



REPUBLIC OF KENYA



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**Republic v Oterah (Criminal Revision E008 of 2023)
[2023] KEHC 2676 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E008 OF 2023
RE ABURILI, J
MARCH 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

ARTHUR ALLAN NDANYI OTERAH RESPONDENT

RULING

1. This revision file was initiated vide a request dated March 13, 2023 made by the ODPP, Kisumu, calling upon this court to call for the trial court record in Maseno Criminal Case No E041 of 2013 Republic vs Arthur Allan Ndanyi Oterah and invoke the provisions of Section 364 of the *Criminal Procedure Code* and set aside the order reviewing bond terms for the accused person made by Hon. Mitey, PM on March 8, 2023 as initially set by Hon. Yalwala, SPM on February 6, 2023.
2. Upon consideration of the request, I called into this court the subject court file which has been expeditiously submitted for perusal and directions as appropriate.
3. In the said court file, the accused person Arthur Allan Ndanyi Oterah is charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) (ii) of the *Narcotic Drugs and Psychotropic Substance (Control) Act* No 4 of 1994 as amended by the *Narcotic Drugs and Psychotropic Substance (Control) Act* of 2022.
4. The particulars of the charge as per the charge sheet dated January 27, 2023 are that on the 22nd day of January 2023 at Kisian area in Kisumu West Sub-county within Kisumu County, jointly with others not before court, the accused person trafficked in a narcotic drug namely, cannabis to wit 887.5kg with a street value of Kshs 26,625,000 by conveying in a Motor Vehicle Registration No KDA 321R/2F 6300 Trailer Make Mercedes Axon in contravention of the said Act.



5. The accused took plea of not guilty on January 27, 2023 upon which Hon CL Yalwala, SPM heard the Prosecution Counsel who urged the court not to grant bond to the accused as he was arrested while on transit and that he had no fixed abode.
6. The accused asked for time to get an advocate which time he was granted and on January 30, 2023, his counsel, Mr Onsongo appeared and argued the application for release of his client on bond pending trial. The court then ordered for a pre-bail assessment report.
7. Vide a detailed and well-reasoned ruling delivered on February 6, 2023, Hon. Yalwala granted the accused person bond of Kshs 5 million with one surety of similar amount and fixed the case for hearing on May 10, 2023 and set a mention date before court No 2 on February 22, 2023.
8. On the latter date, the trial court shows that the case was before Hon J Mitey, SRM and the accused who appeared in person sought for review of bond terms saying he was suffering and he had a land case in Mombasa so he wanted to be assisted to have the bail terms reviewed so that he could attend to that land case and he had documents for the same.
9. Hon Mitey then ordered for a social inquiry to be conducted for purposes of a pre-bail report, upon which Mr Shitsawa, Prosecution counsel informed the court that the pre-bail report has already been availed. The court then remarked that since it was handling the case for the first time, it needed time to go through the proceedings and consider the application for review.
10. The court confirmed the hearing date of May 10, 2023 and set a mention date for March 8, 2023. On the latter date, the court again confirmed the hearing date for May 10, 2023 and set a mention for March 23, 2023 but when the accused sought for review of bond terms or cash bail, the court, now Hon. J. Kimetto, PM granted cash bail of Kshs 500,000. The above order is what prompted this request for revision.
11. In the request for revision of the orders reviewing the bond terms for the accused person, the ODPP asserts that the Honourable Magistrate who made the order reviewing bond terms for the accused person lacked jurisdiction to do so and that the said review could only be done by the court that granted the bond terms or a higher court. That the Principal Magistrate could not review orders of a senior court. Further, that in reviewing the said bond terms, the Principal Magistrate did not consider the seriousness of the offence vis a vis the bond terms issued which the ODPP is aggrieved by considerably.
12. The provisions of Section 362 of the *Criminal Procedure Code* were invoked granting this court jurisdiction to make appropriate orders. The ODPP asserts that the trial court was not entitled to review the bond terms as that would amount to an illegality as it reviewed orders of a senior court hence the Principal Magistrate made orders without jurisdiction.
13. This court was urged to set aside and revise the orders of March 8, 2023 and revert the initial bond terms as and until the application is pursued through proper legal channels.
14. Counsel for the accused person left the issue to the court to peruse the file from the lower court and make appropriate orders.

Determination

15. I have considered the application for revision of the trial court's order of March 8, 2023. I have called for and perused the trial court record and appraised myself of the law and practice in matters revision.
16. Section 362 of the *Criminal Procedure Code* empowers this court to call for and examine the record of any criminal proceedings before any subordinate court for the purposes of the court 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.

