



REPUBLIC OF KENYA



**Kiambati v Republic (Criminal Revision E097 of 2022)
[2023] KEHC 509 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E097 OF 2022
RM MWONGO, J
JANUARY 30, 2023**

BETWEEN

ERICK KIMATHI KIAMBATI APPLICANT

AND

REPUBLIC RESPONDENT

*(Original Conviction and Sentence in Criminal Case No.
E447 of 2022 of the SPM Magistrate's Court at Gichugu)*

RULING

1. The applicant is charged in the lower court with obtaining money by false pretenses in that on 8th June, 2022 at Joy Millers Kianyaga within Kutus Township with intent to defraud, he obtained ksh.51,012,298/=, from Joy Millers Ltd, pretending that he was in a position to sell them dry white maize. He is also charged with nine (9) counts of theft of motor vehicles.
2. He pleaded not guilty and was remanded in custody. Later he was granted bond of Kshs. 50,000,000/= with two sureties or cash bail of Ksh10,000,000/=.
3. Dissatisfied with the bail terms he filed this application for review of the bail terms which he argues are inordinately high and unreasonable. His application is grounded in Articles 49, 50 (1) and 165 (3) of [the Constitution](#) and Sections 123, 362, 364, 365, 366 of the CPC.
4. The applicant's application is supported by his affidavit of 18 paragraphs deponing inter alia, that the trial court pegged its bail bond amount on the amount alleged to be fraudulently obtained by him; that the respondents willingly withheld information to the effect that the applicant did avail delivery notes for the maize delivered to the complainant; that he has a good defence; that he needs special medical attention and the excessive bond terms issued by the trial court make it harder for him to get such attention; that he is ready to comply with any terms set by this court, and that he has never been charged before with any offence in Kenya and is not a flight risk.



5. The applicant also deponed a further affidavit reiterating the averments in his supporting affidavit and seeking to be granted bail of Ksh.10,000,000/, with two sureties of similar amount. He also annexed numerous documents showing that the criminal case emanated from commercial agreements between the complainant and the accused for the supply of maize.
6. The prosecution's response reiterates the charges facing the applicant and asserts the seriousness thereof based on the huge amounts of money involved. Further, the state asserts that: the applicant did not disclose that the nine (9) other counts he faces are with different complainants; that the trial court took into account the various offences, their nature and seriousness; that the applicant has not demonstrated his inability to comply with the bail bond terms;
that the ten counts with which the applicant is charged each attract several years imprisonment.
7. Further the prosecution alleges that the Applicant was arrested whilst fleeing to Uganda and is a flight risk; that he has several other pending criminal cases; and that should the court be minded to reduce bail, it should not reduce it below Kshs.10,000,000/=.
8. In support of the state's position, the investigating officer on 28.11.2022 filed a 15-paragraph replying affidavit asserting that the Applicant was arrested on 24th August 2022 at the Kenya Uganda border after a long tedious search; that the Applicant is facing another criminal charge in Nairobi Milimani Case No. 773 of 2022 for Kshs. 30,000,000/=; that the applicant is a flight risk as he is a frequent traveler of no fixed abode; and that the Applicant is likely to interfere with witnesses and evidence.
9. The Interested Party filed an application to be enjoined in the cases but opposed the review of the bail bond terms. That application was not opposed.
10. The parties made oral submission in court on 30.11.22 which I have duly considered.
11. The essence of the applicant's submissions is that the trial court appears to have based the bail on the amount charged; that the bail is contrary to Section 123 (3) of the CPC; that the court should have considered that there was a serious relationship between the parties; the Applicant and Complainant are in a commercial Principal/Agent relationship; that the complainant would load money onto the Applicant's account for the purchase of maize which he obtained from Kenya, Tanzania, Zambia and elsewhere; that between January and July 2022 over 800 million was deposited into the Applicant's account; that the applicant would obtain delivery notes; that the applicant is a young man aged 27 years and has been in remand for over 3 months.
12. The state in submissions agreed that there was in fact a business relationship between the Applicant and the complainant for 6 months; that the relationship collapsed; that the trial court rejected an application for review of the bail terms because the accused was a flight risk; that an amount of Shs.10 million to bail would not be commensurate with the offences charged.
13. The Interested Party submitted that Applicant had not sought to quash the charges in the lower court if the case was hopeless as he alleged; that the applicant was to source maize, inform the principal of it, and the principal would deposit the cash, followed by which there would be delivery.
14. The Interested Party cited the case of *Victor Kiprono Ng'eno v DPP* [2021] eKLR which held that bail and bond terms should not be so low that the Accused is enticed to fail to show up at trial.

Analysis and Determination

15. I have carefully considered the application for review; the documents availed by the parties and the parties' pleadings, submissions and authorities.



