



**Director of Public Prosecutions v Waswa (Criminal Case
E028 of 2025) [2025] KEHC 7487 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E028 OF 2025**

S MBUNGI, J

MAY 27, 2025

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

CHARLES WASWA ACCUSED

RULING

1. The accused person, Charles Waswa, was charged on 10.04.2025 with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#).
2. A plea of not guilty was entered. Defence Counsel, Ms. Malanda, made an oral application to the court, that the court calls for a pre-bail report before granting bond terms.
3. Prosecution Counsel, Ms. Osoro, despite not being opposed to bond, agreed to the application by defence counsel for a pre-bail report.
4. I ordered that a pre-bail report be filed to assist the court in making its determination. The same was filed on court on 12th May, 2025 by Senior Probation Officer, Kakamega County who recommended stringent bond terms be imposed on the accused person.
5. The court's power to grant bond is provided for under Section 123 of the [Criminal Procedure Code](#), the discretion is not absolute but is informed by considerations set out under Section 123 as read with the Bail and Bond policy guidelines and further circumstances which apply on a case to case basis. Therefore, issues for determination in the accused application are:-
 - i. Whether the accused is a flight risk
 - ii. Whether the accused lacks a place of abode and cannot be traced if released
 - iii. Whether the accused security would be at risk



- iv. Whether the accused would interfere with witnesses
 - v. Whether the conclusion in the inquest form compelling reasons to deny him bond.
6. Article 49 (1) (h) of *the Constitution* grants an accused person the right to be released on bond or bail on reasonable conditions pending the hearing and determination of his trial. It states as follows;
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.
7. Section 123A of the *Criminal Procedure Code* provides;
- (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;
8. The right to bail and bond is premised on the accused person's right to be presumed innocent until proved guilty as no evidence has been placed before this Court yet on their culpability and the accused person's right to liberty. In deciding whether or not to grant bond, the court is guided by the following principles:-
- (a) The right of the accused to be presumed innocent.
 - (b) The accused person's right to liberty.
 - (c) The accused's obligation to attend trial.
 - (d) The right to reasonable bail and bond terms.
 - (e) That bail determination must balance the rights of the accused persons and the interest of justice.
 - (f) Consideration of the rights of the victims
9. The Court has discretion to grant or refuse bail depending on the circumstances of each case. The Court is required to take into consideration settled principles of the law when determining whether or not to grant bail pending the hearing of a criminal case.



10. In Republic Vs. William Mwangi Wa Mwangi [2014] eKLR ,Muriithi, J held that:

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”
11. Similarly, in the case of Kelly Kase Bunjika v Republic [2017] eKLR the Court had this to say: -

“It is clear that the primary consideration for bail is whether the accused will attend his trial for charges facing him and it must therefore be a compelling reason if it is demonstrated that the accused person is likely to fail to attend court proceedings. The question in this matter becomes whether there is on a balance of probabilities evidence that the accused is likely to abscond.”
12. In Nyeri High Court Criminal Case No. 8 of 2016 Republic vs Danford Kabage Mwangi the criteria or compelling reasons to consider in the exercise of judicial discretion in bail applications were set out to include:
 - i. The nature of the charges.
 - ii. The strength of the evidence.
 - iii. The gravity of the punishment in the event of conviction.
 - iv. The previous criminal record of the accused, if any.
 - v. The probability that the accused may not surrender himself for trial.
 - vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.
 - vii. The likelihood of further charges being brought against the accused.
 - viii. Detention for the protection of the accused.
13. A pre-bail report acts as a guide to the Court when considering the suitability of an accused person whether to be released on bail and/or bond. However, the pre-bail report is not the final say.
14. According to the Pre-bail report on record, the accused person was a ‘bodaboda’ rider from a polygamous and fragmented family setup. He is also separated from his wife with whom they have three children. He lacks social anchoring; his family is disorganized and loosely connected. Neither has he been residing with or participating actively in his children’s lives.
15. His family has expressed reluctance to stand surety despite attempts to engage his stepbrother and cousin. Also considering that this is a fratricide case, the court is advised to be cautious since there is a concern on how the accused person might be received back to the community.
16. Having carefully considered the submissions by both the Defence and the Prosecution, the contents of the pre-bail report, and the applicable legal principles, the Court finds that while the accused, Charles Waswa, faces a grave charge of murder, the Prosecution has not presented compelling reasons to deny him bail.



17. The pre-bail report indicates that the accused hails from a fragmented family background and lacks strong social ties. His family has expressed reluctance to stand surety, and there are concerns about his reintegration into the community. However, these factors, while noteworthy, do not, in themselves, constitute compelling reasons to deny bail. The right to bail is a constitutional right under Article 49(1) (h) of *the Constitution*, which stipulates 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 as was held in the case of *Republic v William Mwangi Wa Mwangi* [2014] eKLR:

“It is now settled that in the event that the State is opposed to the grant of bail to an accused person, it has the onus of demonstrating that compelling reasons exist to justify denial of the constitutional right to bail.”

18. This principle underscores the necessity for the Prosecution to provide substantial justification for denying bail, which has not been sufficiently demonstrated in the present case.

19. Similarly, in *Kelly Kases Bunjika v Republic* [2017] eKLR, the Court emphasized that the primary consideration for bail is whether the accused will attend his trial. The Court stated:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for charges facing him and it must therefore be a compelling reason if it is demonstrated that the accused person is likely to fail to attend court proceedings.”

20. In the current matter, there is no evidence presented to suggest that the accused is a flight risk or that he will fail to attend his trial. There is no indication that the accused has a history of failing to attend court since he has no known previous criminal record.

21. While the accused's family is reluctant to stand surety, this does not preclude the possibility of other suitable sureties being found. Considering the above, the Court finds that the concerns raised can be mitigated through the imposition of stringent bail conditions.

22. Paragraph 3.1. (d) of the Bail and Bond Policy Guidelines (at page 9) provides that:

d)“...Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

23. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person.

24. Having considered the circumstances of the case, the gravity of the offence and the pre-bail report, I order that the accused be released on a bond of Kshs.500,000/- with one surety of a like sum. The accused shall attend all scheduled court sessions without fail. Failure to comply shall lead to cancellation of bail and immediate remand.

25. Hearing on 30.6.2025.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF MAY, 2025

S.N. MBUNGI



JUDGE

In the presence of:

Court Assistant: Elizabeth Agong'a

Ms Oso for the ODPP .

Accused present.