17. Upon calling into this court the subordinate court's record as stipulated above, Section 364 of the [Criminal Procedure Code](#) provides for what orders this court can make. The section is also clear that no order shall be made to the prejudice of an accused person unless he has had the opportunity to be heard either personally or by an advocate in his own defence, with an exception where an order made relates to the lower court failing to pass sentence which it was required to pass under the written law creating the offence conceived.
18. As I write this ruling, I am also alive to the supervisory jurisdiction of this court under Article 165(6) and (7) of the [Constitution](#) which empowers this court to call for the records of the subordinate courts for examination and giving directions or orders this court considers appropriate to ensure the fair administration of justice.
19. Having stated all the above principles of law, the question I must answer is whether this court should grant the order sought namely set aside the order of March 8, 2023 that reviewed bond terms for the accused to cash bail of Kshs 500,000 and what other orders/directions should this court make.
20. I observe that apart from the order of review complained of, there is no ruling on the request for review of bond terms in the matter by the Magistrate who made the order complained of.
21. The law regarding release of accused persons on bond is embedded in Article 49(1) (h) of the [Constitution](#) which guarantees an arrested person the right to be released on bond or bail, as reasonable condition, pending a charge or trial, unless there are compelling reasons not to be released.
22. The right to be released on bail pending trial, from the above provisions of the constitution, is nonetheless, not absolute. There must, however, be compelling reasons not to release the accused/ arrested person on bond pending trial. The courts have pronounced themselves on what is compelling reason and held that the high probability of an accused person not turning up for trial is a compelling reason, as well as the nature and seriousness of the offence. Since the Constitution does not provide categories of cases where bond can be denied and those that bond can be granted automatically, Section 123A of the [Criminal Procedure Code](#) gives parameters for the grant of bail. The right to a fair hearing is also achieved when an accused is released on bail to enable them prepare adequately for their trial.
23. In the instant case, the issue is not grant of or denial of bail but the review of bond terms by a Magistrate of a lower rank to the Hon Magistrate who initially granted bond after delivering a detailed ruling following serious objection as to the release of the accused person on bond pending trial.
24. The order for bail pending trial was made following a Pre-bail assessment report being filed by a Probation Officer to the effect that the accused has a fixed abode, is employed as a long distance driver, is a Kenyan resident of Kisumu County where his family reside and also in Mombasa where his wife and child live by virtue of his mobile employment which involves him travel out of the country more often.
25. Bond when granted, from the spirit and letter of Article 49 of the [Constitution](#), should be reasonable. What that means is that if bond is unreasonable, then it is tantamount to denial of bond all together.
26. Exorbitant bond terms will obviously deny the accused person the opportunity to be released on bond because of the inability to afford. That is not the intention of the law.
27. The accused is however expected to post sufficient security for his appearance in court at the time and place designated by the court to answer the criminal charges. The law presumes an accused person innocent until proved guilty. The seriousness of the offence is therefore just one of the factors to be considered in the order granting an accused person bond pending trial.



28. In the instant matter, the narcotics allegedly trafficked by the accused are valued at over 26 million. He was granted bond of 5 million which is just $\frac{1}{5}$ of the value of the Narcotics allegedly trafficked.
29. The Hon Magistrate who took plea and granted bail after hearing the prosecution and the defence counsel did then refer the file to be mentioned by another court, being court No. 2 and hence court number 2 was well seized of the file when he mentioned the matter which already had a hearing date fixed for May 10, 2023 and upon the accused requesting for review of bond terms, it appears that the court had not perused the file so he initially called for a pre-bail report but was quickly reminded by the prosecution counsel that a pre-bail report had already been filed. The magistrate then set the matter for mention to reconsider the plea for review of bond terms. At that stage, the prosecution counsel did not object to the court revisiting the issue of bond terms. The court then reviewed the bond terms. What is however not clear from the reviewed bond term is whether the surety bond still stands since the order only states:

“Cash bail is set at Kshs 500,000.”

30. I say not clear because the order made by Hon. Yalwala only provided for surety bond without the alternative of cash bail. The magistrate reviewing bond terms did not indicate whether the cash bail was an alternative to the surety bond earlier on granted.
31. Another issue that needs clarity is that on February 22, 2023 when the matter went before Hon J Mitey, SRM, albeit the coram is clear that it was Hon J Mitey SRM, in the typed proceedings availed to this court, the magistrate signing the proceedings for that day is J Kimetto, Principal Magistrate and yet on March 8, 2023 when the matter came up for mention, the proceedings show that the presiding magistrate was J. Kimetto, Principal Magistrate and he endorsed on the proceedings and set the matter for mention on March 23, 2023 and reviewed the bond terms by setting the cash bail at Kshs 500,000 and that is what provoked this request for review.
32. Surprisingly, anybody reading the proceedings for February 22, 2023 and March 8, 2023 and casually observing the signatures for the Hon. Magistrates who presided over the proceedings, the said signatures are the same even without inviting a handwriting expert to examine them.
33. My conclusion on this issue is that it is possible that it is the court clerk, a Mr Otieno, whose handwriting is hardly readable and is just scribbled as he wrote the coram for the court on February 22, 2023 and March 8, 2023 and wrote wrong coram especially on March 22, 2023 to the effect that the presiding magistrate was J Mitey, SRM when it was Hon J Kimetto, or vice versa. The other assumption I can make and deduce is that J Kimetto and J Mitey could be one and the same person but it cannot be true that J Mitey, SRM is the one presiding and making orders which are signed off in the same handwriting by J Kimetto, Principal Magistrate.
34. After calling into this court the trial court file and perusing the same, I directed the ODPP and the defence counsel to appear before me and they did appear on March 24, 2023.
35. Mr Onsongo Advocate intimated to court that the court can examine the law and make its decision in the matter. On the part of the ODPP, Mr Okoth SPPC submitted that the court handling the case did not allocate the file to court No 2 for hearing but for mention only. That he did not know if Mitey is Kimetto and that even the Principal Magistrate has no jurisdiction to handle the matter. He urged this court to make appropriate orders.



