



REPUBLIC OF KENYA



**Kilasi v Republic (Criminal Revision E237 of 2022)  
[2022] KEHC 15543 (KLR) (Crim) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15543 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E237 OF 2022  
JM BWONWONG'A, J  
NOVEMBER 21, 2022**

**BETWEEN**

**ABRAHAM NYONGESA KILASI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for revision of the order of Hon. H. Okwani, PM, delivered on 31<sup>st</sup> August 2022 in Makadara Chief Magistrate's Court in Criminal Case No. MSCSO No. E33 OF 2022, Republic v Abraham Nyongesa Kilasi)*

**RULING**

**The Case For The Applicant**

- 1 The applicant has under certificate of urgency applied for revision of the order denying him bail/ bond and transfer of the same case to another magistrate of competent jurisdiction for hearing and determination, pursuant to sections 123, 362, 364 (i) (b) of the *Criminal Procedure Code* (cap 75) Laws of Kenya and articles 22, 47, 50, and 165 (6) (7) of the 2010 *Constitution* of Kenya.
- 2 The applicant's application is supported by 13 grounds that are set out on the face of the notice of motion dated July 13, 2021, with the following being the major grounds.
- 3 The application is based on the following major grounds. That the above case is scheduled for defence hearing and determination on November 21, 2022 and it is only fair and just that this matter be determined before the scheduled hearing. The failure of the trial court to grant bail/bond to the applicant with conditions is in conflict with the doctrine of presumption of innocence and in total disregard of the Judicial Policy Guidelines on Bond/Bail Guidelines of March 2015 clause 4.26; which set out the grounds for refusal of bail/bond to an accused person. These grounds include where it is



shown that the accused will not attend his trial and is likely to interfere with witnesses, amongst other grounds.

- 4 Furthermore, the failure to grant bail/bond to the applicant amounts to an unfair trial, despite a bail report recommending a grant of bail/bond to the accused on favourable terms. The applicant's right to a fair trial has been infringed by the continuation of the trial before the said learned magistrate, who has exhibited actual and/perceived bias against the applicant. The trial learned magistrate openly made remarks on August 31, 2022 that bail/bond will be granted after the closure of the defence case; which render the application nugatory.
- 5 In addition to the grounds that are set out on the face of the notice of motion, the application is supported by a 33 supporting affidavit sworn by counsel for the applicant (Mr Job Marasi); whose major averments are as follows.
- 6 In addition to replicating the grounds that are set out on the face of the notice of mention, counsel for the applicant has deposed to the following major averments. The applicant has a pending matter, being Criminal Case MCSO No E144 of 2021, Republic v Abraham Nyongesa Kilasi at Makadara Law Courts regarding the same complainant. It is not in dispute that the applicant had been granted bail/bond in the sum of Shs 200,000/- in criminal case MCSO No E144 of 2021, Republic v Abraham Nyongesa Kilasi at Makadara Law Courts. The applicant has a strong defence with high chances of success.
- 7 Furthermore, on April 13, 2022 the trial court declined to grant bail/bond on the grounds that a bail information report by the probation officer had not been tabled in court. When the prosecution had closed its case, counsel for applicant renewed the application for bail/bond, but the trial court stated that the ruling on bail/bond will be delivered with or without the said report.
- 8 That on August 31, 2022 the said bail/bond information report was on the court file and had a positive recommendation in favour of the applicant that he be granted bail; but the court refused to grant bail/bond. The applicant informed the court that he was going to call four witnesses, and the trial court stated that bail/bond would be granted upon the closure of the defence case.

### **The submissions of the applicant**

- 9 Based on article 49 (1) (h) of the 2010 Constitution of Kenya, counsel for the applicant has submitted that the applicant is entitled to be released on bail/bond, unless the prosecution satisfies the court on a balance of probabilities that there are compelling reasons not to release him on bail/bond. Additionally, counsel has also submitted that the presumption of innocence operates in favour of the applicant by virtue of article 50 (2) (a) of the 2010 Constitution of Kenya.
- 10 Furthermore, counsel has also cited the Judicial Policy Guidelines on Bond/Bail Guidelines of March 2015 clause 4.26; which sets out the grounds for refusal of bail/bond to an accused person. Those grounds are inapplicable to the applicant's case.

