

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL CASE NO. E027 OF 2025

**REPUBLIC.....APPLICAN
T**

VERSUS

**SAMUEL NJIHIA NYAGA.....
.....ACCUSED**

RULING:

1. Vide a Notice of Motion Application dated 12th January, 2026, the Applicant, SAMUEL NJIHIA MAINA is seeking the following orders:
 - a) **THAT the Applicant be released on bond or bail on reasonable conditions pending the hearing and determination of the case.**
 - b) **THAT the cost of this application be in the cause.**

2. The application is based on the grounds on its face and supporting affidavit sworn by the Applicant. According to the Applicant, although charged with an offence, he is presumed innocent until proven guilty by this court which then entitled him to the right to liberty as guaranteed by the **Constitution of Kenya** and cannot be curtailed without a demonstration of any compelling reasons by the prosecution. The applicant/accused has averred that the prosecution has not advanced any compelling reasons to this court warrant him being denied released on bond/bail.

3. The application is opposed by the prosecution who have relied on the affidavit in opposition of bail/bond sworn by **Corporal Francis Kimemia**, wherein he has deponed that on 1st November, 2025, the applicant/accused assaulted the deceased who is his wife using a sharp slasher, a result of which she sustained serious cut wounds on the head, shoulders and forearms.

4. That the deceased was rushed to hospital but unfortunately she succumbed to death while undergoing treatment. According to Corporal Kimemia, the accused committed a serious and grave crime, which although is bail-able, his security cannot be guaranteed as he was rescued by the police from the angry neighbours after committing the crime. **Corporal Kimemia** avers that the deceased's family, more particularly her son, **James Kinyua Njihia** is also angry and opposed to the accused person's release on bond pending his trial

5. In response to these averments in the affidavit to oppose bail/bond, the applicant reiterated his constitutional right to the presumption of innocence and avers that the prosecution has not substantiated the ground raised to deny him the release on bond as the same is only a bare allegation. It is in the applicant's contention that he has confidence that his safety and security are the existence of the institution charged with security of persons, the Investigating officer. He undertook to attend trial until the case is concluded.

6. To adequately determine the application, the court called for a social inquiry to be conducted on the accused and a pre- bail information was subsequently filed in court on 26th November,2025. The Principal Probation Officer, **GEOFFREY MBURU K**, conducted a social inquiry on the applicant/accused to assist in determining the accused person's suitability for bond. He inquired into the accused persons personal and family history, his relationship with drugs and substance. His bond adherence history, the concerns of the children's and those of the community members to come up with recommendations.
7. The counsel for the parties orally submitted their arguments for and against the application. They reiterated their averments in their respective affidavits. The accused also addressed court and related that his son had conspired with his mother, the deceased to sell his whole land whose proceeds he used to buy two motor vehicles. He told court that he has been all over beginning with the Family Bank, Kangema Branch where he established that the title deed has been deposited. He compelled the very office, he has been to, the officer have been bribed by his son. The accused left breaking down.

DETERMINATION

8. Upon listening to all counsel for the parties herein including, the accused person himself, I have also carefully read the proceedings and pleadings before the court.

From all those, the question for determination on whether the accused person.

9. The applicant has brought the application pursuant to Article **49(1) (h) and 50 (2)(a)** of the **Constitution** alongside **Section 123 A** of the **Criminal Procedure Code** which gives guidance on the administration of bail and bond for arrested and accused person in this Country. Our Constitution, 2010 recognises the right to bail and bond for arrested person and regulates the administration thereof to all the arrested and accused persons regardless of the offence committed. Under **Article 49(1) (h)** of the Constitution, the law states that:-

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

10. This provision provides for the right of an accused person to be presumed innocent until proven guilty for an offence and the accused persons’ right to liberty unless there are compelling reasons to be denied the same and the right to reasonable bail and bond terms. The administration of bond and bail is provided for under **Section 123 A** of the **Criminal Procedure Rules** which provides 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 fulfillment 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.”**

11. **Article 50(2)(a) of the Constitution** provides that: -

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

12. In this case, the applicant/accused is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. This is a capital offence which attracts a mandatory death sentence, which, before

the promulgation of the Constitution of Kenya, 2010 was not bailable. However, after the promulgation, a murder suspect NOW has a constitutional right to be released on bail.

13. A reading of the Provisions of **Article 49(i)(h)** clearly stated that the right to bail is not absolute. The same can be denied if there is a demonstration of compelling reasons to warrant the same. In the case of **REPUBLIC VS MBITI MUNGUTI (2020) eKIR, Odunga, J** (as he was then) stated that:

'It is true that the right to bail is not absolute and where there are compelling reasons the same right to be may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the Prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and are not in isolation. The mere fact therefrom that the offence with which an accused is charged with carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the

accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for purposes of ensuring the attendance of the accused for trial and right not be based solely on the sentence that the accused stands to serve if convicted.”

14. In view of the offence of murder being punishable by death, the same is considered to be grave and serious offence that it which involves taking away another person's life, which is not condoned by society, that many people may hardly understand why a person who has committed such heinous crime is let free during the trial.

