



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC. CR. APPLICATION NO. E029 OF 2021**

**NANCY MAKENA MBUBA.....APPLICANT**

**VERSUS**

**PROSECUTION .....RESPONDENT**

*(Being a revision against a ruling by Hon. Njoroge (CM) sitting at Chuka Law Court in*

*Criminal Case No. E 162 of 2021 and delivered on the 10<sup>th</sup> .02.2021)*

**RULING ON REVISION**

**INTRODUCTION**

1. The applicant herein was charged with the offence of stealing contrary to **section 268(1) as read with section 275 of the Penal Code.**
2. Particulars being that on the 11<sup>th</sup>.01.2021 at KIMS Apartments in Meru South Sub- County within Tharaka Nithi County jointly with another not before the court stole one mobile phone make Samsung Galaxy, one jacket, one perfume, one padlock, four ATM cards, cash Kshs.1800 and Kshs. 55,400 from M-Pesa account all valued at Kshs. 93,500 the property of Gibson Nyandigisi Memba.
3. She was charged with a second count of stupefying in order to commit a felony contrary to **Section 230 of the Penal Code.**
4. Particulars being that on the 11<sup>th</sup>.01.2021 at KIMS Apartment in Chuka Town, Meru South Sub County within Tharaka Nithi County with intent to commit a felony namely stealing, administered stilnox zolpidem 10 mg an overpowering drug to Gibson Nyandigisi Memba.
5. Miss Wahome appearing for the applicant moved this court to exercise its supervisory authority over the lower court in relation to the trial court's ruling denying the applicant bond/bail.
6. On the 21<sup>st</sup>.06.2021, the court ordered that the application be served on the prosecution and to proceed on the 24<sup>th</sup>.06.2021.
7. On the 24<sup>th</sup>.06.2021, Miss Wahome informed the court that the application was coming up for interparte hearing and further that the accused was not produced before the lower court; she therefore sought for another date as the prosecution also asked for more time to make a reply to the application.
8. On the 29<sup>th</sup>.06.2021, the prosecution conceded that they did not see any compelling reason as to why the applicant could not be granted bail/bond.
9. The court thus issued a ruling date on the application.

**APPLICANT'S CASE**

10. By a letter of review dated 16<sup>th</sup>.06.2021 and filed under certificate of urgency, the applicant moved this court under the following grounds:

i. **THAT** the applicant has been in custody since 11<sup>th</sup>.03.2021.

ii. **THAT** the lower court has unjustifiably refused to grant her bond yet the offence she is charged under section 268(1) as read together with section 275 is bailable offences.

iii. **THAT** her constitutional right to liberty stand to be prejudiced by further incarceration.

iv. She prayed that this application be granted.

11. She urged court to exercise it's powers of revision to call the **Chief Magistrate's Court File CR. Case No.E 162 of 2021** for inspection and revision.

12. That the court be pleased to revise or alter the decision of the trial court and release the accused person on reasonable bail or bond terms.

13. She relied on the case of **Kenya Musoni v Republic [2012] eKLR**.

#### **ANALYSIS AND DETERMINATION**

14. The issue for determination is whether the application for revision from a decision of the trial magistrate denying the accused person bail amounts to a complaint which this court can consider under its powers on revision.

15. The right to bail or bond is a fundamental right enshrined in the Bill of Rights. **Article 49 (1) (h) of the Constitution** provides that an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

16. **Article 49 of the Constitution** stipulates that: An arrested person has the right to

a) .....

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. But in this case, the prosecution has not opposed the application.

17. In **Michael Juma Oyamo & another v Republic [2019] eKLR**, the Court of Appeal pronounced itself as follows in respect to compelling reasons that can justify denial of bail/bond:

“Article 49(1) (h) of the Constitution states that an arrested person has the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons....”

18. In considering whether to revise a trial court's decision on bail in terms of **section 123 (3) of the Criminal Procedure Code**, the High Court, exercises the powers of appellate to interfere with the discretion of a trial court. The High Court must be satisfied that the decision of the trial court is plainly wrong or, has misdirected itself in failing to take into account a material factor or taking into account an irrelevant factor and it has resulted in a miscarriage of justice, as expressed by the Court of Appeal for East Africa in the context of **Mbogo v. Shah (1968) EA 93** as follows:

“A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice”.

19. The court observes that this application has not been opposed by the prosecution and further that the court takes a judicial notice of and the directions from the Judiciary during the existence of the ravaging effects of Covid -19 that accused persons should be allowed to seek for revision and or appeals to reduce unnecessary overcrowding within the remands and jails.

20. An order by the trial magistrate to deny an accused personal bail/bond must be based on the existence of compelling reasons which must be disclosed and approved by the prosecution. I agree with the prosecution counsel that there were no compelling reasons which were disclosed before the trial magistrate. The application for revision has merits. The order denying the applicant bail is revised and set aside. The matter shall be mentioned before the trial magistrate on 6/7/2021 for bail terms to be set.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH DAY OF JUNE 2021.**

**L. W. GITARI**

**JUDGE**