



**Murage v Republic (Miscellaneous Criminal Application E123 of 2024)
[2024] KEHC 11160 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E123 OF 2024
HI ONG'UDI, J
SEPTEMBER 25, 2024**

BETWEEN

ALEX MAINA MURAGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Alex Maina Murage filed the Chamber summons dated 17th July, 2024 seeking the following orders;
 - i. Spent.
 - ii. That the Honourable Court be pleased to review the decision of the trial magistrate in Nakuru Chief Magistrate Criminal E2830 of 2022 Republic v Alex Maina Murage and reinstate the bond terms of the accused person suspended on 27th June, 2023.
 - iii. That the Honourable court be pleased to call for and examine the record of Hon. Magistrate in Nakuru Chief Magistrate Criminal E2830 Of 2022 Republic v Alex Maina Murage for purposes of satisfying itself as to the correctness, legality and propriety of the orders of the court issues on 27th June, 2023 and 9th July, 2024 consequently alter/quash the ruling which overruled the objection on introduction of new witness/witness statement.
 - iv. That this Honourable court be and is hereby pleased to stay the proceedings of Nakuru Chief Magistrate Criminal E2830 of 2022 Republic v Alex Maina Murage pending the hearing of this Application inter partes.
 - v. Any other orders this Honourable court may deem fit and just to grant.
 - vi. Costs be provided for.



2. The application is premised on the twenty (20) grounds on its face plus the applicant's supporting affidavit sworn on 17th July, 2024. It is opposed by the respondent based on the replying affidavit of counsel Emma Okok sworn on 7th August, 2024.

Applicant's case

A summary of the applicant's case is that he is facing a charge of grievous harm contrary to section 234 of the penal code in Nakuru Magistrate's Criminal Case No. E2830 of 2022 Republic v Alex Maina Murage. After taking plea he was released on bond on 25th August, 2022. Following an application by the investigating officer, his bond was cancelled on 27th June, 2023. The same has not been reinstated to date. His various attempts to have the bond reinstated have been futile.

3. He further claims that just after all the prosecution witnesses had testified, an application was made by the prosecution to introduce a new witness and new evidence. The application was allowed by the trial court despite his objection, on 9th July, 2024.
4. He therefore prays for reinstatement of his bond and for the new witness not to be allowed to testify.

Respondent's case

5. The respondent has averred that when the issue of the new witness in the criminal case was introduced it was opposed. However, counsel told the court that should the application be allowed the defence should be given time to peruse the statement before proceeding with the hearing. This request was granted. It is their case that late supply of witness statements is not fatal to the prosecution case, since presentation of evidence is a continuous process as long as the prosecution case has not been closed. On the issue of cancellation of bond it was deponed that the applicant was threatening witnesses. To them this is a compelling reason for cancellation or denial of bond terms for an accused person.
6. This application for review was canvassed by written submissions.

Applicant's submissions

7. These were filed by Gordon Ogola, Kipkoech & Company Advocate and are dated 26th August, 2024. It is counsel's submission that the arbitrary decision of cancelling the applicant's bond was not based on any substantive evidence. That there was no affidavit by the investigating officer and OB extract of a report of assault on the victim or interference with her or any other evidence in support. That the application was made in the absence of the applicant's counsel, applicant or victim.
8. Relying on the case of *Martim Mukira v Republic* [2017] eKLR counsel submitted that before cancelling an accused person's bond the court must be satisfied that there are compelling reasons to satisfy the court for such denial of a right. Counsel thus submitted that in the present case there is no evidence or compelling reasons, as the applicant denied any interference with witnesses.
9. On the calling of the Lower court record for examination by this court counsel relied on sections 362 & 364 of the Criminal Penal Code, cases of *Slaw Wallace & Co. Ltd v Govindas Paru Slothamdas & another* [2001] 3SCC 445 and *Thomas Patrick Cholmondeley v Republic* [2008] eKLR.



