



**Njuguna & 2 others v Republic (Criminal Revision E006 of 2023)
[2023] KEHC 20935 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E006 OF 2023
WM MUSYOKA, J
JULY 28, 2023**

BETWEEN

BRIAN NJUGUNA 1ST APPLICANT

EVANS ODHIAMBO APOM 2ND APPLICANT

IBRAHIM ANWAI 3RD APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision arising from order made, in Busia CMCCRC No. E785 of 2023,
by Hon. PA Olenko, Senior Principal Magistrate, SPM, on 10th May 2023)*

RULING

1. The proceedings herein were initiated by way of a Motion, dated June 8, 2023, and lodged herein on June 13, 2023. It seeks that the excessive bond terms set by the trial court in Busia CMCCRC No. E785 of 2023 be varied. The principal grounds, on the face of the originating Motion, are that the bond terms are so excessive as to be tantamount to denying bond, the offences charged and the bond terms do not marry.
2. The background, given in the supporting affidavit sworn by, Erick Jumba, the Advocate for the applicants, is that the trial court imposed a bond of Kshs. 5,000,000.00 each, which the applicants have been unable to process. A copy of the charge sheet is attached, showing that the applicants face charges of forgery and making documents without authority.
3. The respondent has reacted to the Motion, vide an affidavit sworn by Shirley Chepkonga, Principal Prosecution Counsel, on June 23, 2023. She avers that the bond terms were not excessive, and were commensurate with the seriousness of the offences charged, and the severity of the sentences available



in the event of conviction. She further avers that the grant of bond is discretionary, and, in any case, the applicants have not sought variation of the bond terms at the trial court.

4. The Motion was argued orally on July 5, 2023. *Victor Kiprono Ngeno v The Office of the Director of Public Prosecutions* [2021] eKLR (Lagat-Korir, J) and *Kimanzi & another v Republic* [2022] KEHC 12223 (KLR) (Mutende, J) were cited.
5. The principal argument against the bond terms imposed is that they were excessive. I struggle to understand the sense in which the applicants considered them excessive, as no effort was made in the affidavit sworn in support of the Motion, nor in the oral submissions, to demonstrate how and why the bond terms were excessive. Bond is granted at the discretion of the court, after considering a variety of factors. The duty was on the applicants to demonstrate that the trial court did not take into account the relevant considerations, and if it did it erred in principle. He who alleges must justify their allegations.
6. Secondly, it is alleged, in the affidavit, that the applicants are unable to process the bond terms. No evidence is provided. Mr. Jumba is not qualified to make that statement. He is not one of the applicants. The bond terms were not made with respect to him. He has not averred that he got that information from the applicants. He just cannot make such a statement. It amounts to mere speculation, if he cannot state where he got that information. It is for such reasons that Advocates are discouraged from swearing affidavits on behalf of their clients, especially on matters that touch of facts that ought to be in the personal or peculiar knowledge of their clients. Although these are criminal proceedings, Order 19 Rule 3 of the *Civil Procedure Rules* would apply here, to guide on what affidavits filed in court proceedings ought to be confined to.
7. Thirdly, admission to bond is discretionary, and the orders are not cast in stone. The trial court has discretion to vary the terms of the bond. The applicants have not demonstrated that they made such an application for variation of the bond terms, to the court which imposed them, in the first instance, before coming to the High Court, upon refusal by the trial court to accede to their request.
8. I am not persuaded that there is material before me upon which I can find that the orders of May 10, 2023 were improper, irregular, incorrect or illegal. The Motion, dated June 8, 2023, is hereby dismissed. The trial court shall be returned to the said court. the instant file to be closed. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28TH DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Jumba, instructed by Balongo & Company, Advocates for the applicants.

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the respondent.

