



REPUBLIC OF KENYA



KENYA LAW
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**Kizungu & another v Republic (Criminal Appeal 22 of 2023)
[2023] KEHC 26635 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 22 OF 2023
DR KAVEDZA, J
DECEMBER 20, 2023**

BETWEEN

NANCY INDOVERIA KIZUNGU 1ST APPLICANT

EUGENE OTIENDE JUMBA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed a notice of motion dated 21st September 2023, seeking an order to set aside the decision delivered by the Chief Magistrate’s Court sitting at JKIA on 31st August 2023 and admit the applicant to reasonable bail terms. The application is supported by an affidavit sworn by the applicants’ advocate Danstan Omari of a similar date.
2. The averments made in support of the application are that: The applicants were jointly charged with the offence of being in trafficking in narcotic drugs contrary to section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994 as Amended with Narcotics Act 2022 and the offence of possession of proceeds of crime contrary to section 4 (c) as read with section 16 (1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act*, 2009. They pleaded not guilty and applied to be admitted to reasonable bail terms. Vide a ruling dated 31st August 2023, the trial court denied them bond.
3. The applicants through their learned counsel contended that the trial magistrate alienated the applicants’ presumption of innocence and condemned the applicants. That the applicants have been denied the right to bail unjustly. The apprehension that the applicants would interfere with investigations is unfounded. In addition, the 1st applicant’s health has been deteriorating since her incarceration. The applicants undertake to attend court as and when required.



4. In response, the respondent filed grounds of opposition dated 22nd November 2023. The grounds raised were that there were compelling reasons to deny the applicant bail/bond. The trial court appreciated the presumption of innocence. The applicants have neither established nor suggested any basis to interfere with the trial court's decision. The application is frivolous, vexatious, and an abuse of the legal process.
5. The applicants filed written submissions in support of their motion. They submitted that for bail/bond to be denied, there has to exist, compelling reasons. That the affidavit to oppose the bond was merely speculative with no cogent evidence to support the averments.
6. It was argued that the primary consideration for admittance to bail is to secure the presence of an accused in court during their trial. The accused persons are ready and willing to attend court during their trial if admitted to reasonable bail terms. Their places of abode are well known. The 1st applicant is also sickly and in need of medical attention pending trial. They prayed to be admitted to reasonable bail terms. They cited the cases of HCCR 8 of 2016 (Nyeri) R v Danford Kabage Mwangi and Job Kenya Musonu v Republic (Nairobi High Court criminal application no 399 of 2012) in support of their position.
7. The respondent through learned prosecution counsel submitted that the charges against the applicants arise from organised crime. It was a lucrative enterprise that created an incentive for the offender to abscond. In addition, the applicants escaped a police operation and do not have a permanent fixed abode. It would therefore be difficult to trace them if they abscond. Learned prosecution counsel maintained that the applicants had not demonstrated incorrectness, illegality, and impropriety of the trial court's decision in denying the applicants' bail. She urged the court to dismiss the application.

Analysis and determination.

8. I have considered, the application, the response, the written submissions, and the applicable law. The issue for determination is whether there were compelling reasons to deny the applicant reasonable bail/bond.
9. The revisional jurisdiction of this court is donated by Section 362 of the Criminal Procedure Code which provides that:

“The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of 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.”
10. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order or finding is tainted with illegality, errors of law, or impropriety or that there was irregularity in the proceedings that gave rise to the impugned order, finding or decision.
11. The trial court's record shows that on 28th August 2023, the applicants and two other co-accused took plea and denied the charges preferred against them. The trial court heard an application for bail pending trial. On 31st August 2023, the applicants were denied bail/bond. On the other hand, their co-accused were granted bail. The reason for the denial of bail was that they were a flight risk given their involvement in the criminal enterprise of drug trafficking and the charge of being in possession of proceeds of crime. The court noted that these were compelling reasons to deny the applicants the enjoyment of their constitutional rights to bail.