15. “Compelling reasons” was defined in the case of **R.Vs Joktan Malende and 3 Others, Criminal Case No. 55 of 2009** as:

‘The phrase compelling reasons do not denote reason that are forceful and convincing a to make the court feel very strangely with the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent ground that meet the high standards set by the Constitution.’

16. **Section 123 A of the Criminal Procedure Code** provides 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 fulfillment 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.”

17. The factors to be considered in determining the compelling reasons are set out under **Section 4.9** of the **Bail and Bond Policy Guidelines** as follows: -

“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. According to the decisions of the courts, the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial. In practice, the courts have made this evaluation by considering the following non-exhaustive factors:

(a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty. Where the charge against the accused person is serious, and the punishment heavy, the courts assume that there are more probabilities and incentives for the accused person to abscond, whereas in case of minor offences there may be no such incentives.

(b) The strength of the prosecution case. An accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence against the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is aware of the weight of the

prosecution's case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.

(c) Character and antecedents of the accused person. Although the character and antecedents of the accused person do not by themselves form the basis for denial of bail or bond, they may justify the refusal of bail or bond if they are coupled with other adverse factors.

(d) The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.

(e) Likelihood of interfering with witnesses. Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if;

(i) there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and

(ii) the court cannot impose conditions to the bail or bond to prevent such interference. For example, where the accused person has been provided with witness statements, and therefore knows the identities of the prosecution witnesses

and the nature of the evidence that these witnesses will adduce at trial, there is a real likelihood that the accused person may contact the witnesses. The likelihood that such an accused person may contact witnesses “could probably inflict genuine fear and anxiety in the potential prosecution witnesses,” and therefore constitutes a compelling reason for the denial of bail. In this regard, defilement cases present a special challenge. The country is not only experiencing an upsurge in defilement cases, but many such cases are compromised as soon as accused persons are released on bail. This happens because the families of the accused person and the victim usually negotiate to settle the cases out of court. Some courts are dealing with this challenge by denying accused persons bail until witnesses, especially the victim, have testified in such cases. The courts have adopted the same approach in murder cases, particularly where the witnesses are closely related to the accused person.

(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. Here, the courts reason that if the accused person is

either related to the witnesses or stands in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact the accused person might have on the witnesses, if he or she is released pending trial. However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice.

(h) Child offenders. Where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.

(i) The accused person is a flight risk. Where the accused person is a foreigner who does not have a fixed abode or hosts in the country and Kenya does not have an extradition treaty with the accused person's country, there is a presumption that he or she is a flight risk and may therefore fail to attend trial if granted bail or bond. The rationale for this presumption is that it would be impossible to prevail upon such a country to return its national to Kenya to be prosecuted should they abscond after being granted bond or bail.

(j) Whether accused person is gainfully employed. The courts also consider the fact that an accused person is gainfully employed to enhance the likelihood that he or she will attend trial. However, it should not matter whether or not the accused person is a casual laborer or is engaged in permanent and pensionable employment. Accordingly, the fact that the accused person is a casual laborer should not, in itself, constitute the basis upon which the court determines whether or not to grant bail.

(k) Public order, peace or security. Whether the release of an accused person will disturb public order or undermine public peace or security. Pretrial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such that the release of the accused person would be likely to lead to a public disturbance.

(l) Protection of the accused person. Whether pretrial detention is necessary to protect the accused person.''.

18. In this case, the Prosecution's reason for objecting to accused being released on bond/bail is that his security is not guaranteed as he was rescued from angry neighbours by police officers after he committed the offence, hence his life could be at risk. It is also deponed that the deceased's family, more particularly, the only son of the

marriage, is angered by the incident and is opposed to the father being released on bail. This son has even gone to swear an affidavit to this effect.

19. The accused/applicant has rebutted this by arguing that this ground is only bare allegation without substantiation. He argues that this is a country governed by the rule of law and he has confidence that if granted bail, his safety will be ensured by the institution that is mandated with the security of persons.

20. I have read through the pre-bail information report filed on 26th November, 2025 and find that the same reiterates the sentiments expressed by Corporal Francis Kimemia that since the incident is still fresh on the minds of the deceased's family and community, there is hostility against the accused so that if he is admitted to bail/bond, his security will not be guaranteed. The Probation Officer also reports that the accused is socially and physically isolated from his family and the community a result of which there is none willing to assist him adhere to bond/bail terms.

21. In view of the above findings, I find that even though as deponed by the accused/applicant, the state has a duty to protect and ensure safety for its citizens, it is not a guarantee that this can be done on a 24:7 basis. Therefore, this court finds it prudent to deny the applicant/accused bond/bail terms on account of his safety until such time that there shall be a demonstration of

change of circumstances in respect of the record and or emotions of the family and community towards the accused person or with regard to lapse of time.

22. It is so ordered.

**RULING DELIVERED VIRTUALLY AND IN OPEN COURT THIS
27TH DAY OF APRIL, 2026.**

**HON. D. O. CHEPKWONY
JUDGE**

In the Presence of:

M/s Maina HB Mr Matu HB for the Victim.

Mr Mwangi Counsel for the Accused

Accused: Present

Court Assistant: Brian