



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION NO. E008 OF 2021**  
**GEOFFREY WERE.....APPLICANT**  
**VERSES**  
**REPUBLIC.....RESPONDENT**

(Arising from orders in Criminal cases No. 1172 of 2018; 1128 of 2018 and 1166 of 2018 at Makadara Chief Magistrate's Court)

**RULING**

1. Geoffrey Were, the Applicant, approached this court through chamber summons dated the 5<sup>th</sup> day of January, 2021, seeking review of orders declining issuance of bond and bail terms by the court presided over by Hon. Nyagah, Chief Magistrate and Hon. Eunice Suter, Senior Resident Magistrate, both of Makadara Law Courts and reinstatement of the original bond terms issued in matters stated above, by the Honourable Magistrates.

2. The Application is premised on grounds that: The Applicant's constitutional rights to bail and bond were denied; this court has revisional and supervisory jurisdiction to call and examine criminal proceedings before the subordinate courts for the purpose of satisfying itself as to the legalities or propriety of any finding or other record and the proceedings therein.

3. The Applicant swore an affidavit in support of the Application where he deposed that he faces charges of obtaining money by false pretences contrary to section 313 of the penal code; he was released on bail that he complied with but was subsequently cancelled without being granted an opportunity to be heard. That he is undergoing a health condition that cannot be dealt with by prison department, and that unless he is released to seek medical attention through his own means, he will not access justice as he will not be there to have his day in court.

4. The application was canvassed by way of written submissions. It was urged for the Applicant that the issue raised was a matter of life and death as Prison had conceded the inability to deal with the situation.

5. That an arrested person has the right to be released on bond unless there are compelling reasons. He cited the case of **Republic vs Robert Zippor Nzilu Criminal Case No. 14 of 2018**, where **Odunga J.** stated that

**“What constitutes compelling reasons are, however depend on the circumstances of each case and there are to be considered cumulatively and not in isolation.... the court will lean in favour of liberty and grant bail where possible.”**

6. That the Applicant has based the application on medical grounds that are not countered and justice will not be served if the Applicant is left to fate. That the Applicant demonstrated to the lower court that circumstances existed that warranted reconsideration of his bail terms and bond. He cited the case of **Republic vs Francis Maina Wairimu (2020)eKLR** where it was stated that:

**“In an application for review of the denial of bail the applicant is under a duty to convince the court that there had been change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders.”**

7. And **Republic vs Diana Suleiman Said & Another (2014) eKLR** where it was stated that:

**“The changed circumstances test is one of a 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 accuse”**

8. It was urged by the Respondent that after the Applicant was released on bond he absconded on 29/11/2018. Neither his surety nor advocate knew his whereabouts. Upon being summoned the investigation officer explained how he had made efforts to trace him that were not fruitful. Subsequently the surety was arrested and with his help the Applicant was arrested on the 1/2/2021. The Applicant’s explanation that he was in detention in Goma was not acceptable to the trial court, therefore, he was remanded in custody.

9. Quoting the Constitution and the Bail Bond Guidelines, 2015, it was argued that although bond is a constitutional right unless there are compelling reasons, there were principles to be observed. That whereas one of the requirements of bail is to ensure that the Accused attends court, the Applicant had demonstrated that he had no intention of attending court.

10. That the averment that the Applicant is experiencing health challenges is an issue that can be handled at the Prison health facility and there is referral mechanism in place.

11. Article 49(1)(h) of the Constitution provides as follows:

**(1) An arrested person has the right—**

**h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

12. It is therefore an accused person’s right to be released on bond, unless there are compelling reasons. The constitution does not define compelling reasons. In basic English a compelling reason would be one that convinces the other party that something advanced is true.

13. The Applicant herein was arraigned in Criminal Cases No.1166/2018 and 1172/2018 on the same day, the 4<sup>th</sup> June, 2018, where he was alleged to have obtained money by false pretence and use of false documents, respectively. On the 28<sup>th</sup> May, 2018 he was again arraigned to answer charges of obtaining money by false pretence in Criminal case No.1172/2018, and was released on bail. This must have been as a result of the legal principle that every accused person is considered innocent until proven guilty.

14. Two months later he failed to turn up for trial until two years later when he was brought to court under arrest. The explanation he gave was that he was held in Goma during the duration that he failed to turn up in court. The trial court heard the application and declined to reinstate bail. In its ruling the court pointed out that the explanation given was not supported as the Applicant gave unsupported stories regarding his non-attendance. She relied on the case of Jonathan **Batita & Another v Republic (2017)Eklr** where the court stated that:

**“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”**

15. When the Applicant was released on bond there were conditions attached. He undertook to attend court without failure. However, he violated the conditions by failing to turn up for trial. He was arrested two (2) years later. His surety who was obligated to ensure his attendance was nowhere to be found. The court threatened to penalize the Investigation Officer in the matter who worked around the clock and had him arrested.

16. The most important thing that the court considers when releasing a person on bail is whether the person is a flight risk. Therefore, the probability of failing to turn up for trial is a compelling reason that would make a person be denied bail.

17. The argument of the Applicant is that some circumstances may exist that would make the court be considerate. He avers that he suffers from an ailment that cannot be treated at the prison facility. There is a letter dated 18/12/2020, authored by Omboki Joshua of the Inmates Medical Facility, who states that the Applicant was taken to the facility with complaints of fainting episodes, generalized fatigability, dizziness, chest tightness and generalized body weakness and chest pain. In his view any assistance offered to him would be a deterrent intervention. In his earlier letter dated 18<sup>th</sup> November, 2020, he had referred him to Kenyatta National Hospital for treatment and he was treated. There was however, no document from the Referral hospital indicating that the condition of the Applicant was not manageable.

18. The trial court declined to reinstate the Applicant’s bond because save for the allegations, there was no evidence that he travelled to Goma, and that he was detained. This is therefore a person who may not be easily believed. The question begging is, if released, will he turn up for trial? The constitution upholds the rights of an Accused person who is presumed innocent until proven guilty. But, victims of the offence have the right to the trial beginning and concluding without unreasonable delay.

See section 9(1)(b) of the Victim Protection Act.) This case has been pending in court for two years, nine months because of the conduct of the Applicant, this fact cannot be overlooked.

19. From the foregoing, taking into consideration justice and fairness, I find and hold that the instant application lacks merit. Accordingly, it is dismissed.

20 It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MARCH, 2021.**

**L. N. MUTENDE**

**JUDGE**