.

28. On the question as to whether this court could grant her bail/bond terms while awaiting sentence on the ground of her ill-health and pastoral ministry, this court considered the Medical Report dated 24th November 2025 by Dr John Omollo. It bore the same date as the one when she was convicted of the offence of murder.

29. According to the said Medical Report, the 2nd Accused person was diagnosed with a bronchial asthmatic attack and was treated for the same. It was also indicated that she was on treatment at the time and that continued follow-up at the Medical Outpatient Clinic (MOPC), family involvement in her care and avoidance of cold environments, dust, smoke and pollen were expected to improve her condition and reduce the frequency of asthmatic episodes.

30. Notably, Tony Nyadimo, a Clinical Officer at Kakamega Women's Prison told this court that he had been managing the 2nd Accused person for asthma, a long-standing arthritis on the left hip

joint, and peptic ulcers causing gastritis, which was the occasional inflammation of the gastro-intestinal tract. He stated that the attacks get worse during cold seasons but that he was able to manage her if she got an attack.

31. He pointed out that although the prison did not have a medical facility, they took the sick prisoners to the General Hospital. He stated that there had been no need for the prison to request for special care for the 2nd Accused person or to take her to the said General Hospital. In this regard, therefore, this court was also not persuaded that it should reinstate the bond terms for the 2nd Accused person to await sentence.

32. Most importantly, this court found the 2nd Accused person's prayer for bail/bond pending the filing of the Pre-Sentence Report and sentencing on account of her health and pastoral ministry to have been shaky. This was because if the court were to find her undeserving to serve for non-custodial sentence, she would have to serve a custodial sentence. It was not, therefore, clear to this court if her submission was geared towards persuading the court to mete upon her a non-custodial sentence. As she was awaiting mitigation and sentencing, this court did not wish to interrogate the suitability or otherwise of a non-custodial or custodial sentence in the case herein. Doing so would be pre-empting the proceedings of 12th February 2026.

33. Whichever way this court looked at the 2nd Accused person's arguments, it found that the Prosecution had demonstrated that

there were compelling reasons not to grant her bond/bail pending the Pre-sentence Report and sentencing. Even so, release on bail/bond while awaiting the Pre-Sentence Report had actually been overtaken by events as the Pre-Sentence Report was filed on 21st January 2026.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's decision was that the 2nd Accused person's Notice of Motion Application dated and filed on 2nd December 2025 was not merited and the same be and is hereby dismissed.
35. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **4th** day of **February** 2026

J. KAMAU
JUDGE