



**Rasto & 5 others v Republic (Criminal Appeal E124 of 2022)  
[2022] KEHC 15663 (KLR) (Crim) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15663 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E124 OF 2022  
JM BWONWONG'A, J  
NOVEMBER 24, 2022**

**BETWEEN**

**CALEB NAGOMERE RASTO ..... 1<sup>ST</sup> APPELLANT  
AGAZIVA BRIAN KENNETH ..... 2<sup>ND</sup> APPELLANT  
JACKLINE MIMAYO KINZI ..... 3<sup>RD</sup> APPELLANT  
EUNICE AKINYI MOI ..... 4<sup>TH</sup> APPELLANT  
SHELMITH KIPRONO AKA JEROP ..... 5<sup>TH</sup> APPELLANT  
PATRICK MWANGI NJUNGUNA ..... 6<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the ruling of Hon E Rainy (SRM) delivered  
on 14th July 2022 in Kibera Chief Magistrate's Court in Criminal  
Case No. E762 of 2022 Republic vs Caleb Nagomere Rasto & 5 others)*

**RULING**

1. The appellants being dissatisfied with the ruling of Hon E Riany, SPM, delivered on July 14, 2022 have appealed against the entire ruling. In their memorandum of appeal, the appellants have raised seventeen grounds challenging the decision of the trial magistrate in granting stringent pre-trial bail/bond terms.
2. The main grounds raised in the memorandum of appeal are that the trial magistrate erred in law and fact by imposing an unfair and unreasonable bail/bond terms which required the appellants to provide two sureties, each of whom must be a civil servant, a term that is discriminatory and amounts to denial of bail/bond, not considering that the appellants are not civil servants and it is unlikely for them to



have friends or family members who are civil servants, setting the amount of bail at one million shillings (Kshs 1,000,000/=); which is reachable to only high ranking civil servants, thereby discriminating against relatives of the appellants who are willing to stand as sureties, which is in violation of the provisions of article 50 of the *Constitution* of Kenya, by failing to consider the 1<sup>st</sup> appellant's medical report and failing to consider the option of granting cash bail to the appellants.

3. They have urged the court to allow their appeals and grant them fair bail/bond terms.

### **The 1st to 5th appellants' submissions**

4. Mr Omondi learned counsel for the 1<sup>st</sup> to 5<sup>th</sup> appellants submitted that the trial court passed a conviction on the appellants by issuing punitive bond terms especially the requirement of two sureties who are civil servants for the 2<sup>nd</sup> to 4<sup>th</sup> appellants. Further that the trial court failed to take cognizance of each individual accused person's circumstances. Learned counsel urged the court to urgently grant the orders sought as the appellants continue to be held in custody for their inability to comply with the bail/bond terms, which he contended are extremely unfair in the circumstances.

### **The 6th appellant's submissions**

5. Mr Kinyanjui learned counsel for the 6<sup>th</sup> appellant submitted that the trial court erred in finding that the prosecution advanced compelling reasons to have the 6<sup>th</sup> appellant's bond terms enhanced to more stringent, alongside those granted to the other appellants herein. Further, the trial court granted uniform bail terms for all the appellants without considering and distinguishing the circumstances of the of the 6<sup>th</sup> appellant, which he insisted were different. That this was done without the 6<sup>th</sup> appellant being given the opportunity to present his individual circumstances contrary to the *Judiciary Bail and Bond Policy Guidelines* and the provisions of section 123A of the *Criminal Procedure Code* (cap 75) Laws of Kenya.
6. Learned counsel further submitted that the 6<sup>th</sup> appellant has no history of non-compliance with bond terms or failure to attend court. He argued that the decision to impose stringent bond terms was therefore not justified. He added that the 6<sup>th</sup> appellant will not interfere with witnesses, he is not a flight risk and there were no compelling reasons for the punitive bail/bond terms issued by the trial court.

### **Issues for determination**

7. The court has considered the grounds of appeal raised and the submissions by the parties. The issue that arises for consideration is whether the appellants were granted bail/bond terms that were manifestly excessively.

### **Analysis and determination**

8. In the present appeal, the appellants are challenging the reasonableness of the terms granted by the trial court for their release in particular the condition of having two sureties who are civil servants. They argued that the same was unreasonable, impracticable and discriminatory.
9. In an application for bail/bond, the paramount consideration is whether the accused person will turn up for his trial. Additionally, the bail/bond terms must not be pegged on the amount of money stated in the charge sheet alone but on the consideration that the accused person is presumed innocent until proven guilty, and reasonable bail terms where no compelling reasons have been given. The appellants



in this case enjoy the presumption of innocence until proven guilty and have a right to reasonable bail/bond terms. Article 50 (2) (a) of the Constitution of Kenya provides that: -

“Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.”

10. On the issue of terms of release on bail, section 124 of the *Criminal Procedure Code* provides as follows:

“Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.”

