



**Director of Public Prosecutions v Bajber & 2 others (Criminal Revision E168 of 2023) [2023] KEHC 21628 (KLR) (Crim) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21628 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E168 OF 2023  
DR KAVEDZA, J  
JULY 31, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**AND**

**SAMYA ABDALLA SALIM BAJBER ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED AHMED BAKRY ..... 2<sup>ND</sup> RESPONDENT**

**HAMID AHMED BAKRY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for revision of the ruling delivered on 3rd March 2023 by Hon. G. Shikwe PM in Milimani Magistrates Court Application No. E247 of 2023)*

**RULING**

1. The notice of motion for determination is dated 6<sup>th</sup> March 2023. In the application, the director of public prosecutions seeks a revision against the ruling of the trial court granting the 1<sup>st</sup> and 3<sup>rd</sup> respondents bail and substitute the same with an order declining to admit them to bail. In the alternative, the applicant prays that the court reviews the bail terms granted to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to reflect and/or be commensurate with the value of the subject matter.
2. The gravamen of the application is that on January 10, 2023, the United Republic of Tanzania (URT) made a request to the Republic of Kenya for the extradition of the 1st and 3rd Respondents against whom an International Warrant of Arrest had been issued on 15th November 2022 by the court in D'Salaam for reciprocal backing. Consequently, the 1st and 3rd Respondents were arrested on November 25, 2022 and arraigned on November 28, 2022 at Kiambu Chief Magistrates Court vide Miscellaneous Application No. E509 of 2022. They are facing charges of obtaining money USD



725,000.00 the equivalent of Kshs. 90,625,000.00 and Tshs. 2.1 billion by false pretences contrary to section 302 of the Penal Code in the URT.

3. The prosecution sought and was granted detention orders for 14 days. Subsequently, the applicant commenced Extradition proceedings against the 1st and 3rd Respondents in Milimani Chief Magistrate's Court Application No. E247 of 2023. In the said proceedings, the respondents made an application for bail pending the hearing and determination of their extradition proceedings. In the ruling delivered on 3<sup>rd</sup> March 2023, the court made a determination that the applicant herein had not demonstrated any compelling reasons to warrant the denial of bail to the 1<sup>st</sup> and 3<sup>rd</sup> respondents. They were each admitted to a bond of Kshs. 500,000/= with one surety of a similar amount. In the alternative, they were admitted to pay a cash bail of Kshs. 200,000/= each. They were also directed to deposit their passports with the court pending the hearing and determination of the extradition proceedings.
4. The applicant is now challenging the ruling by the court in the extradition proceedings. It is contended that the 1st and 3rd Respondents are a flight risk as they hold Passport Numbers AK0430055 and CK37409 respectively. Further, they own a travel company which is an incentive to flee the country. It is argued that the offences for which the extradition is sought, carry a cumulative sentence of 21 years and they would be tempted to flee from the jurisdiction of the court.
5. The applicant maintains that in the impugned ruling, the court considered irrelevant factors such as the duration that the extradition proceedings may take, an issue that was not raised by either of the parties. In addition, the trial court failed to consider that there were changed circumstances since a formal extradition request had been issued as opposed to the preceding period when they had been admitted on a police bond of Kshs. 30,000.
6. The grant of bail pending trial is a discretionary power bestowed upon the court before which an arrested person is presented. This court is called upon to determine whether it should interfere with the exercise of that discretion by the extradition court admitting the 1<sup>st</sup> and 3<sup>rd</sup> respondents to bail. I have considered the respective submissions of the parties herein, the authorities relied on, and the applicable law.

#### **Analysis and determination.**

7. This court's revision jurisdiction is circumscribed under section 362 of the [Criminal Procedure Code](#) to the determination of the legality, correctness, or propriety of any finding, or order recorded or passed by a subordinate court. In exercising that jurisdiction, the court notes that the orders sought to be revised were made in exercise of the trial court's discretion. Accordingly, this Court can only interfere with such discretion where it is shown it was not exercised judiciously.
8. The applicant argues that the trial court's decision was wrong for failing to find that the prosecution had established compelling reasons to warrant the denial of bail to the Respondents. It is contended that the 1st and 3rd Respondents are a flight risk as they possess passports and owing to their travel history, are likely to abscond trial. The applicant further argues that the trial court failed to consider the seriousness of the offence. That if found guilty, the respondents are liable to an imprisonment term of 21 years.
9. In an application for bail pending trial, the primary consideration is whether the accused person will avail himself to court for the trial. See [Republic vs Sabit Mamuor Deng & another](#) (2020) eKLR and [Republic vs John Kabindi Karisa & 2 others](#) (2010) eKLR. It is not disputed that the 1st and 3rd respondents who are husband and wife with have five (5) issues, are Kenyan Citizens. The concerns raised by the applicant that the respondents are likely to abscond if released on bail pending trial



because they have no fixed abode and are due to their travel history is not supported by evidence. It was clear that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were arrested at their home in Mombasa where they live with their children.

10. While the prosecution's apprehension is justified that the respondents may likely abscond because of the punishment they would face if they are convicted, this court is of the view that the concern can be addressed by granting appropriate conditions for release on bail. At page 20 paragraph 2 of the ruling, the learned magistrate noted that:

“It goes without saying and bears repeating that in most of the cases if not all that have been quoted above are of more serious offences where the subjects of those rulings were facing charges of murder which is a capital offence...yet a good number qualified and were granted bond by the High Court. The applicant herein is yet to furnish me with any authority in our jurisdiction where an accused person facing a charge of obtaining by false pretences is denied bond based solely on the reason of the seriousness of the charge the amounts involved notwithstanding.”

