Kogo v Republic (Criminal Revision E020 of 2024) [2024] KEHC 9834 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL REVISION E020 OF 2024

DR KAVEDZA, J

JULY 30, 2024

BETWEEN

MAUREEN CHERONO KOGO .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The applicant filed the notice of motion for determination pursuant to section 123 and 362 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya and Articles 49 (!)(h) and 50(2)(a) of the *Constitution* of Kenya. The applicant sought a revision of the ruling delivered by the trial court at JKIA Chief Magistrate's Court Criminal case no. E083 of 2024 denying her bond on 11th June 2024.
2. The application is supported by the grounds on the face thereof and an affidavit sworn by the applicant's advocate dated 12th June 2024. The averments made are that the applicant was charged, jointly with three others not before this court with two counts of offences namely: trafficking narcotic drugs under section 4(a)(ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994 and conspiracy to commit an offence under section 4(B)(4) as read with section 4(B)(5) of the *Narcotics Act*. She pleaded not guilty to both counts and sought reasonable bail terms pending trial. The prosecution opposed her application with an affidavit sworn by PC Boniface Mutisya dated 10th June 2024.
3. In opposing bail, it was argued that the applicant is charged with a serious offence that could lead to imprisonment if found guilty, providing an incentive to abscond. The applicant is considered a flight risk. She was arrested in a house in Kileleshwa with the co-accused persons who are foreigners. The prosecution expressed concern that she was being used as a conduit in the drug trafficking trade. They argued that it was in the public interest not to release the applicant pending trial.

4. In a ruling delivered on 11th June, 2024, the trial magistrate determined that the applicant was a flight risk due to her involvement in drug trafficking. The applicant is now challenging the impugned ruling.

5. In her application for revision, the applicant stated that she is the mother and sole provider to a minor. That the trial magistrate erroneously presumed her guilty before a conviction was made. She argued there was no compelling evidence from the prosecution to prove she is a flight risk. As a Kenyan citizen, she urged the court to grant reasonable bail terms, which she undertook to abide by.

6. The application was canvassed by oral submissions. Mr. Mong'are represented the respondent and Mr. Ogutu represented the applicant. Both highlighted the legal basis for their respective positions, which need not be rehashed here.

7. I have considered, the application, the response, the written submissions, and the applicable law. The issue for determination is whether there were compelling reasons to deny the applicant reasonable bail/ bond.

8. The revisional jurisdiction of this court is donated by Section 362 of the *Criminal Procedure Code* which provides that:

> "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."

9. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order or finding is tainted with illegality, errors of law, or impropriety or that there was irregularity in the proceedings that gave rise to the impugned order, finding or decision.

10. The trial court's record shows that on 10th June 2024, the applicant and three other co-accused took plea and denied the charges preferred against them. The trial court heard an application for bail pending trial. On 11th June 2024 the applicant was denied bail/bond. The reason for the denial of bail was that she was flight risk given her involvement in the criminal enterprise of drug trafficking. The court noted that these were compelling reasons to deny the applicant the enjoyment of the constitutional rights to bail.

11. The constitution specifically requires under Article 49 (h) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the *Criminal Procedure Code*, Article 49 (h) places the burden of proof on the state to demonstrate compelling reasons.

12. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of the *Constitution*, the courts are to be guided by the provisions of section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides:

> "In such a determination the courts are to factor the following exceptions to limit the right to bail;
>
> (a) Nature or seriousness of the offence;
>
> (b) The character, antecedents, associations, and community of the accused person;

(c) The defendants record in respect of the fulfilment of obligations under previous grant of bail;

(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 if released on bail, it is likely that he would fail to surrender to custody;

(b) Should be kept in custody for his own good.

13. 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."

14. 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.

15. From the record of the trial court, the prosecution through an affidavit to oppose bond sworn it was averred that the applicant was a flight risk. It was further contended that she a tenant where the other co-accused persons were arrested. Finally, that it was in the public interest that she remains in custody during her trial.

16. The main concern raised by the state was that the applicant was a flight risk and therefore unlikely to turn up for trial. Bearing in mind that the standard of proof at this stage is simply on a balance of probabilities. I am not persuaded that, given the circumstances in which the applicant was arrested, it was more probable that she was not intent on fleeing the jurisdiction of the court.

17. It is also doubtful that the applicant has no fixed abode in Kenya, being a Kenyan citizen. It was acknowledged that the in the affidavit in opposition to bond that the applicant was a tenant in a premises in Kileleshwa where she was arrested. It is perplexing, however, that they now claim that they had no fixed abode thus contradicting their own solemn affirmations.

18. As to equating living in rental premises to having no fixed abode, surely that cannot be a reason for denial of bond. Most urban dwellers do not live in their own houses. Such a ground would mean that anyone living in a rental house would be found to have no fixed place of abode. No evidence has been placed before the court to show that the applicant changes residences so frequently that they can be assigned such a label.

19. The trial magistrate also contended that the applicants are a flight risk given their involvement in the alleged criminal enterprise of drug trafficking/ As to the nature of the offence and the seriousness of the

punishment likely to be meted if the accused person is ultimately found guilty, there is no gainsaying that the offences are serious both locally and internationally.

20. Indeed, the seriousness of the charge and the possible outcome of a conviction, may be an incentive for an accused to jump bail was a key consideration in *Watoro vs. Republic* [1991] KLR 220, where 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..."

21. However, in the current constitutional order, transnational crimes are offences like any other for the purposes of bail pending trial. Therefore, a bail application in such cases, has to be looked at from the prism of Article 49(1)(h) of the *Constitution*. The key question that takes centre stage is whether the accused will turn up for her trial if released on bond. I, 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."

22. From the foregoing jurisprudence, the law on bail/bond has crystallised. The mere fact that the applicant is facing charges that are transnational in nature is not a reason to deny her bail pending trial. It was the duty of the prosecution to demonstrate to the court that the applicant is a frequent international traveller, by producing her travel history. Secondly, a pre-bail report would have established whether the applicant has a fixed abode as well as close ties in the society, to authenticate the averments of the investigating officer.

23. From the foregoing, I find merit in the application and it is hereby allowed on terms that the orders made by the trial court in the ruling delivered on 11th June 2024 denying the applicant bail are hereby set aside and consequently are substituted by the following orders:

    i. The applicant Maureen Cherono Kogo is granted bond of Kshs. 1,500,000 with one surety of a similar amount.

    ii. The applicant is directed to provide two contact persons one of whom is to be an adult blood relative.

iii. The applicant is to deposit her passport in court and shall be retained during the period of her trial.

iv. The applicant shall not be issued with any new passport and or any temporary travelling documents of whatever nature.

v. This order shall be served upon the Immigration Department in compliance with order (iv) above.

vi. The applicant shall report to the investigating officer every first week of the month until the conclusion of the trial.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2024

D. KAVEDZA

JUDGE

In the presence of:

Ms. Ogutu for the Applicant

Mr. Mong'are for the Respondent

Nelson Court Assistant