



Nyongesa & another v Republic (Miscellaneous Criminal Application E011 of 2022) [2023] KEHC 1664 (KLR) (27 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E011 OF 2022**

JM CHIGITI, J

FEBRUARY 27, 2023

BETWEEN

MOSES WANJALA NYONGESA 1ST APPLICANT

MOFFAT UTWERE 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application against the Order on Bail and Bond terms of Ruiru Senior Principal Magistrates Court (J. A. Agonda PM) dated 1st April, 2022 in Ruiru SPMCR No. E551 of 2022 under Article 40 (1), (h), 50(2), (a), 159(1) & (2) and 258(1) of the Constitution of Kenya)

RULING

Background:

1. What is before the court is the Application filed on April 1, 2022. The Application is supported by the Affidavit of Moses Wanjala Nyongesa and Moffat Utwere.
2. The Application is brought under article 40 (1), (h), 50(2), (a), 159(1) & (2) and 258(1) of the [Constitution of Kenya](#).
3. The Applicants seeks the following reliefs:
 - i. Spent
 - ii. That pending the hearing and determination of this application this Honourable court be pleased in interim to release the accused persons on reasonable bond terms.



- iii. That the Honourable court be pleased to review the Ruiru Chief Magistrates Court order on Bail and Bond terms for the Applicants made on 1st April 2022 and reduce the same to affordable and reasonable levels.
 - iv. That this Honourable court be pleased to grant an order for the accused persons be taken to Hospital for urgent medical attention.
 - v. That the Honourable court be pleased to issue any further and /or better orders as may meet the ends of justice.
4. The Application is premised on the following grounds:
- A. That the Ruiru Chief Magistrate set very strict, stiff, unaffordable, and unreasonable bail and bond terms to the Applicants.
 - B. That the Applicants herein are not flight risk.
5. Ms. Ngesa for Republic opposed the Application through her oral arguments, when the matter came up for hearing on 26/1/2023.

Analysis and Determination:

6. The issue for determination that arises is whether or not the Application for review of the bail/bond terms is merited.
7. Article 165 (6) of the Constitution provides that 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.
8. Article 165 (7) of the Constitution provides that For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
9. I have read the Affidavit dated April 4, 2022, and appraised myself with the contents therein. I have weighed this against the arguments by Ms. Ngesa, who opposed the Application on the grounds that:
- i. The Applicants are facing an offence of obtaining by false pretence.
 - ii. They entered a plea of not guilty.
 - iii. They were given a bond of Ksh. 6,000,000 or bail of 3,000,000 in the alternative.
 - iv. The terms are reasonable, appropriate, and justifiable.
 - v. That the value of the property in issue is Ksh. 4,372,000.
 - vi. Prays that the terms should not be interfered with.
10. The amount involved in charge sheet is Kshs. 4,372,000.
11. In the case of Harish Mawjee & another vs. Republic [2020] eKLR Criminal Revision case no 545 of 2020, as follows: -

“There are certain overarching principles that govern the administration of bail and bond by Courts. First of all, courts have sole discretion to give determinate bond terms and



they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused's ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court or appeal... an accused can apply for review of bond terms given by the trial court. The application should be made before the trial court which granted the bond. If, however the accused is still aggrieved by the decision of the trial court, he can still approach the higher court for relief.”

12. Further, in the case of *Andrew Young Otieno vs. Republic* (2017) eKLR, Kimaru J. stated as follows: -

“This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to a denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms to be imposed by the trial magistrate. He has been in remand custody for a period of over two years.”

13. Bail is a discretionary order that is granted by the trial court after considering all the factors placed before it by the prosecution and the accused person.

14. The High Court will only interfere with such an order if in its opinion, the bail terms are manifestly excessive to an extent that the same would amount to a denial of bail by implication.

15. Bail terms should not have the effect of detaining an accused person in custody as they wait for their case to end. This would in effect amount to a violation of article 50 (2) (a) of the *Constitution* which provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.

16. After perusing the trial record, and upon analyzing the grounds as set out in the Applicant's affidavit as weighed against the opposition as amounted by the counsel for the Republic, I hereby find the bond/ bail terms to be unreasonable and excessive.

Disposition:

17. The Application is granted in the following terms.

1. The accused persons are released on a bond of Kshs.1,000,000 with two sureties or a cash bail of Ksh. 500,000.
2. The accused persons shall be taken to the nearest Government of Kenya Hospital.

Dated and delivered at Kiambu this 27th day of February, 2023.

.....
J. CHIGITI (SC)

JUDGE

In the Presence of;

For Appellant:



For Respondent:

C/A:

Ruling delivered virtually.

