



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. E023 OF 2020**

**ELIZABETH ACHIENG ABONGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from ruling and Orders of cancellation of bond and Orders of rejection of proposed***

***sureties in Siaya PM's Court Cr. Case No. 151 of 2020 delivered on the 16.12.2020***

***and 23.12.2020 respectively by Hon. J.O. Ong'ondo, Senior Principal Magistrate)***

**JUDGMENT**

1. The appellant herein is Elizabeth Achieng Abongo. She is the accused person in Siaya Principal Magistrate's Court Criminal Case No. 151 of 2020 wherein she is charged with the offence of obtaining money by **false pretenses Contrary to Section 313 of the Penal Code**. It is alleged that on the 28<sup>th</sup> day of December, 2018 at Nyamninia Sub-Location, Yala Township Location in Gem sub-county within Siaya County, with intent to defraud., she obtained Kshs 490,000 from one Judith Anna Agola, pretending that she was in a position to sell a parcel of land No. **East Gem/Nyamninia/1706** to the said complainant, a fact she knew to be false.

2. The appellant took a plea of not guilty on 10.3.2020 before Hon. Lester Simiyu, Principal Magistrate and the Presiding Magistrate released her on her own bond of KShs.50,000 with one surety of similar amount or cash bail of KShs.50,000/=. The Learned Principal Magistrate then fixed the case for hearing before Court one (1) now Senior Principal Magistrate, for 22.4.2020. As fate would have it, 22.4.2020 fell on a Covid-19 intensive date when all Courts in the country were operating at half capacity and that explains why there is no record of court proceedings for that date until 28.5.2020 when the Hon. Trial Magistrate fixed the matter for mention on 20.7.2020. On the latter date, the trial Court fixed a hearing for 8.9.2020 on which date parties sought an opportunity to attempt a reconciliation which never materialized hence a hearing date was subsequently fixed and hearing commenced on 19.10.2020 before Hon. J. Ong'ondo now Senior Principal Magistrate.

3. On 16.12.2020 and after 4 prosecution witnesses had testified, the trial Magistrate remarked that in view of evidence adduced, he found it overwhelming and may lead to accused to jump bail in view of the lenient bond terms. He stated that the money involved is Kshs 490,000 yet bond is KShs.50,000 with surety or cash bail of KShs.50,000/=. He therefore revised the bond terms as follows:

***“Accused is hereby released on bond of Kshs. 500,000/= with two sureties. If title Deeds, there must be evaluation report indicating total value as Kshs 500,000/= . A Cash bail Kshs 200,000.”***

4. The trial magistrate then fixed a hearing date and remanded the appellant in custody.

5. On 17.12.2020, the Appellant's surety appeared before Hon. M. Mwangi, Resident Magistrate for approval of bond and Mr. Christopher Omojong Odoi was approved as the first surety for the appellant, after he produced his pay slip for November, 2020 as security, showing he had shares worth KShs.300,000/= in Busia Teachers Co-operative Society.

6. On 24.12.2020 the 2<sup>nd</sup> surety appeared before Hon. Ong'ondo, Senior Principal Magistrate but she was rejected on account that she could not meet bond terms with her pay slip. The trial Magistrate also observed that the earlier surety was approved by error. He found that the surety cannot immediately repay KShs.55,804/-. He rescinded the approval.

7. It is following the above Orders of 16.12.2020 and 24.12.2020 respectively that the appellant was aggrieved and so she filed this appeal on 28.12.2020 seeking the setting aside of the Orders cancelling the appellant's bond and that the appellant's bond be reinstated on

reasonable terms.

