



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC CRIMINAL APPLN NO. E027 OF 2022**

**ELIUD MULI MUSYOKA ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant, *Eliud Muli Musyoka*, was on 10<sup>th</sup> January 2022 arraigned before the Makadara Chief Magistrate's Court in Criminal Case No. 101 of 2022 on a charge of obtaining money by false pretences contrary to *Section 313* of the *Penal Code*.

2. The particulars of the offence allege that on diverse dates between March 2018 and 24<sup>th</sup> October 2021, at Kayole Junction in Kayole Estate in Njiru sub-county within Nairobi County, with intent to defraud, the applicant obtained a total sum of KShs.2,774,157 from *Grace Kavata Maingi* by falsely pretending that he was in a position to transfer ownership of Plot Nos. 1444, 1452 and 3174 Mitaboni, from her husband's name *Maingi Muli Mbiti* to her name through transmission, a fact he knew to be false.

3. Upon denying the charges, the trial court granted him a bond of KShs.2,000,000 but did not specify whether it was a personal bond or bond with surety and if so, how many.

However, from the subsequent proceedings, it is apparent that the bond was with surety of a similar amount since a proposed surety was later presented before the trial court on 24<sup>th</sup> January 2022. He was examined and found to be unsuitable and was thus rejected.

4. On 4<sup>th</sup> February 2022, the applicant approached this court by way of a Notice of Motion dated 1<sup>st</sup> February 2022 mainly seeking review of the bond terms granted by the trial court and revision of the order of the trial court rejecting the surety he had offered.

5. The applicant implored this court to reduce the amount of bond set by the trial court to an affordable amount of less than KShs.200,000 claiming that he was a man of meagre means. He further prayed that this court accepts the proposed surety.

6. In the grounds premising the motion and in the depositions made in his supporting affidavit dated 1<sup>st</sup> February 2022, the applicant faulted the trial court for giving him stiff and unaffordable bond terms. He averred that he was unwell after being diagnosed with hypertension and that he was in need of urgent medical attention. He asserted that he was not a flight risk.

7. He was aggrieved that the learned trial magistrate rejected his proposed surety one *Francis Musyoka Mbiti*, his father who had provided title to his land known as Mitaboni/Mitaboni/1564 valued at KShs.3,000,000 as security for his attendance on grounds that he was too old even after he had gone through the process of verification and valuation of the land.

8. The applicant averred that his family cannot raise another security equivalent to the exorbitant amount set by the trial court and that such terms amounted to indirect denial of bond which violated his constitutional right to bond or bail pending trial and the right to be presumed innocent until proved guilty. He urged that should this court be concerned about the age of the proposed surety, it may make further orders for the applicant to avail another surety whose sole purpose would be to ensure his attendance in court.

9. The application is contested by the state as well as the interested party. The respondent filed grounds of opposition dated 18<sup>th</sup> February 2022 while the interested party swore a replying affidavit on 7<sup>th</sup> March 2022. In the grounds of opposition, the respondent contended that the application lacked merit as the applicant had not provided reasonable grounds to justify grant of the orders sought; that the bond terms set by the trial court were reasonable and not excessive considering the charges facing the applicant; that the learned trial magistrate was right in rejecting the proposed surety since he was incapable of discharging his duties as a surety.

10. On her part, the interested party deposed that she was the complainant in the case before the trial court. She gave a history of her relationship with the applicant stating that he had hoodwinked her into sending him money on several occasions for the past four years after he allegedly cast a spell on her through witchcraft. She was apprehensive that if released, the applicant will interfere with her by continuing with his mischief of bewitching her.

11. The application was argued orally before me by learned counsel *Mr. Owiti* who represented the applicant; learned prosecuting counsel *Ms Adhiambo* who appeared for the respondent and learned counsel *Mr. Muchiri* for the interested party.

In their submissions, learned counsel reiterated and expounded on the averments made by their respective clients in support and in opposition to the application.

12. In addition, *Mr. Owiti* submitted that *Section 123* of the *Criminal Procedure Code* provides that bond/bail terms shall not be excessive and gives this court jurisdiction to vary bond terms granted by a trial court. He asserted that the offence of obtaining money by false pretences was a misdemeanor which attracted a prison sentence of three years upon conviction. He relied *inter alia* on the case of *Cyril Kipkorir Serem V Republic, [2020] eKLR* where the accused was facing similar charges as the applicant and the High Court varied bond of KShs.600,000 set by the trial court and reduced it to KShs.100,000 with one surety of like amount or a cash bail of KShs.100,000.

13. On the issue of surety, *Mr. Owiti* submitted that the trial court ruling was erroneous and vague. He urged this court to allow the application as prayed, save for prayer number 5 which had been overtaken by events.

14. *Ms Adhiambo*, in opposing the application supported the trial court's decision arguing that the bond terms were reasonable since the applicant was accused of having defrauded the complainant of KShs.2,774,157. In her view, the facts in the application do not show that the applicant is unable to raise a surety but that the surety he provided did not understand his role as surety.

Counsel proposed that the court orders the applicant to provide another surety in compliance with the orders made by the trial court. She invited me to dismiss the application for lack of merit.

15. Counsel for the interested party, *Mr. Muchiri*, associated himself with the submissions made by the respondent. He further cited the case of *Patrick Tuva Mwamigu V Republic, [2007] eKLR* where the court considered witchcraft as a form of provocation. He prayed that the application be dismissed.