11. Although the seriousness of a charge is not the only consideration for determination on whether to deny or grant bail, it would be a travesty of justice to trivialize the rights of the victims simply because the offence under investigation does not involve loss of life. In my view, investigations for the offence of obtaining money by false pretences in the sum equivalent to Kshs. 90 million shillings cannot be said to be a minor offence.
12. The applicant further faults the subordinate court for failing to appreciate the changed-circumstances test as laid in *Republic v Diana Said Suleiman & Another* [2014] eKLR. It is argued that a formal extradition request has since been made and extradition proceedings are on course, and therefore the bond terms should reflect the changed circumstances. In its ruling, the court was of the view that the commencement of extradition proceedings did not occasion a change in circumstances to warrant the cancellation of their bond.
13. The changed circumstances test is one of common sense where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or the review of terms thereof. The court reserves the power to revisit the issue in the interest of justice not only for the accused but also for the complainant and society at large. In my view, contrary to the findings by the subordinate court, the commencement of extradition proceedings, occasioned a change of circumstances to warrant a review of the bond terms to be proportionate to the offence the respondents are charged with.
14. With regards to the proportionality of the bail terms granted by the court vis-à-vis the value of the subject matter, it is argued that the terms issued were too lenient in the circumstances of the case. The bail and bond policy guidelines, 2015 provide that bail conditions should be reasonable, proportionate to the offence for which bail is granted, appropriate to the risks in relation to which they are imposed, and take into account the individual circumstances of the accused person.
15. The test of proportionality plays a role in deciding whether to grant or deny bail, as well as balancing the competing rights between an accused and the victims. See articles 24(1)(e) and 50 (9) article of *the Constitution*. *The constitution* must therefore be interpreted holistically and as an integrated whole so that the rights sustain each other as opposed to subverting each other. That is to say, the rights of the accused to bail on the one hand, and the rights of the victims and the interest of justice, on the other



hand, have to be considered. Lesiit, J (as she then was) in the case of *Republic v Richard David Alden* [2016] eKLR above cited, further stated:

“Under the guidelines, the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.” (emphasis mine) And I dare add that any bond terms imposed must be geared towards safeguarding the integrity and credibility of the criminal justice system.

16. In applying the proportionality test, I have considered that the 1<sup>st</sup> and 3<sup>rd</sup> respondents are facing extradition proceedings. They are also accused persons in a court in Tanzania where they are facing charges of allegedly obtaining money USD 725,000.00 or the equivalent of Kshs. 90,625,000.00. The question for determination is whether the bond of Kshs. 500,000 or cash bail of Kshs. 200,000 is proportionate to the investigations in question?

17. Whereas the bond should not be excessive to amount to a denial, it should also not be so little to entice the accused to abscond. In the case of *Republic v Danfornd Kabage Mwangi* [2016] eKLR Mativo J(as he then was) discussed the need to weigh an accused person's right to bail vis-à-vis the interests of the public and the reasons given in opposition to granting bail. He observed as follows:

“Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive...”

18. The gravity of the offence as a consideration was appreciated by Mbogholi Msagha, J in Criminal Application No. 319 of 2002 *Priscilla Jemutai Kolonge v Republic* (unreported) at page 3, wherein he held as follows:

“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”

19. From the foregoing holdings, the likelihood that an accused person may abscond because of the seriousness of the offence is a factor that should be considered by the court. I am therefore persuaded that the terms issued by the trial court were too lenient in the circumstances. Even though the respondents are presumed innocent until the contrary is proven, the court must take into account the value of the subject matter involved. In so doing, the court strikes a balance between the right of the accused to bail on the one hand and the interest of the victims who play a critical role in the critical justice system and the public on the other hand.

20. Lastly, the applicant faults the extradition court for having taken into account irrelevant factors in its ruling, factors which were never pleaded by any of the parties. That is, the duration of extradition proceedings usually take in this country before they are concluded. To this end, he found that it would



not serve the ends of justice to keep the respondents in custody for an indeterminate period pending the conclusion of the proceedings. To my mind, the observation by the court was consequent upon his comprehensive analysis and finding that the applicant herein had not established any compelling reason to warrant the denial of bail terms.

21. The subordinate court observed that the extradition process would likely be protracted. As much as I find nothing wrong with this observation, I do not entirely agree with the sentiments expressed by the trial magistrate. Extradition proceedings are criminal in nature and I see no reason why they should be protracted. On the contrary, being a cross-border investigation, the hearing should be expedited to safeguard the integrity of the criminal justice system of this country.
22. For the foregoing reasons, I find that the trial court did not properly exercise its discretion by granting very lenient bond terms. It is trite that a court must be reluctant to interfere with the exercise of judicial discretion of a subordinate court unless it is convinced that doing so would be ensuring that justice is upheld and served properly. In this case, I am persuaded that interference with the trial court's discretion is necessary to ensure the furtherance of the administration of justice. I, therefore, find that the application dated March 6, 2022 is merited and substitute the bond terms issued by the trial court with the following orders:-
  - i. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are each admitted to a bond of Kshs. 10,000,000/= with a surety of a similar amount.
  - ii. In the alternative, to (i) above, they shall be admitted to a cash bail of Kshs. 5,000,000/= each.
  - iii. The order to deposit of their passports in court shall remain in force.
  - iv. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are hereby directed to appear before the trial court within 7 days from the date hereof for processing of bond terms on August 10, 2023.
  - v. In default to (iv) above, a warrant of arrest to issue against the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

Orders accordingly.

**RULING READ, DELIVERED AND SIGNED THIS 31ST DAY OF JULY 2023**

.....

**D. KAVEDZA**

**JUDGE**

**In the presence of**

Mr. Owiti for the applicant/ State.

Mr. Omwenga for the complainants.

Joy C/A.

