



REPUBLIC OF KENYA



KENYA LAW
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**Ndegwa v Republic (Criminal Appeal E040 of 2024)
[2025] KEHC 9329 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E040 OF 2024
GL NZIOKA, J
JUNE 23, 2025**

BETWEEN

GABRIEL KABUE NDEGWA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Ruling in MCCR E100 of 2019 by
Hon. J. Ndengeri (PM) at Naivasha CM's Court 16th October 2024)*

JUDGMENT

1. The appellant herein was arraigned in the Chief Magistrate's court at Naivasha charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the charge states that on the 4th day of December, 2018 at Lanet Estate within Nakuru County, jointly with another not before court with intent to defraud, obtained Ksh 300,000 from Jane Wambui Maina by falsely pretending that he was in a position to secure her daughter a chance in Kenya Defence Force recruitment.
3. The appellant was also charged in the 2nd count with a similar offence. The particulars thereof states that, on 4th day of December, 2018 at Lanet Estate within Nakuru County, jointly with another not before court, with intent to defraud, obtained Ksh 300,000 from Thomas Kimani Mbutia by falsely pretending that he was in a position to secure his son a chance in Kenya Defence Force recruitment.
4. He pleaded not guilty to both counts. The matter was then set down for hearing and he was granted bond of Ksh 700,000/= plus one surety of similar amount or cash bail of Ksh 300,000/=. On 31st January, 2019, the surety was approved and the appellant released from custody.



5. Subsequently, the parties engaged in negotiation with a view to settle the matter out of court. On 21st October, 2020, the appellant was absent and a warrant of arrest issued was against him. On 11th November, 2020, the same was lifted and matter stood over to 18th February, 2021.
6. On that date, a warrant of arrest was issued against the appellant and matter stood over to 10th March, 2021. Again upon an explanation of his absence, the warrant of arrest was lifted. On the same date, the surety in this matter sought to withdraw his title deed to use as a security for a loan. He stated that he had requested the appellant to conclude the matter but kept on evading him. The surety was allowed to withdraw and the appellant was directed to avail another surety. However, on 28th March, 2022 the same surety who had withdrawn again stood surety for the appellant.
7. On 1st September, 2022, the case proceeded to hearing. (PW1) Thomas Kimani Mbutia testified. On 15th February, 2023, the proceedings were stayed to allow the parties settle the matter. On 10th July, 2023, the court noted that the appellant was not in court. The court was informed that he had been diagnosed with depression. That information came from the wife but the court directed he avails himself.
8. By 11th September, 2023, the appellant was not in court. It is on record that the appellant had been seen by the investigating officer at Gilgil. The court issued a warrant of arrest for him and summons to the surety. The warrant and summons were extended on several occasion scheduled for mentions dates to 24th April, 2024 when he appeared and at the same time the surety indicated that he was intending to withdraw from being a surety. The appellant told the court that he had been unwell for three (3) weeks. However, he had no objection to the surety being allowed to withdraw as such. The appellant bond terms were cancelled. On 4th September, 2024, the appellant's counsel sought that the appellant be released on reasonable bond terms as he is sick and elderly.
9. On the 16th day of October, 2024, the trial court rendered a ruling on the bond application and rejected the appellant's application for bond pending trial.
10. It is against this decision that the appellant appealed on the following grounds verbatim reproduced;
 - a. That he was granted bond of Ksh 700,000 which he duly lodged with the court and thus was admitted on bond.
 - b. That I fell ill and was hospitalized and was thus unable to attend court on the designated date forcing the court to issue a warrant of arrest.
 - c. That when I presented myself before court, I tried explaining myself in vain. I was not even granted an opportunity to produce medical evidence proving that I was hospitalized and thus incapacitated from attending court.
 - d. That the complainant and I had gotten into an agreement on the modality of repayment of the monies owed to him of which I had already started by paying Ksh 5,000/=. However, I was unable to continue paying due to my hospitalization.
 - e. That I am still committed to honouring the repayment agreement but I am is incapacitated by the fact that I have been in remand custody for the last eight (8) months and hence I can neither access my bank accounts or any of my businesses from custody.
 - f. That the prosecution has not adduced any evidence in court to indeed prove that there are compelling reasons for me to be denied bond/bail during the pendency of my trial.



