



**Kimanzi & another v Republic (Criminal Revision E172 of 2022)
[2022] KEHC 12223 (KLR) (Crim) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E172 OF 2022
LN MUTENDE, J
AUGUST 19, 2022**

BETWEEN

NELSON JOHN KIMANZI 1ST APPLICANT

BRENDA KANINI KATENDE 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicants herein through a Notice of Motion dated 29th July, 2022, seek review of bail/bond granted by the lower court.
2. The application is premised on grounds that: The applicants have been in remand from 21st July, 2022; the subordinate court has unjustifiably reviewed upwards the bail terms, yet, the nature of the charge remains the same; the applicants' constitutional rights to liberty stand to be prejudiced by further incarceration considering they had paid and complied with the original bail and bond requirement set by the court; and, they have never failed to attend court.
3. The application is supported by an affidavit deposed by Eric Kinaro, the advocate seized of the matter, who deposes that the applicants who are charged with the offence of obtaining money by false pretence were released on cash bail of Ksh. 200,000/- and Ksh.300,000/- respectively, and, after the Prosecution amended the charge, without being moved by the prosecution, the court on its own motion reviewed the bail and bond terms upwards, by granting the 1st applicant, cash bail of Kenya Shillings Five Hundred Thousand (Ksh. 500,000/-) or bond of Kenya Shillings One Million (Ksh. 1,000,000/-) with a surety, and the 2nd applicant, cash bail of Kenya Shillings Five Hundred Thousand (Ksh. 500,000/-) or bond of Kenya Shillings Five Hundred Thousand (Ksh. 500,000/-) with a similar surety, terms that the applicants have not met.



4. That the applicants have always complied with the court's directions such that the learned magistrate exercised her discretion injudiciously, hence the prayer for reinstatement of the original bail terms.
5. The Respondent did not file a response to the application.
6. The application was canvassed through oral submissions. It was urged by Mr. Kinaro, learned Counsel for the applicants, that initially the particulars of the offence indicated that the sum alleged to have been obtained was Ksh. 5,161,743/- that was raised to Ksh. 21,161,743/-. After the amendment of the charge, the prosecution sought directions from the court which proceeded to vary the bond terms despite opposition from the defence.
7. That the offence is a misdemeanor, only the amount changed, therefore, there were no compelling reasons to warrant the court to vary or review the terms. That the act of variation was done on speculative basis and was injudicious.
8. Ms. Akunja, learned Counsel for the State who did not oppose the application urged that the Judiciary Bail and Bond guidelines provide a consideration for determining bail /bond granted which include gravity of the offence; but, the same should not be too lenient or too punitive. That, being from the same family, the court should have considered how they were to raise the bail.
9. I have considered arguments put forward herein by both the applicants and respondent. An accused person has the right to be released on bail/bond. This right is provided for by the supreme law and statutory law. (Vide Article 49(1)(h) of *the Constitution*). But, there is a qualification; this is subject to non-existence of compelling reasons, which calls upon the prosecution to justify the need to deny bail.
10. From the preceding analysis, it is apparent that the judicial officer is seized of the discretion to not only grant bail/bond but also to set terms and conditions. In so doing, the court should be guided by various factors. Section 123A (1) of the *Criminal Procedure Code* provides that:

Subject to Article 49(1)(h) of *the Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

 - (a) The nature or seriousness of the offence;
 - (b) The character, antecedents, associations and community ties of the accused person;
 - (c) The defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;
 - (d) The strength of the evidence of his having committed the offence;
11. The Judiciary Bail/Bond Policy Guidelines, paragraph 4.2 6 (h) sets out the considerations of granting or declining bond, it also recognizes that the change of circumstances in the course of trial may influence bond.
12. Therefore, in setting bail/bond terms, it is solely the court's discretion. A court ordinarily adheres to the standard of practice. The court has the discretion to decrease or increase bail terms depending on the circumstances of the case, but in doing so it all depends on the individual turning up for trial.
13. The law provides for review of bail/bond terms by the court that is seized of the matter. The court does not become functus officio once bail is granted. In the course of trial, the court may deviate from orders granted, and, decrease or increase bail/bond. This depends on circumstances of the case. This



fact was well captured in the case of *Republic vs. Diana Suleiman Said & another* [2014] eKLR that is persuasive, where the court delivered itself thus:

“With respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused’s refusal to attend court while on bail, when sureties withdraw or for other reasons.

The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.

I find nothing in the provisions of Article 49 (h) of *the Constitution* or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio...”

14. When granting bail/bond the court should endeavor to preserve the liberty of the accused who remains innocent until proven otherwise, but, this right must be balanced with the rights of the victim. The gravamen herein is enhancement of bail/bond. The amended charge captured the sum alleged to have been obtained fraudulently as slightly more than four times what had been captured in the initial charge. The sum in question was now Kshs. 21,161,743/-.
15. Revisionary powers of this court are provided under Article 165 of *the Constitution* which stipulate that:-
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

The statute at Section 362 of the Criminal Procedure Code 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.

16. The mandate of granting bail lies with the court. Bail set also depends on the severity of the offence. When the court enhanced the terms of bond it depended on the enhanced sum. The action taken cannot be dismissed as having been mere conjecture or injudicious, therefore, there was no irregularity.
17. In the circumstances, the application is unmeritorious. Accordingly, it is dismissed.
18. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 19TH DAY OF AUGUST, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Kinaro for Applicants

Ms. Akunja for Respondents

Ng'ang'a Court Assistant