12. The *Constitution* specifically requires under Article 49 (h) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the *Criminal Procedure Code*, Article 49 (h) places the burden of proof on the state to demonstrate compelling reasons.
13. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of the *Constitution*, the courts are to be guided by the provisions of section 123A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides:
- “In such a determination the courts are to factor the following exceptions to limit the right to bail;
- (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfilment of obligations under previous grant of bail;
 - (d) The strength of the evidence of his having committed the offence:
- (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;
- (a) Has previously been granted bail and has failed to surrender to custody if released on bail, it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own good.
14. In the *Bail and Bond Policy Guidelines*, it is restated as a general guideline in Paragraph 4.9 that:
- “In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the *Constitution* of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”
15. Moreover, by dint of Article 50(2) of the *Constitution*, every accused person is entitled to the presumption of innocence. Hence, in the *Bail and Bond Policy Guidelines*, it is recommended that:
- The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.
16. From the record of the trial court, the prosecution through an affidavit to oppose bond sworn by Sgt Stephen Chesire averred that the 1st applicant had been on the run before her arrest. In addition, the 2nd applicant lacked identification documents during his arrest and it would be difficult to trace him if released. It was further contended that the applicants lacked a permanent fixed abode and they were a flight risk.



17. The main concern raised by the state was that the applicants were a flight risk and therefore unlikely to turn up for trial. Bearing in mind that the standard of proof at this stage is simply on a balance of probabilities. I am not persuaded that, given the circumstances in which the two accused persons were arrested, it is more probable than not that they were intent on fleeing from the jurisdiction of the Court.
18. It is also doubtful that the applicants have no fixed abode in Kenya, being Kenyan residents and citizens. I concur with the pronouncements of the learned counsel for the applicants, as articulated in the affidavit in opposition to bond. It is acknowledged that the law enforcement agency executed a search within the confines of the applicants' premises. It is perplexing, however, that they now claim that they had no fixed abode thus contradicting their own solemn affirmations.
19. As to equating living in rental premises to having no fixed abode, surely that cannot be a reason for denial of bond. Most urban dwellers do not live in their own houses. Such a ground would mean that anyone living in a rental house would be found to have no fixed place of abode. No evidence has been placed before the court to show that the accused persons change residences so frequently that they can be assigned such a label.
20. The trial magistrate also contended that the applicants are a flight risk given their involvement in the alleged criminal enterprise of drug trafficking and the charge of being in possession of proceeds of crime. As to the nature of the offence and the seriousness of the punishment likely to be meted if the accused persons are ultimately found guilty, there is no gainsaying that the offences are serious both locally and internationally.
21. Indeed, the seriousness of the charge and the possible outcome of a conviction, may be an incentive for an accused to jump bail was a key consideration in *Watoro v Republic* [1991] KLR 220, where it was held thus:

“The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody ... the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases...the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction...”

22. However, in the current constitutional order, transnational crimes are offences like any other for the purposes of bail pending trial. Therefore, a bail application in such cases, has to be looked at from the prism of Article 49(1)(h) of the *Constitution*. The key question that takes centre stage is whether the accused persons will turn up for their trial if released on bond. I, find apt the expressions of Hon Ibrahim, J (as he then was) in *Republic v John Kabindi Karisa & 2 others* [2010] eKLR that:

“This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the *Criminal Procedure Code* which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these cases, the mandatory sentences provided by law is Death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any



offence under the Penal Code including those that attract the death sentence e.g. murder, the same is bailable. A murder suspect has a Constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.”

23. From the foregoing jurisprudence, the law on bail/bond has crystallised. The mere fact that the applicants are facing charges that are transnational in nature is not a reason to deny them bail pending trial. It was the duty of the prosecution to demonstrate to the court that the applicants are frequent international travellers, by producing their respective travel history.
24. Secondly, a pre-bail report would have established whether the applicants have a fixed abode as well as close ties in the society, to authenticate the averments of the investigating officer.
25. From the foregoing, I find merit in the application and it is hereby allowed on terms that the orders made by the trial court in the ruling delivered on 31st August 2023 denying the applicants herein bail are hereby set aside and consequently are substituted by the following orders:
 - i. Nancy Indoveria Kizungu and Eugene Otiende Jumba are each granted a cash bail of Kshs 1,000,000 and a bond of Kshs 3,000,000 together with one surety of a similar amount.
 - ii. The applicants are directed to report to the investigating officer every fortnight until the conclusion of their trial.
 - iii. The applicants are directed to deposit their passports (if any) with the trial court.
 - iv. The Director General Immigration is directed not to issue passports to the applicants and/or replace them.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2023.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Otieno for the state.

Mr. Omari and Ms. Mativo for the Applicants

Joy Court Assistant.