10. Additionally counsel submitted that allowing admission of further evidence would cause unnecessary delay of the case since there may be a demand for recall of witnesses. In the case of *Director of Public Prosecution v David Mwiraria (deceased) & 6 others* [2020] eKLR it was held;

I wish to state that, despite the process of disclosure being a continuous exercise, the same is subject to certain limitations or parameters. Disclosure cannot be endless without justification. The process of disclosure during the trial must meet certain criteria inter alia;

- i. The additional evidence is not intended or likely to ambush the defence.
 - ii. It is not intended to fill in the gaps created by the defence.
 - iii. The notice is sufficient for the defence to prepare adequately.
 - iv. The intended evidence could not have been reasonably available or foreseeable before commencement or early stages of the trial.
11. Relying on Article 50 (2) counsel argued that the current situation is different since the intended witness was not in the picture from the beginning of the case. Further that it had been indicated that the eye witness present wanted to testify, virtually and he wondered why the introduced witness did not want to testify physically before the court. He thus urged the court to grant the orders sought.

Respondent's submissions

12. These were filed by M/s Emma Okok Principal Prosecution counsel for the respondent and are dated 12th September, 2024. She submitted that late supply of witness statements is not fatal to the prosecution case. She cited Article 50 (2) of the *Constitution* of Kenya which provides;

Every accused person has the right to a fair trial, which includes the right—

- (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
13. She further referred to the Supreme Court of Kenya case of *Hussein Khalid & 16 others v Attorney General* [2019] eKLR where it was stated;

“Further, our jurisprudence is replete with authorities to the effect that presentation of evidence is a continuous process during the trial process provided that the accused has not been put to his defence. We draw an answer to the Appellant’s complaints under Article 50(2) (j) of the *Constitution* from the case of *Dennis Edmond Apaa and others v Ethics and Anti-Corruption Commission*, Nairobi Petition No. 317 of 2012, [2012] eKLR which dealt with the issue of disclosure of documents by the prosecution as follows;

- (26) The words of Article 50(2) (j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair



trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2) (c) guarantees the accused the right, “to have adequate facilities to prepare a defence”.

- (27) This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence....The obligation to disclose was a continuing one and was to be updated when additional information was received.”

The court further stated as follows’

“Note also that the 2nd and 3rd Respondents are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is to bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence.

14. Counsel thus submitted that the trial court had properly exercised her discretion in allowing the request for additional evidence.
15. On the issue of review of bond counsel submitted that bond is a constitutional right under Article 49 (1) of the Constitution which provides;
49. (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.

Though the Constitution has not defined what compelling reasons are, Section 123 A(i) 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 fulfillment of obligations under previous grants of bail; and;
- (d) the strength of the evidence of his having committed the offence;”



16. It is her further submission that interference with witnesses is a compelling reason for denial of bond. She referred to the record showing that the applicant's bond had been cancelled as he interfered with witnesses and even assaulted the complainant while on bond. It is her argument that such orders may be reviewed when there is evidence of changed circumstances as was held in the case of *Republic v Diana Suleiman Said & another* [2014]eKLR where it was stated;

“with respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused's refusal to attend court while on bail, when sureties withdraw or for other reasons. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances change in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.”

17. Counsel thus submitted that there was no new compelling issue raised by the applicant nor any change in the circumstances that had led to the cancellation of his bond. She further submitted that the High court only exercises revisionary powers in exceptional circumstances as stated in the case of *Director of Public Prosecution v Joseph Murimi Mugweru* [2020] eKLR. She urged the court to dismiss the application for lack of merit.