8. The appellant's grounds of appeal are:

**1. The Learned trial Magistrate erred in law and in fact in canceling the appellant's bond merely on account of the fact that the amount subject of the charge was higher than the cash bail of KShs.50,000/= already deposited in Court.**

**2. The Learned trial Magistrate erred in law and in fact in canceling the appellant's bond suo moto.**

**3. The Learned trial Magistrate erred in law and in fact by canceling the appellant's bond without any complaint from any party neither the prosecution, the complainant nor the Investigating Officer given that the appellant had never missed Court sessions since February 2020 when the lower Court case began and given the fact that she had dutifully been making appearances and had not flouted any bond terms.**

**4. The Learned trial Magistrate erred in law and in fact in declining to approve the two sureties who had made appearance pursuant to his fresh order on bond to the appellant and that such refusal was based on the mere fact that the cooperative shares appearing on the pay slips of the two teachers who were intending to be sureties could not amount to KShs.500,000/=.**

**5. The Learned trial Magistrate erred in law and in fact in failing to appreciate that bond is a constitutional right and denial of the same must be found on serious, tangible and compelling reasons non of which are present in this case.**

**6. The Learned trial Magistrate erred in law and in fact in acting arbitrarily, improperly and against the constitutional rights of the appellant without any basis.**

9. The Appeal is as per Petition of appeal dated 28.12.2020. Simultaneous with the filing of the substantive appeal, the appellant also filed an application under the High Court Vacation/Recess Rules seeking among other orders, that she be released on bail pending hearing determination of this appeal.

10. The Appellant's Counsel had the application filed Under Certificate of Urgency and the same was placed before the regional Recess Duty Judge Kiarie Wa Waweru Kiarie – J. on 29.12.2020 at Busia High Court. The learned Judge directed that the Lower Court proceedings be typed; the record of appeal be prepared and the file be placed before the Judge on 19.1.2021 for further directions.

11. On 19.1.2021, the matter was placed before me in accordance with the directions of **Hon. Kiarie Waweru Kiarie – J. made on 29.12.2020** and both Mr. Ashioya Advocate for the Appellant and Mr. Kakoi, Senior Prosecution Counsel agreed to orally canvass the main appeal. Mr. Ashioya appeared virtually via Microsoft Teams.

12. As the trial record of appeal had already been submitted to this court on 18.1.2021, this court proceeded to admit the appeal to hearing and directed for a hearing of the appeal forthwith.

13. Mr. Kakoi commenced the address to court submitting that albeit there is nothing illegal with enhancement of bond terms, but that in this case, there was no justification for the enhancement of bond terms as the appellant accused person had attended all court sessions without violating the bail terms granted by Hon. Lester Simiyu, Principal Magistrate who took the plea on 10.3.2020.

14. Mr. Ashioya Counsel for the appellant submitted and urged this court to find that cancellation of the appellant's bail terms without any complaint from the prosecution was unlawful and unjustified.

15. Further, that the observation made by the trial Magistrate at Page 14 Paragraph 5 of the proceedings that evidence against the appellant was overwhelming, was premature. In addition, it was submitted by Mr. Ashioya Counsel for the Appellant that there was no foundation to state that the accused will jump bail hence the Order was uncalled for, unconscionable and disproportionate. It was also submitted that the trial court did not specify which error existed in approving the 1<sup>st</sup> surety who was a teacher and so was the 2<sup>nd</sup> surety. Counsel urged this court to set aside the order setting aside bond terms earlier granted and reinstate it and set aside the orders of the trial court.

## **DETERMINATION**

16. I have carefully considered the grounds of appeal, the material placed before this court as contained in the trial court record and the oral submissions by both counsel with the Prosecution Counsel conceding that in the circumstances of this case, there was no justification by the trial Magistrate cancelling the initial bond terms granted to the appellant yet the appellant had faithfully attended all court sessions without violating the said bond terms. In other words, both Counsel were in agreement that there were no compelling reasons for cancellation of the initial bond terms and imposing heavier bond terms on the appellant.

