



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ndubi alias Kaka v Republic (Miscellaneous Criminal Application
E028 of 2025) [2025] KEHC 13280 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CRIMINAL APPLICATION E028 OF 2025
WA OKWANY, J
SEPTEMBER 25, 2025**

BETWEEN

LEWIS ACHIKA NDUBI ALIAS KAKA APPLICANT

AND

REPUBLIC RESPONDENT

(Being a Revision of the Ruling in the Chief Magistrate's Court at Nyamira in MCSO E021 of 2025 delivered by Hon. B.A Jumar, Resident Magistrate on 21st May 2025)

RULING

1. This ruling is in respect to the Application dated 24th June 2025 wherein the Applicant seeks the following Orders:
 1. That the Honourable Court be pleased to call for the file MCSO E021 of 2025 Republic vs. Lewis Achika Ndubi.
 2. That the Honourable Court be pleased to set aside the decision of the Magistrate's Court declining to admit the Accused/Applicant on favourable bail/bond and be pleased to admit the Accused person to favourable bail/bond terms.
 3. That the Honourable Court be pleased to order and/or direct the Accused/Applicant to report to the Kiambere Police Station once a week as a condition attached to bail/bond terms.
 4. That the Honourable Court grants any further Orders it may deem fit and just in the circumstances.
2. The Application is supported by the Applicant's affidavit wherein he states that trial court declined to grant him bond despite the fact that the Probation Officer's pre-bail report favoured his release on bond. He further averred that he is a father and the sole bread winner for his three children and their sole breadwinner. He further stated that he was diagnosed with recurrent tuberculosis while in custody.



He contended that he had a known place of abode and undertook to attend court at all times. He also undertook to maintain a distance from the complainant and the Prosecution witness. He added that he will comply with the bond terms.

3. Mr. Chirchir, learned counsel for the Respondent opposed the Application and submitted that the trial court rejected the first pre-bail report and that the second pre-bail report was not attached to the Applicant's supporting affidavit. He also contended that the complainant had expressed fear for her life in the event the Applicant is granted bond. Mr. Chirchir noted that the Applicant did not present any material to support the claim that he is ailing. He urged the Court to dismiss the Application.
4. I have carefully considered the pleadings filed herein and the parties' rival submissions. I find that the main issue for determination is whether the Application is merited.

Analysis and Determination

5. Article 165 of the *Constitution* grants the High Court supervisory jurisdiction over subordinate courts. The Article states as follows: -

Article 165

1. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial, or quasi-judicial function, but not over a superior court.

6. Section 362 of the *Criminal Procedure Code* stipulates thus: -

S. 362. Power of the High Court to Call for Records

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

7. Section 123 of the *Criminal Procedure Code* provides as follows: -

123. Bail in certain cases

- (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

8. Article 49 (1) of the *Constitution* provides as follows on an accused person's right to bond/bail: -

49. Rights of arrested persons

- (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.

9. It is on the basis of the above constitutional and statutory provisions that this Court must consider whether the decision, by the trial court, to deny the Applicant bail/bond was founded on correct legal principles.

10. An accused person is entitled to bail or bond except in instances where there are compelling reasons to deny bond. This means that the right to bail and bond is not absolute. In exercising its discretion to



grant or refuse to grant bail, a court of law must be guided by legal provisions and consider in totality the circumstances of a case. Section 123A of the *Criminal Procedure Code* provides as follows: -

123A. Exception to right to bail

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.
11. *The Judiciary Bail and Bond Policy Guidelines* set out, at paragraph 4.9. thereof, other inexhaustive considerations that must be made by the court in such cases. In particular, the courts must consider: -
- 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. Character and antecedents of the accused person.
 - d. The failure of the accused person to observe bail or bond terms on previous occasion.
 - 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. Child offenders.
 - i. The accused person is a flight risk.
 - j. Whether accused person is gainfully employed.
 - k. Public order, peace or security.
 - l. Protection of the accused person.
12. The facts of the present case are that the trial court declined to grant bond on the basis that the complainant's safety was in jeopardy as indicated in the pre-bail report. The question for the Court's



determination is whether the trial court acted within the precincts of the law and the jurisprudence set out on bail and bond applications.