### **The Case For The Respondent's**

- 11 The respondent filed grounds of opposition in which it has stated that the application lacks merit and that the applicant has not demonstrated that his article 50 (2) fair trial rights have not been breached. The respondent urged the court to dismiss the application.
- 12 Additionally, the respondent filed a skeleton submission in opposition to the application. Counsel for the applicant (Mr Kiragu) has submitted citing article 49 (1) (h) of the 2010 Constitution of Kenya that the grant of bail/bond involves an exercise of discretion by the trial court and that the right to be



released on bail/bond is not an absolute right. Counsel has pointed out the applicant has not attached the probation officer's report to his application.

- 13 Counsel has further submitted that the applicant is charged with a sexual offence, which he says is very sensitive and that the applicant is likely to interfere with the evidence. Additionally, counsel has also submitted that the applicant has not placed any other material to show that the trial court is biased; other than the allegation touching on bail/bond.
- 14 Finally, counsel has submitted that the case has reached the defence hearing and his application is a delaying defence strategy with the applicant having seen that the prosecution evidence is very strong against him. He has therefore urged the court to dismiss the application.

### **Issues For Determination**

- 15 I have considered the applicants deposition and his submissions. I have also considered the grounds of opposition and the submissions of the respondent.
- 16 As a result, I find the following to be the issues for determination.
1. Whether the grant of bail/bond depends on the stage of the proceedings where the trial has reached.
  2. Whether the applicant has demonstrated the existence of bias in the trial court.

### **Issue 1**

- 17 I find that the grant or refusal of bail/bond becomes alive issue once a person has been arrested. The issue does not depend on the stage where the proceedings of the trial court have reached. The only limitation on the court's discretion to deny the release of the accused on bail is the presence of compelling circumstances.
- 18 I therefore find that it was not proper for the trial court to order that the bail/bond would be granted upon the closure of the defence case. The grant of bail/bond is concerned with the freedom of the accused at any stage of the proceedings. It has nothing to do with the stage where the proceedings have reached. Even where the defence have closed their case, the presumption of innocence as enshrined in article 50 (2) (a) of the 2010 *Constitution* of Kenya is still in operation and is not thereby suspended.
- 19 So precious is the freedom of the individual that the trial court immediately after conviction may still release the accused on bail pending the entering of an appeal in the High Court under sections 356 and 357 of the *Criminal Procedure Code* (cap 75) Laws of Kenya.
- 20 It was therefore irregular for the trial court to condition the grant of bail/bond pending the closure of the defence case.

### **Issue 2**

- 21 The applicant had been granted bail/bond in the sum of Shs 200,000/- in criminal case MCSO No E144 of 2021, Republic v Abraham Nyongesa Kilasi at Makadara Law Courts in respect of the same victim. It was therefore incumbent upon the trial court to make its finding as to why it was not making a ruling whether to release the applicant on bail or not. The postponement of making a ruling on the issue of bail was irregular.
- 22 Furthermore, the trial court acted irregularly on August 31, 2022, when the court still refused to grant bail/bond to the applicant; because the bail/bond information report was on the court file and had a



positive recommendation in favour of the applicant that he be granted bail. I find that the adjournment of the ruling until the closure of the defence case raised an unrebutted presumption of apprehension of bias. In the mind of an objective and reasonable man, the court raised fears of bias that were not rebutted.

- 23 I therefore find the respondent's submission that this court should call for the lower court file is without merit as the material before the court was sufficient to warrant the revision of the order that was complained of by the applicant. Additionally, the respondent did not challenge the credible affidavit evidence of the applicant in respect of the conduct of the trial court.
- 24 In the premises, the application succeeds with the result that the order of the lower court refusing the grant of bail/bond is hereby set aside. In its place the accused is hereby released on bail/bond in the sum of Shs 200,000/- with a surety of a similar amount to be approved by the court.
- 25 Furthermore, the trial of the case is hereby transferred to another magistrate of competent jurisdiction, pursuant to this court's powers under section 81 of the [Criminal Procedure Code](#).

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS NOVEMBER 21, 2022.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of-**

Mr. Kinyua: Court Assistant

Mr. Job Marasi for the accused.

Mr Mutuma for the Respondent