17. The National Council on Administration of Justice developed guidelines on Bail and Bond and the consideration for grant of bond include the nature of the charge or offence and the seriousness of the punishment to be meted if the accused is found guilty; the strength of the prosecution's case; the character and antecedents of the accused person; the failure of the accused person to observe bail or bond terms; likelihood of interfering with witnesses; the need to protect victim or victims of the crime from accused persons; the relationship between the accused person and potential witnesses; whether the accused is as a flight risk; whether the accused is a threat to Public Order, Peace or Security; and whether it may be necessary to protect the accused person during trial in light of the offence that he committed.

18. The most important of all consideration is that **Under Article 50(2) of the Constitution**, bail is a Constitutional right though not an absolute right. In addition, what is critical is that the accused person will attend court without fail during the trial and that he or she will not

interfere with witnesses or that his or her release on bail will not subject him or her to mob injustice by the victims of the offence or the family of the victims. In that regard, the merits of the case facing the accused is not a factor as the accused is presumed innocent until proven guilty.

19. In **Nganga vs Republic (1985) KLR 451**, Chesoni J. (as he then was) stated that in exercising its discretion to grant bail to an accused person under the Constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors as follows:

***“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions...generally in principal, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it shown by the prosecution that there are substantial grounds for believing that:***

***a. The accused will fail to turn up at his trial or to surrender to custody; or***

***b. The accused may commit further offences; or***

***c. He will obstruct the courts of justice***

***...The primary purpose for bail is to secure the accused person’s attendance at court to answer the charge at the specified time.”***

20. Makhandia J, (as he then was) in **Republic Vs. Danson Ngunya and Another [2010] eKLR** held that if the state wants the accused deprived of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

21. In the instant case, the prosecution concedes the appeal on the ground that there was no evidence to show that the appellant was violating the bonds terms granted to her hence the cancellation of her bond was not justified.

22. I note that the value of the subject matter of the charge facing the appellant granted bond equivalent to Kshs 490,000 whereas the Hon Lester Simiyu who took the plea gave bond terms equivalent cumulatively to Kshs 50,000/=. This in my humble view was quite disproportionate and therefore not commensurate to the charge against the appellant.

23. Nonetheless, the Law presumes an accused person innocent until proven guilty by the prosecution. This does not mean that the trial Court should not impose proportionate and commensurate bail terms on an accused person as extreme low bond terms no doubt sends a wrong message out there that one can commit a crime and be released on easy bail terms irrespective of the nature of or seriousness of the offence one is alleged to have committed.

24. In the instant case, the bond terms given initially were basically in the range of 49% of the 10% of the value of the amount alleged to have been obtained fraudulently from the Complainant.

25. Upon conviction, punishment for obtaining money by false pretences which offence is a misdemeanor under Section 313 of the Penal Code is three years’ imprisonment. The court may also order for compensation of the complainant where there is no Civil suit initiated for recovery of the money proven to have been obtained from the Complainant by the Convict. In this case, Mr. Ashioya submitted that there was a civil suit pending before court, against the appellant for recovery of the monies allegedly defrauded.

26. However, as the trial of the appellant had commenced in earnest and was nearing completion without the accused violating the bond terms earlier given by the court and/or without any complaint that the accused was likely to jump bail, or was interfering with witnesses, notwithstanding the strength of the prosecution case, I find that it was uncalled for, for the trial Magistrate to cancel the initial bond terms given by Hon. Lester Simiyu, Principal Magistrate and imposing new bond terms ***suo motu***, considering that this is not a civil suit where issues of security for costs are considered.

27. Accordingly, I find this appeal meritorious and make the following Orders :

This appeal is allowed, the orders of 16.12.2020 and 23.12.2020 issued by the trial court respectively are set aside and substituted with an order that the appellant shall be released on her own bond as initially ordered by Hon. Lester Simiyu on 10/3/2020 in Siaya PM Cr Case No 151 of 2020, of Kshs 50,000/= plus one surety of similar amount or deposit cash bail of KShs.50,000/ into court.

28. File closed

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 25<sup>th</sup> Day of January 2021**

**R.E. ABURILI**

**JUDGE**