11. The *Judiciary Bail and Policy Guidelines* were developed to provide guidance in decision making in matters of bail/bond in line with the constitutional provisions. The guidelines recognized the need for a balanced approach in preserving the public interest and the right of an accused person to a fair trial. On guiding the courts in determining reasonable bail terms, the guidelines provide that bail/bond amount should not be excessive, they should not be far greater than was necessary to guarantee that the accused person would appear for his or her trial, amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing from the jurisdiction of the court. Bail/bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person.

12. What is reasonable bail/bond will be determined by reference to the facts and circumstances prevailing in each case.

13. In the case of *Kirit Bhangwanda Kanabar v Director of Public Prosecutions & another [2018] eKLR*, the court discussed what should guide the court in determining the quantum of bond terms, as a way of gauging what would be reasonable bond terms and observed that:

“The seriousness of the offence should not be seen from an eye of the quantum or liquidated amount stated to be defrauded or stolen but the nature and gravity of the offence should be in line with prescribed penal provisions and probable sentence on conviction. It was important to distinguish between the nature of the offence as a category and the seriousness of it as attached by the legislature in its various cluster of punishment in default.

Given the framework, the automatic trigger on the cash bail being based on a particular percentage or ratio of the alleged amount in the offence charged to was a fallacy not attributable to any rationale or legal craft. In other words, exercise of discretion in determining bail terms should apply the fundamental rights to ensure fairness, access, justice, consistency, predictability, speedy trials and due process of the law. That was because the framers of the Constitution forged a new path under article 49 (h) which mirrored the rule against the use of excessive bail. Setting bail amounts at ratios that were unaffordable contravened equal protection and due process rights of an accused person

There was no inquiry carried out to satisfy the court that the accused person had the ability to deposit the cash bail or recognizance of a surety of ten (10) million in lieu of cash”

14. From the record, when the appellants herein took plea, they were granted a bond of seven (7) million shillings with a surety of similar amount. They sought a review on the grounds that they were not in



a position to meet the conditions set. The trial court reviewed the bond to one million with a surety of similar amount.

15. The 1<sup>st</sup> accused therein was subsequently released on those terms and he absconded. The victim's advocate moved the court to vary the terms on the ground that they were too lenient. The trial court subsequently varied the terms and added the condition of two sureties who are civil servants.
16. The appellants approached this court and sought a review of the condition requiring two sureties who are civil servants to be dropped. The trial court in its decision of July 14, 2022 dismissed the application and dissatisfied with the decision, the appellants lodged these appeals against it.
17. I have carefully considered the decision appealed against. The purpose of bail/bond is to secure the attendance of the accused. I do not understand the reasoning behind the requirement of two sureties who are civil servants. Any other Kenyan citizen can ensure the attendance of an accused person in court and serve as a surety as long as he/she meets the requirements of the court.
18. The circumstances of the accused also ought to have a bearing on the bail terms set. It serves no purpose to recognize the right of an accused person to be released on bail, and in the same breath impose terms that are beyond the ability of the accused; which would in effect amount to taking away that right. That was why it is within the liberty of the court to seek information to assist in making informed decisions.
19. It is important for the court to give reasons for its decision. It is trite that a judgement or a ruling of a court or tribunal is a decision determining the rights and liabilities of the parties in a legal contest or proceedings. It is the basis upon which the public holds the court accountable by giving reasons why a particular path was taken giving rise to the outcome in resolving the dispute.
20. Having exercised the discretion and a conclusion reached as to the bail conditions to be imposed, I find that the court must give reasons for imposing specific terms and conditions. The learned trial magistrate was the one better placed to carry out an inquiry in assessing the appellant's ability to get two sureties who are civil servants before ordering it as a condition precedent for their release. In this respect the reasons for the decision is mandatory in terms of accountability and transparency.
21. It is against this backdrop that I find that the trial court in making the decision exercised discretion which violated the provisions of article 49 (h) of the Constitution of Kenya. The powers of the High Court under this jurisdiction takes an approach to satisfy itself that the subordinate court did not error in law or on findings of fact in arriving at the impugned decision.

I find that the terms of bail were excessive and discriminatory

22. In this case the offence involves large sums of money of over one hundred million shillings (Kshs 100,000,000/-). The record shows that the other conditions on the grant of bail were responsive and in favour of the appellants.
23. In the premises, the application succeeds with the result that the order of the trial court is hereby set aside. In its place it is hereby ordered that each accused to be released on a bond of shillings one million (Kshs 1,000,000/-) with a surety of a similar amount; the said surety may be any Kenyan citizen. The requirement that a surety must be a civil servant is discriminatory and is hereby set aside.
24. In the alternative, each accused may be released on cash bail of shillings eight hundred thousand (Kshs 800,000/-).

Those are the orders of the court.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**



**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr Kinyua: Court Assistant

Mr Gitau for the 1st to 5th appellants.

Ms Handa for the 6th appellant.

Mr Mutuma for the respondent