16. There is no doubt whatsoever, and it is not disputed, that the criminal charges emanate from commercial agreements between the Applicant and Complainant which have gone awry. This is attested to by the affidavit and annexures of Detective Nicholas Oluoch, and also by the supporting affidavit of the Applicant and annexures.
17. The letters attached to the affidavit of Nicholas Oluoch from the National Police Service dated 29.7.2022 and 1.8.2022 clearly show that the complainant paid Ksh.51,012,298/= on the 8th June, 2022 through transfer to the Accused's account for supply of dry maize. Thereafter they were allegedly unable to reach the Applicant. Further reports show that nine trailers belonging to the complainant (set out in Counts 2 -10) were detained in Arusha, Tanzania, presumably for failure to pay for the said maize.
18. On his part the Applicant has annexed an Agreement for supply of maize; his Equity Bank statement for the period 7.2.2022 to 25.8.2022 which shows numerous large credits from the complainant company (Interested Party) including Shs.51,012,298 made on 8.6.2022. He also annexed numerous delivery notes from himself to the complainant, Joy Millers Ltd, stamped by the complainant Company.
19. I need not go into detail in assessing the documentation annexed save to state that I am convinced that the documents disclose an active commercial relationship between the parties.
20. For purposes of the application, Section 123 (2) of the CPC provides:

“The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive”.
21. For purposes of considering whether or not bail and bond terms imposed on a party are reasonable or excessive, I have no doubt in my mind that this court has revisionary jurisdiction under both the CPC Sections 362 - 364 and Article 165 (6) of *the Constitution*. The High Court can and has in numerous cases exercised revisionary jurisdiction in respect of the reasonableness of bail and bond terms.
22. This Court also notes that an accused person has a constitutional right under Article 50 (2) of *the Constitution* to be treated as innocent until proven guilty and to be granted bail and bond on reasonable conditions unless there are compelling reasons not to be released.
23. The Probation Officer filed a report. It shows, inter alia, that the accused is a flight risk and not suitable for bail or bond; that the accused has another court case in the City Court Nairobi, where he is charged with obtaining Sh.30 million and was granted bail of Kshs.10 million; that the accused has a long travelling history making him a flight risk.
24. I have also noted from the Probation Report that the victim impact statement shows that the accused had previously transacted business with the complainant on numerous accounts; and:

“.....had been dependable and consistent in supplying them with dried maize. As a result, the complainant had no hesitation whatsoever in sending the accused huge sums of money to procure maize”.
25. According to the Probation Report, it is the ordeal of the accused in dodging and failing to keep his end of the bargain that has caused the complainant's doubts:

“that the accused will adhere to bond/bail terms considering that he has affiliations in other countries due to the nature of his business undertaking.....”



In addition, he (complainant) feels that the accused defrauded him and allegedly subjected him to immense loss”.

26. The Probation Report concludes that:

“The accused has no history of having jumped bond, bail in the past;.....

There were no compelling social reasons noted that could make him unsuitable for bond terms”

27. Taking all the above matters into account, I agree with the trial court’s decision not to deny the accused/ applicant bail, as there were no compelling reasons.

28. As far for the bail/bond terms, I note that the complainant and accused have engaged as business counterparts. As a result, it is not the role of the court to take any position for or against any of the parties as regards the bail terms; the court has to be reasonable in the circumstances.

29. I note that in this case the lower court appears to have pegged the bond/bail amount of Kshs.50,000,000/= to the amount of Kshs.51,012,298/= which he is charged with obtaining.

30. There is no specific or required method for calculation of the bail or bond amounts. In some countries, though, there is a bail/bond schedule to help identify the bail/bond amount that is opt. The schedule relates to offences based on their seriousness and to different types of offences. In Kenya, we do not have such a schedule, and it is left to each court to determine bail or bond amount from the nature and circumstances of each case.

31. The object of bail/bond is not to secure the amount charged or allegedly defrauded. The bail/bond policy is intended primarily to ensure that the accused attends court; that he is not likely to endanger the safety of victims or the public; that he will not interfere with witnesses; and is not danger to national security or the public interest.

32. The Judiciary Bail and Bond Policies Guidelines at page 9 paragraph 31 (d) under pins the right to reasonable bail/bond terms as follows:

“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 amount and conditions shall not be more that is necessary to generate the appearance of the accused person for trial. Accordingly bail or bond amounts shall not be excessive, that is; they should not be greater than necessary to generate that the accused person will appear for his trial”.

33. Taking into account all the foregoing, I think that the trial court’s decision to impose a Shs.10,000,000 cash bail or a bond of 50,000,000/= with two sureties of similar amount was unreasonable in the circumstances of this case.

34. Accordingly, I review the bail/bond terms as follows:

1. The Accused/Applicant may be released on bail in the amount of Kshs.5,000,000/= and with two sureties valued at Ksh.10,000,000 each verified by the Court, and upon the following other terms:
 - (a) The Accused shall report to the OCS Kasarani Police Station on every Monday of every week of the month and the OCS shall maintain a detailed record of his attendance which record may be called for on demand by the court.



- (b) The Accused shall not interfere with any witnesses or with the investigations in the matter.
 - (c) The Accused shall deposit his passport in court and shall not travel outside the Republic of Kenya without prior written authority obtained from the court.
 - (d) The Accused shall attend every mention and hearing during the proceedings in the lower court.
2. In the event of failure to comply with any of the foregoing conditions, the bail/bond shall forthwith, at the discretion of the court, stand forfeited and the accused remanded into custody.
 3. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 30TH DAY OF JANUARY, 2023.

.....

R. MWONGO

JUDGE

Delivered in the presence of:

1. Mamba for State
2. Kagucha for Applicant
3. Asimwe for the Interested Party
4. Accused/Applicant not Present
5. Murage Court Assistant