16. I have carefully considered the application, the grounds of opposition, the affidavits on record in support and in opposition thereof and the submissions made on behalf of the parties. I find that the key issues arising for my determination are twofold. The first issue is whether the applicant has made out a case warranting revision of the bond amount fixed by the trial court and secondly, whether the trial court erred in rejecting the applicant's proposed surety.

17. The revisional jurisdiction of this court is well set out in *Section 362* of the *Criminal Procedure Code* which provides as follows:

***“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.”***

18. In *Republic V Milka Jerobon Chumba, [2017] eKLR*, the court had this to say about the revisional jurisdiction of the High Court:

***“The jurisdiction of the High court on revision is not unlimited. Section 362 and 364 of Criminal Procedure Code when read together leave no doubt that the court can only exercise its revisionary jurisdiction if it is satisfied that there was an illegality, incorrectness, irregularity, mistake or impropriety in the decision, sentence or order sought to be reviewed.”***

19. The Supreme Court of India in *Slaw Wallace & Co. Ltd V Govindas Paru Slothamdas & Another [2001] 3SCC 445* observed that:

***“The High Court is entitled to satisfy itself as to the regularity of the proceedings of the correctness, legality or propriety of any decision or order passed therein and if, on examination, it appears to the High Court that any such decision or order should be modified, annulled, reversed, or remitted for consideration it may pass such order accordingly.”***

20. Besides the aforesaid jurisdiction, this court under *Section 123 (3)* of the *Criminal Procedure Code* has wide and unfettered discretion to revise bond terms issued by the lower court of course in the interest of justice. The provision states as follows:

***“The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”***

Guided by the parameters of this court's revisional jurisdiction as shown above and bearing in mind the provisions of *Section 123 (3)* of the *Criminal Procedure Code*, I will now address the first issue.

21. It is not disputed that the applicant, like all other accused persons, has a constitutional right to be released on bail or bond pending trial and to be presumed innocent until proved guilty. *Article 49 (1) (h)* of the *Constitution* stipulates that an accused person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there were compelling reasons not to be released.

22. To buttress the above constitutional requirement, *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.”***

23. In the case of *Harish Mawjee & Another V Republic, [2020] eKLR*, *Lesiit J (as she then was)* observed thus:

***“First of all, 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 right to seek review of bond terms from trial court or High Court on appeal.”***

24. Further, the Judiciary’s *Bail and Bond Policy Guidelines* at p.9 paragraph 3.1 (d) reinforces the right to reasonable Bail and Bond terms by specifying 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.”***

25. In the present application, as stated earlier, the applicant is facing a charge of obtaining money by false pretences contrary to *Section 313* of the *Penal Code* which is a misdemeanor. The offence on conviction attracts a maximum custodial sentence of three years.

26. In making a decision whether to grant or review bond terms, the court’s paramount consideration is whether if released, the accused will turn up for his trial or will abscond. In this case, the prosecution has not alleged that the applicant is a flight risk.

In fact, the prosecution is not opposed to the admission of the applicant to bond. Its only contention is that the bond terms issued by the trial court are reasonable and should not be reviewed downwards.

27. The applicant has been categorical that apart from the surety who was rejected by the learned trial magistrate, he does not have another surety to secure his release given the inordinately high amount of bond granted by the trial court. He has maintained that he is a man of meagre means and he is completely unable to comply with those bond terms. The fact that he is still in custody since January this year lends credence to his claim and makes it plausible.

I am inclined to agree with the applicant that a bond of Kshs 2,000,000 with a surety of like amount for an offence of the nature charged in this case is excessive and unreasonable and justifies intervention by this court by way of revision.

28. On the issue of the rejected proposed surety, I am unable to fault the learned trial magistrate for rejecting the proposed surety given that it is not disputed that he was an 86 year old man who was also very sick. The court record shows that he could not walk on his own and had to be carried into the court room by two male adults; that he did not even understand why his sons had brought him to court.

29. The main obligation of a surety is to ensure that an accused person whose release he intends to secure will attend the court whenever required. This may involve monitoring the progress of the case and movements of an accused person to ensure that he attends court on all hearing dates or whenever required by the court.

30. The proposed surety in this case, given his age and health condition would clearly be unable to discharge the duties and responsibilities of a surety.

In the circumstances, I am satisfied that the learned trial magistrate correctly exercised his discretion in finding the proposed surety unsuitable and declining to approve him as the applicant’s surety. The trial court’s order does not therefore fall within the parameters of this court’s revisional jurisdiction.

31. Regarding the interested party’s claim that the applicant had bewitched her hence her disposition to keep giving him money upon request without asking any questions, it is my finding that this claim is subject to proof during the trial. The claim that if released the applicant will continue bewitching and defrauding her is an unsubstantiated allegation which cannot justify denial of bond to the applicant.

32. In view of the foregoing, I find the applicant’s prayer for review of bond terms merited and it is hereby allowed on the following terms:

i. The bond terms granted by the trial court are hereby set aside. They are substituted by an order of this court granting the applicant bond of KShs.300,000 with one surety of a similar amount. The surety will be approved by the trial court.

ii. In the alternative, the applicant shall deposit a cash bail of Kshs.100,000 and one contact person who will be approved by the trial

court.

iii. The applicant shall attend the trial court whenever required to do so.

iv. The applicant shall not contact, intimidate, threaten or interfere with the interested party whether directly or indirectly by any means whatsoever.

v. In the event of violation of condition (iii) and (iv) above, the applicant will be liable to have his bond cancelled and to proceed with his case while in custody.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this 31<sup>st</sup> day of March 2022.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Owiti for the applicant

Mr. Kiragu for the respondent

Mr. Muchiri for the interested party

Ms Karwitha: Court Assistant