Analysis and determination

18. I have carefully considered the application, affidavits, both submissions, cited decisions and the law. The issue I find falling for determination is whether the learned trial magistrate's orders allowing additional evidence by the prosecution and cancellation of the applicant's bond were irregular and/or illegal.
19. I would at this point wish to confirm that the lower court file Nakuru Criminal Magistrate's Criminal case No. E2830 of 2022 together with a copy of typed proceedings were forwarded to this court as directed issue of cancellation of the applicant's bond.
20. The record shows that when the matter came for hearing before the trial court on 12/05/2023 the applicant and his advocate did not attend court. The investigating officer who was present informed the court how the applicant had assaulted the complainant and was therefore a threat. The prosecution counsel applied for a warrant of arrest to issue against him and the cash bail to be forfeited. The trial magistrate issued the two orders sought. The matter was then listed for mention on 30/06/2023.
21. The applicant appeared before court on 27/06/2023 in the absence of his counsel. The prosecuting counsel reiterated what had been stated to court on 12/05/2023. Counsel told the court that the applicant had continued to threaten the complainant, and so requested that the applicant be remanded in custody until the case was concluded. The court had the applicant remanded in custody until the finalization of his case.



22. On 7/02/2024 the defence counsel revisited the issue of the cancellation of the applicant's bond. The court did not rule on it but instead asked counsel to peruse the file and take note. The issue again came up on 20/03/2024. The trial court held that it was functus officio as far as the matter of bond terms was concerned. That prompted the current application.
23. Bond is a constitutional right and can only be denied in special circumstances based on compelling reasons. See Article 49(1)(h) of the Constitution and Section 123A(1) Criminal Procedure Code. Secondly every person appearing before a court of law and in this case the accused person, has a right to a fair trial as provided for under Article 50(2) of the Constitution.
24. The record shows that the presentation by the Investigating officer on 12/05/2023 of alleged threats and assaults of the complainant was done in the absence of the applicant and his advocate, and orders were issued. On 27/06/2023 when the applicant presented himself to court and in the absence of his advocate and while relying further on the submissions by the prosecution counsel the court cancelled the applicant's bond.
25. Thirdly there was no statement or complaint from the complainant or even an OB produced before the court for the court to satisfy itself of the allegations by the investigating officer. The complainant who testified on 18/10/2023 only gave evidence on the charge facing the applicant. She did not mention anything about any further assault/assaults or threats against her by the applicant.
26. My finding is that the trial court should not have acted on the allegations by the investigating officer without any evidence and without giving the applicant and his counsel an opportunity to respond to the accusation on his behalf. This element of forfeiture of cash bail and cancellation of cash bail was therefore unfair, unjust and a violation of the applicant's right to bond and fair hearing.

Issue of admission of additional evidence

27. It is not disputed that on 9/07/2024 the prosecution counsel applied to have a witness statement which had not been supplied to the defence to be admitted for purposes of hearing. Though opposed to its admission the defence counsel added that in the event of its admission the defence should be given time before proceedings, took off.
28. The trial magistrate in admitting the statement stated thus;

“Justice cuts across, for the victim and accused. I have heard the application by the state that it was an oversight on the part (sic) to supply the statement to the defense. I note that from the record by the state the statement was recorded just on or at the same time frame with other prosecution witnesses. I will allow the statement to be supplied to the defense and give time to them to prepare.”
29. At the time the application was made, the prosecution case had not been closed. It was therefore not an issue of re-opening the case. Guided by the holding in the case of Dennis Edmod Apaa & others (Supra) I am satisfied that the order and directions by the trial court on this issue were quite in order. The defence was given time to go through the witness statement and prepare for the hearing. Any other issue on that can only be tackled after the conclusion of the case.
30. My finding is that the application for review partially succeeds and the following orders are hereby issued;
 - i. The order cancelling the applicant's bond is hereby vacated. He shall be released on a bond on Kshs 50,000/= with a surety in similar sum or cash bail of Kshs 30,000/=.



- ii. The forfeited cash bail should be refunded to the applicant, within 60 days.
- iii. The order admitting additional evidence is hereby confirmed.
- iv. Matter to be re-allocated by the Chief Magistrate to another Magistrate with competent jurisdiction since Hon. Kyalo SRM has been transferred.
- v. Mention on 30/09/2024 before the Chief Magistrate.

31. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 25TH DAY OF SEPTEMBER, 2024 IN OPEN COURT AT NAKURU.

H.I ONG'UDI

JUDGE