36. I have already said enough of what the trial court record says. There is however the question of whether the court that took plea did assign the matter to court No 2 for hearing and between Hon J Mitey and J Kimetto who was presiding Judicial Officer for court 2.
37. Ordinarily, if the court station is presided over by an SPM, then if there are magistrates in the ranks of PM and SRM, then court one would be the SPM, Court 2 would be the PM and court 3 would be SRM in that descending order. I therefore believe that court 2 is the PM's court and since Hon. Kimetto signed off as PM, he is the Hon Magistrate who mentioned the matter on March 8, 2023 and set cash bail at Kshs 500,000. The next question is whether the file was transferred to court 2. Although the record shows that the SPM directed court 2 to mention the matter on February 22, 2023, there is no clear order that the matter was to be heard before court 2 since the SPM had already fixed a hearing date and if his intention was to assign the file to court 2 for hearing, he would have clearly said so. I therefore find that the matter was only set for mention before court 2 and not for hearing as fixed by the SPM.
38. The next question is, even that assuming the matter was reassigned to court 2 for hearing or for mention only, either way, did court 2, presided over by PM have jurisdiction to hear and determine the criminal case facing the accused person? To answer this question, I must revisit the law under which the accused is charged and the jurisdiction of magistrate's courts.
39. The accused is charged under Section 4(a) (i) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No 4 of 1994 as amended by the 2022 Act – [Narcotic Drugs and Psychotropic Substances Act](#).
40. The quantity of drugs allegedly found being trafficked by the accused is 887.5kg whose street value is estimated at Kshs 26,625,000. Under the said Act, upon conviction and in this case, without prejudice to the presumption of innocence of the accused herein, the sentence likely to be imposed as per the Act is as follows:-
- “ 4. Any person who traffics in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable –
- (a) in respect of any narcotic drug or psychotropic substance –
- (ii) where the person is in possession of more than 100 grams, to a fine not less than fifty million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment.”
41. In other words, in the case before the trial court, if the accused person is tried and found to be guilty of the charge facing him and is convicted for the offence charged, under Section 4(a) (ii) above, he would be liable to a fine of not less than Kshs 50 million or 3 times the market value of the narcotic drug or psychotropic substances which in this case is 26,625,000 x 3 = 79,875,000 or to imprisonment for fifty (50) years or to both such fine and imprisonment.
42. The jurisdiction of the magistrates is stipulated in the [Magistrate's Courts Act](#) No 26 of 2015. The criminal jurisdiction of the [Magistrate's Court](#) is stipulated in the Act at section 6 which provides as follows:



6. A magistrate court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by:
 - (a) The *Criminal Procedure Code* (cap 75); or
 - (b) Any other written law.
43. Section 2 of the *Narcotic and Psychotropic Substances Act* defines court as a court of competent jurisdiction.
44. In criminal cases, the question of pecuniary jurisdiction does not matter, unlike the criminal jurisdiction. However, considering that the sentence prescribed under the relevant law, combined with the attendant fine are in the range of fifty (50) years and fines of over 79 million, it is appropriate that a more Senior Magistrate handles the matter. It is however not lost to this court that even if a junior magistrate handled the case until the end, he or she would still be permitted to refer the case to a more Senior Magistrate to impose an appropriate sentence.
45. However, in the present scenario where a magistrate reversed a well thought out detailed ruling of a senior magistrate on the issue of bail pending trial, I find that the subsequent magistrate overstepped his mandate. He should have returned the file to the senior magistrate to review the bond terms given earlier.
46. For the above reasons, I find that the second magistrate acted without jurisdiction and that the order of March 8, 2023 reviewing bond granted to the accused was made devoid of jurisdiction. I further find it appropriate to remove the matter from the jurisdiction of the SPM's court Maseno to the Chief Magistrate's court at Kisumu for hearing and final determination. This move will guarantee the transparency, accountability and integrity of the judicial proceedings.
47. Consequently, I hereby set aside the order setting out cash bail and Kshs 500,000 and reinstate the order on surety.
48. The accused is at liberty to apply for review of the bond terms before Kisumu Chief Magistrate's Court.
49. I hereby order that Maseno SPM Criminal Case No. E041 of 2023 which is already before this court shall forthwith be placed before the Chief Magistrate – Head of Station at Kisumu Law Courts for hearing and final determination.
50. Mention on April 4, 2023 before Chief Magistrate Kisumu.
51. I so order.
52. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF MARCH, 2023

R. E. ABURILI

JUDGE

