



**Sote & 3 others v Republic (Miscellaneous Criminal Application E011 & E019 of 2023
(Consolidated)) [2023] KEHC 27031 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E011 & E019 OF 2023 (CONSOLIDATED)
DR KAVEDZA, J
DECEMBER 20, 2023**

BETWEEN

**PAUL KIVULI SOTE 1ST APPLICANT
RAWLINGS INNOCENT ODONDI 2ND APPLICANT
MOSES LIYAI IMBWANGA 3RD APPLICANT
WESLEY SILVANUS ANWANYA 4TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed a chamber summons application dated 8th December 2023, seeking an order to alter, reverse, and/or vary the order issued on 19th September 2023 and vary the bail terms granted. The application is premised on the grounds in the face of the application and supported by an affidavit sworn by the applicants' advocate of a similar date.
2. The averments made are that the applicants were jointly charged with the offence of trafficking in narcotic substances contrary to section 4 (a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) no. 4 of 1994 before the Chief Magistrates Court sitting at JKIA. They were denied bail pending trial. They applied to the High Court to revise the orders of denial of bail/bond. Vide a ruling delivered by Mutende J on 19th September 2023 in High Court criminal revision no. E535 of 2023, the court granted each of the applicants a cash bail of Kshs. 80 million with 3 sureties of a similar amount.
3. It is this bond terms that the applicants claims are punitive hence their inability to meet the same. They averred that they have been in in custody since their arrest on 17th June 2023 and if their application is allowed, that they are willing to abide by any reasonable bail/bond terms that the court may grant.



4. The issue to be determined is whether the terms of bond/ bail set should be reviewed. This is not an application for revision but a variation of the bond terms set by this court. In the case of *Republic vs. Diana Suleiman Said & Another* [2014] eKLR Muriithi J was of the view that the court does not become functus officio on a first application for bond, that Section 123 of the *Criminal Procedure Code* (CPC) (as amended) following the Constitution of Kenya, 2010 makes bail available at all times.
5. In this case, the accused persons have remained in remand custody despite the variation of the initial bond terms which is proof that they cannot find a surety or raise the bail terms imposed. In the case of *Harish Mawjee & Another vs. Republic* [2020] eKLR, it was stated that:

“... 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 ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has a right to seek review of bond terms from trial court or high court or appeal.”(Emphasis added)
6. The court exercises this duty in furtherance of the provisions of Article 49 (1) (h) of the *Constitution* which provides that an arrested person has the right to be released on bond or bail on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released. Although the court can grant and /or review bond terms at any stage of the proceedings in furtherance of the accused’s constitutional right under Article 49 of *the Constitution*, due regard should be given to the gravity of the offence. Importantly, any bond terms granted by the court must be balanced against any injustice or prejudice that would likely be suffered by the society and/or the victim. It is trite law that that the paramount principle to be considered in granting bail, is to secure the attendance of the accused during trial. Its for this reason that bail terms set should neither be so lenient as to entice the accused to abscond nor should they be so excessive so as to amount to ‘indirect’ denial.
7. In this case, this court already found that the accused persons were eligible for bond. The court also found that the accused persons were not a flight risk and there were no alleged threats to the witnesses. Therefore, whether the witnesses are likely to be threatened or influenced and whether the accused persons are a flight risk are issues already determined earlier by this court.
8. Section 123 (2) of the *Criminal Procedure Code* provides that:

The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
9. The Judiciary bail bond policy guidelines similarly provide that bond terms shall be reasonable. The accused persons face five counts of offences related to trafficking in narcotic drugs. Although bail terms must be reasonable to enable the accused person to comply and benefit from his constitutional right, the court must also not be seen to encourage absconding and thus interfere with the administration of justice.
10. The Bail and Bond Policy Guidelines at page 9 paragraph 3.1. (d) provides that:

“Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they



should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”

11. I find the holding in *Harish Mawjee & Another vs. Republic* (supra), relevant to the circumstances of this case. The applicants herein were arrested on 17th June 2023 and arraigned before the trial court where they were denied bail. Upon an application for revision before the High Court they were granted bond. However, they have been unable to meet the bond terms set by the court hence, the application for review. It is my view that their inability to get out of prison despite having been granted bond of Kshs. 80 million with three sureties each, implies that they have been unable to raise the said bond.
12. As was held in the case of *Harish Mawjee & Another vs. Republic* (supra), and a myriad of other decisions, this court is vested with jurisdiction to review its orders if there are changed circumstances. The changed circumstances in this case is that although the applicants have been granted bail, they are unable to meet the terms.
13. Consequently, I exercise my inherent jurisdiction and review the orders issued by this court on 19th September 2023, which are hereby set aside and substituted with an order granting each of the applicants a bond of Kshs. 8,000,000 with one surety of a similar amount. The sureties shall be approved by the trial court.

Orders accordingly.

RULING DATED AND DELIVERED THIS 20TH DAY OF DECEMBER 2023

D. KAVEDZA

JUDGE

In the presence of:

Mr. Otieno for the State

Ogutu for the Applicant

Joy Court Assistant.

