

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL CASE NO. E004 OF 2026

REPUBLIC**PROSECUTOR**

VERSUS

KENNEDY OPIYO ODONGO.....1ST
ACCUSED

CHARLES ODERO ODONGO.....2ND
ACCUSED

RULING

[1] The two accused persons, **Kennedy Opiyo Odongo** (the 1st accused) and **Charles Odero** (the 2nd accused), were arraigned before the Court on 11th February 2026 on Information that they jointly committed the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code, Chapter 63 of the Laws of Kenya. The particulars thereof are that, on the 21st December 2025 at Abuche Village in Ndhiwa subcounty within Homa Bay County, jointly with others not before the court, they murdered **William Otieno Ojwang**.

[2] The accused persons denied the Charge and, through their counsel **Ms. Atieno**, sought to be released on bond pending their trial. The application was opposed by the Prosecution Counsel on the basis of the affidavit sworn by No. 109435 **PC Rogers Kibet**, a police officer attached to Directorate of Criminal Investigations, Ndhiwa Sub County and the investigating officer in this matter.

[3] PC Kibet deposed that crucial prosecution witnesses in this murder trial are **Everlyne Akinyi Otieno, Jared Otieno Odhiambo** and **John Ochieng Nyandago** all of whom hail from the Kamuka Poya and Kachar Villages respectively within Sub-Location and that the accused persons hail from the neighbouring Kochieng village within Kachola sub-location, thereby placing them in close proximity with the witnesses. He further deposed that tension is still high within the neighbouring sub-locations since there have been several attempts by members of the public from the deceased village of Kamuka Poya to attack the family of the respondents in the neighbouring sub-location to avenge the death of **William Otieno Ojwang**. However, the aforementioned attempts were thwarted by the quick intervention of the area chief of South Kanyamwa and Police Officers from Ndhiwa Sub-County.

[4] PC Kibet further deposed that **Everlyne Akinyi Otieno**, the widow of the deceased who is expectant, is still traumatized from the incidence since she witnessed the murder of her husband. She is apprehensive that the life of her unborn baby is at risk if subjected to the anxiety attendant to the release of the accused persons, granted the prevailing hostilities on the ground.

[5] The prosecution also pointed out that On 22nd December 2025 the respondents escaped from their home within Kachola Sub-Location and went to hide in deserted servant quarters at Miwani Sugar Factory at Jamna Village within Miwani North Sub-Location Muhoroni Sub-County, Kisumu County from where they

were later arrested on 13th January 2026. They were therefore considered a flight risk and therefore persons who are unlikely not turn up for their trial; more so because the members of public are baying for their blood and might subject them to mob justice.

[6] Accordingly, **PC Kibet** concluded his affidavit by asserting that, while he is aware that **Article 49(1)(h)** of the Constitution states that an arrested person has a right to be released on bond or bail on reasonable conditions pending trial, compelling reasons exist herein to warrant denial of bond; namely, the likelihood of interference with the prosecution witnesses, the accused are a flight risk, threats to public order, and endangerment of the lives of both the widow and the accused persons.

[7] **Article 49(1)(h)** of the Constitution is explicit that, unless there is some compelling reason, an accused person ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. It provides 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.”

[8] Moreover, by dint of **Article 50(2)** of the Constitution, every accused person is entitled to the presumption of innocence. Hence, in the **Bail and Bond Policy Guidelines**, it is recommended that:

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.

[9] The factors to take into account in a bail application are various. **Section 123A** of the *Criminal Procedure Code, Chapter 75 of the Laws of Kenya*, for instance stipulates that:

(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 fulfilment 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.

[10] And, in the **Bail and Bond Policy Guidelines**, it is restated as a general guideline in Paragraph 4.9 that:

“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”

[11] The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

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

[b] The strength of the prosecution case.

[c] The character and antecedents of the accused person.

- [d] The failure of the accused person to observe bail or bond terms.
- [e] The likelihood of interfering with witnesses.
- [f] The need to protect the victim or victims of the crime.
- [g] The relationship between the accused person and the potential witnesses.
- [h] The best interest of child offenders.
- [i] The accused person is a flight risk.
- [j] Whether the accused person is gainfully employed.
- [k] Public order, peace and security.
- [l] Protection of the accused persons.

[12] I have given due consideration to the applicable law and the justification given by the Prosecution for opposing bail. There is no doubt as to the seriousness of the offence the accused persons are charged with and the punishment to be meted if the accused person is found guilty. The offence of murder is one of the most serious offences in the land; and that it entails the death penalty as the maximum punishment provided for in law. Thus, in **Watoro v Republic** [1991] KLR 220, it was held thus:

The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody ... the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases...the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction..."

[13] Nevertheless, in the current constitutional order, murder is an offence like any other for the purposes of bail pending trial; and therefore, a bail application in a murder case, as in any other

case, has to be looked at from the prism of **Article 49(1)(h)** of the **Constitution**; and the key question that takes centre stage is whether the accused person will turn up for his trial if released on bond. I therefore find apt the expressions of **Hon. Ibrahim, J.** (as he then was) in **Republic vs. John Kahindi Karisa & 2 Others** [2010] eKLR that:

“This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the Criminal Procedure Code which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these cases, the mandatory sentences provided by law is Death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any offence under the Penal Code including those that attract the death sentence e.g. murder, the same is bailable. A murder suspect has a Constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.”

[14] From the averments set out in the affidavit of **PC Kibet**, it did not come out strongly enough that the accused are likely to interfere with witnesses if released on bond. What has been adverted to is that the widow of the deceased is traumatized and therefore may be subjected to additional stress should the accused persons be admitted to bail. The investigating officer also deposed that the release of the accused persons on bond would work against the public order, peace and security in view of tensions between the two clans from which the deceased and the accused persons belong. Counsel for the deceased family also raised the issue that some suspects are still at large and therefore the family is opposed to the release of the accused persons at this stage of the proceedings.

[15] The Court called for Pre Bail Reports in respect of the accused persons. The reports show that the accused were found suitable for release on bond terms so long as the concerns of the witnesses and victims are taken into consideration.

[16] Consequently, the question to pose is whether there are no less restrictive means to achieve the same objective of ensuring witness protection, peace and security as well as the maintenance of public order other than denial of bond. It is not unusual for the courts, in such circumstances, to impose such conditions as are necessary with a view of striking the proper balance between the accused persons' constitutional right to bail and the interests of justice; including the requirement that the accused persons keep off certain localities; the paramount consideration being that they be on hand for their trial as and when required.

[17] In this regard, I agree entirely with the position taken by **Odunga, J.** in **Republic v Robert Zippor Nzilu [2018] eKLR** that:

"...in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to *Thesaurus English Dictionary* is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons."

[18] In the premises, it is my finding that no compelling reason has been given to warrant the continued incarceration of the accused persons. Accordingly, the accused persons' bail application is hereby allowed on the following terms:

[a] Each accused may be released on bond of Kshs. 500,000/= with two sureties standing for them in like sum.

[b] They are hereby prohibited from contacting the widow of the deceased or other relatives of the deceased or the prosecution witnesses.

[c] The accused persons to keep peace and refrain from any acts of violence pending the hearing and determination of this case.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 19TH
DAY OF MARCH 2026**

.....
**OLGA SEWE
JUDGE**