



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISC. CRIMINAL APPLICATION NO. E003 OF 2020

CYRIL KIPRUTO SEREM.....APPLICANT

=VERSUS=

REPUBLIC.....RESPONDENT

RULING ON REVIEW OF BAIL CONDITIONS

Jurisdiction to review trial court court's decision on bail

1. The High Court has jurisdiction to review a trial court's decision on bail and its conditions as provided under section 123 (3) of the Criminal Procedure Code 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.

[Act No. 22 of 1959, s. 13, Act No. 6 of 1976, Sch., Act No. 13 of 1978, Sch., Act No. 19 of 1984, Sch., Act No. 19 of 1985, Sch., Act No. 7 of 1990, Sch., Act No. 14 of 1991, Sch., Act No. 5 of 2003, s. 71.]"

2. 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 exercise of power of appellate interference with the discretion of a trial 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 immaterial factor and it has resulted in a miscarriage of justice, as expressed by the Court of Appeal for East Africa in the context of a civil case 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 misjustice".

See also ***Kelly Kesses Banjuka v. Republic***, Kabarnet HC Misc. Criminal Application No. 20 of 2017.

Reasonable terms of Bail

3. 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* para. 109 at 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).”*

4. In addition, the Judiciary's *Bail and Bond Policy Guidelines* at p.9 paragraph 3.1 (d) underpins the right to reasonable Bail and Bond terms as follows:

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.”

5. The amount of bail or bond is **not** supposed to be an approximation of the value of the subject matter of the criminal charge. It does not follow that the higher the value of the property subject of the trial the higher the bail bond terms. It is with respect faulty reasoning because, were it so, those poor offenders on charges, for example, of **destruction** or **attempted** fraudulent obtaining, of property of **high** value would never secure hefty bail and bond terms imposed. Terms of bond are not meant to punish the accused for any perceived guilt for the charges leveled against him. Nor are the terms meant to ensure he is detained awaiting trial to avoid his escape or to ensure punishment. Terms of bail or bond should be tailored to secure and ensure the attendance in court of the accused for purpose of his trial.

6. If the case meets the criteria for grant of bail in that there are no compelling reasons to deny bail, then the conditions for bail must be such as the accused in the particular case is able to meet. So that grant of bail is not a backdoor denial of liberty contrary to, and in mockery of, Article 49 (1) (h) of the Constitution. The accused is innocent until proved guilty and he is entitled to the Article 25 fair trial protections afforded an accused under the Constitution.

7. As properly urged by Mr. Mong'are, the Ass. DPP in this case in his own words, the object of bail is -

“The purpose of bail is to ensure that the applicant attend whenever required to do so by the court. So it need not be too much. It need to be reasonable owing to the circumstances of the particular case.

The court in the light of circumstances of the case has discretion to review the bond terms to a very reasonable term based on the circumstances of accused person.

If the court finds it necessary to review it should be to reasonable terms affordable by the applicant. The court should also consider that the applicant is a public servant and his place of work is well known and it should not be difficult to get him to attend. This is no hard rule on the amount of bond. It is discretionary and depends on the weight of the value of the case.”

Charges facing the accused

8. The accused in this case who is on charges of obtaining by false pretences, resisting arrest and fraudulent disposal as set out in the Supporting Affidavit as follows:

i) **“Obtaining money by false pretence contrary to *Section 313 of the Penal Code*.**

ii) **Wilfully resisting arrest from Police Officers in due execution of the Police Officer's duties contrary to *Section 103 (a) of the National Police Service Act No. 11(A) of 2011*.**

iii) **Fraudulent disposition of mortgaged goods contrary to *Section 291(1) of the Penal Code*.**”

9. The charges before the trial court in this case are punishable at the highest only by an imprisonment for a maximum of 10 years for the offence of resisting arrest contrary to ***Section 103 (a) of the National Police Service Act No. 11(A) of 2011***; imprisonment term of three years, for the obtaining by false pretences contrary to section 313 of the Penal Code; and imprisonment for two years for the misdemeanor of fraudulent disposition contrary to section 291 (1) of the Penal Code.

