



**Oteri v Republic (Miscellaneous Application E372 of 2021)  
[2021] KEHC 9762 (KLR) (Crim) (21 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 9762 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS APPLICATION E372 OF 2021  
DO CHEPKWONY, J  
DECEMBER 21, 2021**

**BETWEEN**

**VINCENT GISORE ORERI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant Vincent Gisore Oteri, approached this court through the undated Notice of Motion application seeking review of the bail/bond terms issued Makadara Chief Magistrate's Court Criminal Case No. S/O E009 of 2020, Vincent Gisore Oteri –vrs- Republic.
2. In his Supporting Affidavit, the Applicant deposed that he is facing a charge of Defilement contrary to Section 8 (1) as read with sub Section 8 (2) of the *Sexual Offences Act* No.3 of 2006; that on 14<sup>th</sup> January, 2020 he pleaded not guilty to the charge and his bond was set at Kshs.300,000/= with one surety of similar amount; that he is unable to raise the amount since the property he would have relied on as security is under succession; that his parents are casual laborers hence not able to raise the bond amount; that he is not a flight risk; that it his constitutional right to be granted reasonable and affordable bail/bond terms and he thus pray that the court reviews his bond terms downwards form Kshs.300,000/= to Kshs.50,000/= to enable him secure his freedom.
3. In response, the learned prosecution counsel, Ms. Chebii is of the opinion that the bond of Kshs.300,000/= was sufficient taking into account the offence the Applicant is charged with. However, she has urged that if the court is to allow the application, it should give the Applicant a reasonable amount so as to secure his attendance in court.



4. The High Court’s jurisdiction to review a trial court’s decision on bail and its conditions is provided for under Section 123(3) of the *Criminal Procedure Code* which states as follows:-

“ 123. Bail in certain cases

- (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

- (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
- (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

5. In considering whether to review a trial court’s decision on bail in terms of Section 123 (3) of the Criminal Procedure Code, the High Court, as in all cases where its exercise of power of appellate interference with the discretion of a trial court is required, 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 immaterial factor and it has resulted in a miscarriage of justice, as expressed by the Court of Appeal in the case of *Mbogo –vs- Shab* (1968) EA 93, where it was stated 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 misjustice”.

6. With respect to a decision on bail, the court is required to observe the statutory injunction in Section 123(2) of the Criminal Procedure Code that “the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.” The rationale for this rule is elaborated in the Kenya Judiciary’s Criminal Procedure Benchbook, 2018 at para. 109 of p.52 while dealing with minor offences, in terms that–

109. “Courts must ensure bail conditions are reasonable and not excessive, as this would lead to de facto imprisonment and amount to a violation of Article 49 (2). What is reasonable should be determined in light of the facts and circumstances of each case (*R. v Taiko Kitende Muinya* High at Nairobi Criminal Case No.65 of 2010).”

7. In addition, the Judiciary’s Bail and Bond Policy Guidelines at Page 9 paragraph 3.1 (d) underpins the right to reasonable Bail and Bond terms as follows:



3. 1. d) “Right to Reasonable Bail and Bond Terms: Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”
8. Further, in the case of *Ramathan Iddi Ramathan & 5 Others -vs- R* [2019] eKLR, R. Nyakundi J had this to say:

“The question to answer is whether the Honorable trial magistrate imposed an excessive bail. I turn to the Eighth amendment of the American Constitution which prohibits the use of excessive bail. The Supreme Court of the United States of America in the case of *Stack v Boyle* U.S. 1.3.1951

“The court provided guidelines in assessing whether bail is excessive starting from the premise that the traditional right to Freedom before conviction permits the unhampered preparations of a defense and serves to prevent the infliction of punishment prior to conviction. The court defined excessive as: Bail set at a figure higher than an amount reasonably calculated to assure the presence of the accused. Significantly, the court tied the question of whether a bail determination is excessive to the purpose of bail. As the court explained, the purpose of bail is to help assure the presence of the defendant at subsequent proceedings. Since the freedom of bail is limited, the filing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”

9. Justice Nyakundi went on to draw attention to a report by Professor Friedland on detention before trial, a study of criminal cases tried in Toronto Magistrate’s Courts, Toronto Press 1965, where he observed;-

“The practical challenges of setting the quantum of cash deposit, as well as the fairness it produced. System which requires security in advance often produces an insoluble dilemma. In most cases it’s impossible to pick a figure which is high enough to ensure the accused’s appearance in court and yet low enough for him to raise. The two seldom if ever overlap. The ability of the accused to Marshall Funds or property in advance whether he or she would be released pauses even a bigger challenge”

One may add that a court of law shall not deprive an accused person right to life security and liberty for reason that he or she is facing a criminal charge without due process of law. In determining the amount of cash bail or surety covenant with the court as a condition for release the legitimate goal is to ensure the attendance of the accused on all future schedules set down by the trial court. I hold a strong view that imposing financial conditions or surety terms that result in pretrial detention of the person is in violation of the Constitutional due process and right to equal protection before the law. The Constitutional and statutory provisions emphasize on reasonable terms. It is therefore not clear given the available data



where trial courts find their influence to assess high bail terms for accused persons. There is indeed need to adhere to canons of Constitutional interpretation on procedural due process and an opportunity to be heard meaningfully on the ability to raise cash recognizance or surety bonds. It is necessary for the trial court to make an express finding on the record that the accused has the ability to pay the cash bail or raise the recognizance by the sureties. The resulting effect of excessive bail is punishment without conviction.”

10. In light of the foregoing, it is trite that bond terms ought not to act as impediments to the enjoyment of rights by accused persons. Rather, the terms of bail/bond should be tailored to secure and ensure the attendance of the accused in court for purposes of his or her trial.
11. I have taken into consideration the bond terms that were set by the trial court vis a vis the economic circumstances of the Applicant and find that it is highly likely that he will end up remaining in custody for the duration of the trial. As deposed by the applicant, he was granted bail by the trial court on 14th January, 2020 but he is yet to secure his release as at 25<sup>th</sup> October, 2021 when he filed the instant application on the ground that the amount granted is beyond his means. I also find that the Respondent has not demonstrated that the Applicant/accused is a flight risk and may abscond his trial.
12. In my view, having taken taking into account the economic circumstances of the Applicant, the period it has taken for him to satisfy the bond granted by the trial court and there being no demonstration that the Applicant/accused is likely to abscond hence fail to attend his trial, I allow the undated application and review the bail terms granted by the trial court in the following terms:-
  - a. The bond of Kshs.300,000/= that the Applicant/ accused was granted by the trial court be and is hereby reduced to Kshs.100,000/= with one surety of a similar amount.
  - b. In the alternative, the Applicant/accused may be released on cash bail of Kshs.50,000/=.
  - c. The Applicant/accused to provide full particulars of his surety and contact person in terms of names, address, occupation and place of residence.
  - d. Failure to comply with any of the above conditions, the Applicant/accused will remain in custody and or have the bond terms cancelled.
  - e. The Deputy Registrar to send back the original file, being Makadara Criminal Case No.S/O 009 of 2020 to Makadara Law Court through the court Administrator for the same to be placed before the trial court for directions.

It is hereby ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER, 2021**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Applicant in person

Mr. Chebii counsel for State

Court Assistant - Gitonga