13. It is trite that every accused person is presumed innocent until proven guilty. (See the decision by the House of Lords in *Woolmington vs. DPP* [1935] UKHL.) Courts should therefore be averse to refusal of bail applications as it amounts to denying accused persons' right to liberty except where there are compelling reasons to deny bond.
14. The Applicant herein was charged with the offence of attempted rape contrary to Section 4 of the *Sexual Offences Act*. The Applicant faced the alternative charge of committing an indecent act with an adult contrary to Section 11 (A) of the *Sexual Offences Act*. The offence, on conviction, attracts a minimum sentence of 5 years imprisonment which may be enhanced to a life imprisonment for the offence of rape. For the alternative charge, an accused is liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.
15. This court is also cognizant of the principle that compelling reasons for denying bail must be considered in light of the overarching interests of justice and the accused person's rights. This means that the court must strike a delicate balance between the need to protect public safety on the one hand and the need to preserve the rights of the accused person on the other hand.
16. As I have already stated in this ruling, the trial court declined to grant bail on account of the complainant's safety. I have considered the Pre-Bail report dated 21st May 2025 and I note that it did not favour the granting of bond. It is also not lost on this Court that the victim in this case is a person suffering from mental illness and is therefore extremely vulnerable if not defenceless.
17. It was also alleged that the victim had previously been a victim of defilement that resulted in her pregnancy and delivery of a child who is suspected to be sired by the Applicant. This court is of the view that this is a serious allegation that must be interrogated through a recommendation to the Investigating Officer seized with the matter to call for a DNA analysis to establish the paternity of the child in question. This is the only way that the court can get to the bottom of this claim as a way of protecting the vulnerable members of our society.
18. The complainant's family also alleged that the Applicant had repeatedly raped the complainant since 2020 and was previously charged with the same offence in Nyamira MCSO 47 of 2020, but that the case was dismissed. This court was not informed of the circumstances or the reasons for the dismissal of the earlier case, suffice is to say that the said case could only have had a bearing on the issue of bond if it had ended in a conviction.
19. A perusal of the trial record reveals that the case proceeded for hearing on 23rd July 2025 and that four witnesses have so far testified. At the said hearing, the victim, who was declared a vulnerable witness under Section 32 of the *Sexual Offences Act*, was represented by her mother as her intermediary.
20. It is trite law that bond/bail should not be used as a tool of punishment but rather as a safeguard to secure the attendance of an accused person during trial. In *Republic vs. Danson Mgunya & Another* [2010] eKLR, the Court stated:

“The purpose of bail is to secure the accused person's attendance at trial. The principal consideration in an application for bail is whether the accused will attend trial.”
21. In *Nganga vs. Republic* [1985] KLR 451, the Court of Appeal held that the primary consideration in granting bail is whether the accused will turn up for trial, while other factors such as the likelihood



of interference with witnesses, severity of the charge, and the accused's antecedents are secondary but still relevant.

22. In the present case, the Respondent raised fears regarding the complainant's safety. This concern was echoed in the first pre-bail report. However, as already observed, the complainant has since testified in court through an intermediary under Section 32 of the *Sexual Offences Act*. This means that the apprehension of interference with the principal witness has been overtaken by events. In *Republic vs. Joktan Mayende & 3 Others* [2012] eKLR, the court emphasized that: -

“Bail should not be denied on flimsy grounds. There must be cogent and compelling reasons founded on law and evidence to justify the curtailing of an accused person's right to liberty.”

23. In this case, the Applicant has presented himself as a family man, a father of three, and the sole breadwinner for his family. He has also asserted, though without documentary proof, that he suffers from recurrent tuberculosis. While the latter is unsupported, the claim underscores the need to consider his right to health under Article 43 of the *Constitution* in determining suitable bail terms.

24. The seriousness of the charge of attempted rape and the alternative charge of committing an indecent act with an adult cannot be understated. If convicted, the Applicant faces severe punishment. Nevertheless, this alone cannot justify the denial of bond. In the case of *Michael Oyamo & Another vs. Republic* [2019] eKLR the Court of Appeal held that: -

“The mere fact that the offence is serious and carries a heavy penalty is not itself a compelling reason to deny bail. The court must still interrogate the specific circumstances of the case.”

25. After weighing all factors, including the stage of the proceedings (where four witnesses have already testified), the Applicant's community ties, the complainant's vulnerability, and the constitutional presumption of innocence, I am persuaded that the Applicant can be admitted to bond, subject to stringent terms to balance the interests of justice and the protection of the victim.

26. Consequently, I find that the Application dated 24th June 2025 is merited and it therefore succeeds. The ruling of the trial court delivered on 21st May 2025 declining to grant bond is hereby set aside and in its place, the court makes the following orders: -

- a. The Applicant shall be released on a bond of Kenya Shillings Five Hundred Thousand (Kshs. 500,000) with one surety of a similar amount, or in the alternative, a cash bail of Kenya Shillings One Hundred Thousand (Kshs. 100,000).
- b. The Applicant shall report to the Officer Commanding Station (OCS), Kiambere Police Station once every week until the conclusion of the trial.
- c. The Applicant shall not make any contact whatsoever with the complainant or witnesses or her immediate family members, directly or indirectly during the pendency of the trial.
- d. The Applicant shall attend all scheduled hearings without fail, unless excused by the trial court.
- e. In default of any of these conditions, the bond terms shall stand automatically cancelled/revoked.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER 2025.



W. A. OKWANY
JUDGE