10. As urged by Mr. Mwaita, Counsel for the applicant, the charge of resisting arrest would appear from the applicant's affidavit to arise from his appearance at the police station. No Replying Affidavit was filed in answer to the applicant's affidavit in support of the application for review of bail herein. This court, in any event, cannot at this stage properly get into the merits of the charges before the trial court, and it, therefore, says no more of the competency of the charges.

Considerations of health and circumstances of the accused

11. The accused's health condition with a spinal injury and his need for constant medical care was put before the trial court. I have noted particularly the Medical Report dated 22/11/2019 by Dr. Kasmani A. W. where the doctor confirmed that the patient was on-

“continued neuro-rehabilitation [and] he is required to avoid lifting of heavy objects, long distance travelling and to avoid bending. It is advisable for the patient to be stationed in a location close to facilities with neuro-rehabilitation facilities and close to family support too.”

12. The health status of the accused requiring refrain from certain chores and body position constant neuro-therapeutic medical attention by his doctor and assistance by his family must dictate such reasonable terms of bail as the accused is able to meet to ensure that he receives the prescribed medical care and treatment.

Conclusion

13. The discretion of the trial court in imposing bail terms for accused persons before it is accepted, but the same is subject to the statutory review provisions of section 123 of the Criminal Procedure Code and the revisionary jurisdiction of section 364 of the Criminal Procedure Code, as well as the general supervisory jurisdiction of the High Court under Article 365 (6) and (7) all of which the applicant here invoked. The imposition of bond terms requiring the accused public servant school teacher to provide a bond of Ksh.600,000/- with a surety of the same amount are excessive. The object of bail which to secure the attendance to court of the accused in this case of a public servant accused of fixed abode and who teaches at a government school in the neighborhood of the court with little prospect of absconding is served by imposing reasonable bail bond terms, which the accused is able to meet, and if additional conditions are necessary, he may be required to report to the court or to the investigation officer every so often pending the trial of the case. However, in the circumstances of the health condition of the applicant herein, an order for periodical reporting to court or the police shall cause undue and unwarranted hardship as the applicant has been cleared as flight-risk free.

14. The trial court was fully aware of the circumstances of the accused as evidence by this passage from the Ruling:

“He stated that he respects authority and being a teacher, whose employer is TSC he respects his employer and superiors. He further stated that he has fixed abode and that he is stationed at Kabarnet Boys High School as a teacher and has no criminal records and that he has a spinal injury and needs constant medical care.”

15. The court did not consider an alternative of cash bail in the circumstances of the accused who it agreed was not a flight risk saying *“I am convinced that by giving accused sufficient bond terms and we having an idea of where to get him he is not likely to abscond”*.

16. A bond of Ksh.600,000/- with one surety is in the circumstances of this case relative to bail standards in the High Court murder trials at Ksh.500,000/- with one surety is clearly on the higher side. It is, with respect, such a high bail term in all circumstances of the case as to amount to denial of bail. In giving the excessive bail conditions herein the trial court, which sits at Kabarnet and must be taken to be aware of the bail standards at the High Court, was in plain error.

Orders

17. Accordingly, for the reasons set out above, the accused's bail and bond terms are reviewed as follows:

1. The order for bail bond of six hundred thousand shillings (**Ksh.600,000/-**) with one (1) surety of the same amount imposed on the accused by the trial court is set aside.
2. The Accused shall execute a bond of two hundred thousand shillings (**Ksh.200,000/-**) with one (1) surety of the same amount; or
3. In the alternative, the accused shall deposit the sum of One hundred thousand shilling (**Ksh.100,000/-**) as cash bail.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mwaita, Advocate, for the Applicant.

Mr. Mongáre, Ass. DPP for the Respondent.