- g. That I have a permanent abode in the Republic of Kenya to be specific in Site A and Service of Gilgil Sub-county within Nakuru County and my ancestral home is in Othaya Sub-County of Nyeri County.
 - h. That I am is a family man and the sole bread winner of my family running several businesses which are in imminent danger of closure due to my long absence which in effect will translate to loss of the only source of livelihood for my family.
 - i. That I am willing and ready to abide by all the terms that shall be granted by the court in respect to the bond/bail granted.
 - j. That Article 259 of *the Constitution* obligates the courts to interpret *the Constitution* in a manner that advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.
 - k. That this honourable court be pleased to enable me enjoy fundamental right and freedom to be admitted on bond/bail pending the determination of my trial.
 - l. That further grounds will be adduced during the hearing of this appeal.
11. The Appellant prays that the appeal allowed and grant him bail and bond.
12. However, the appeal was opposed vide the grounds of opposition which states;
- a. That the appellant as rescued with a bond of Ksh 700,000 with a surety and the same was approved by the trial court on 31st January 2019.
 - b. That on 8th April, 2019, the appellant informed court that he wanted an out of court settlement and the court granted him that chance.
 - c. That the appellant did not honour up to the out of court settlement and the amount he claims he paid never reflected on record as the complainant disputes ever receiving a dime from the appellant.
 - d. That the appellant absconded court on 19th August, 2020 and on 11th November, 2020 the appellant appeared in court and the warrant of arrest was lifted as the alternative dispute resolution was revised.
 - e. That the trial court proceedings bear witness that the appellant was not keen with the court attendance and various warrant of arrest were issued and later on the surety withdrew his surety on 10th March 2022.
 - f. That on 28th March 2022 the appellant was able to get another surety.
 - g. That on 12th September 2022 the appellant refused his case to proceed by informing the trial court of a standing order he had placed at Tower Sacco so that he could pay the complainant. The said application was opposed and the counsel holding brief for the complainant Mr Musili informed court that the said standing order was a lie and the complainant had not received any cash.
 - h. The complainant also testified in court on 12th September 2022 that he had not received any money from the appellant.
 - i. That later on 15th February 2023 the appellant entered into agreement with the complainant for the repayment of the money.



- j. That after the said agreement, the appellant was to appear before the court for a mention to confirm payment and he never did and a warrant of arrest was issued on 10th July 2023 and the same was executed on 24th April 2024
 - k. The appellant having been absent for a year, his surety was discharged and he was placed in custody.
 - l. That the appellant is still misleading this superior court on all issues he is raising.
 - m. That based on the above grounds of opposition, the prosecution urged the court to dismiss the appellant's application and order they proceed with his case while in custody for he has abused his bail/bond terms to the limit.
13. The appeal has been considered in the light of the material placed before the court and it is noted that, the appellant was arraigned before the court on 14th January, 2019; consequently the litigation in the trial court has been on-going for a period of six (6) years. The matter herein is a simple criminal case which with due diligence should have been concluded in a period of not more than one (1) year. However, only one (1) witness has testified during the last five (5) years.
14. Indeed, the delay in concluding the matter has been occasioned all through by the appellant who sought for time to settle the matter out of court and failed to come to court on several occasions thus causing the delay. In addition, the surety withdrew his security and resurfaced to be admitted and withdrew again.
- From the afore, the appellant is to blame for inordinate delay in the matter.
15. Be that as it were, I have had the benefit of reading the ruling on bail and/or bond application of the trial court. The trial court declined to reinstate the bond basically on the following reasons that: -
- a. The Appellant flouted the conditions of his release.
 - b. The medical documents and receipts produced did not prove the appellant was hospitalized for the entire period he failed to attend court.
 - c. The appellant has failed to honour the settlement agreement he entered into to repay the money.
 - d. The appellant is not a straight forward person as he blatantly misled the court that he paid the debt but has not provided any proof of payment.
16. I note from the afore reasons, that reason (a) and (b) relate to bond terms. With due respect to the trial court, the issue of settlement of the matter out of court, the appellant's failure to honour the same and/or alleged deceit of payment, go to the root or merit of the matter and the lesser said of the same at this stage, the better as the matter is still on going. Furthermore, this is a criminal case, the agreement to settle the matter does not stop the criminal proceedings unless and until the complainant withdraws the same.
17. Furthermore, as much as the appellant delayed the matter, I see no basis why the matter did not proceed as negotiations were on-going. The court too is to blame for allowing the matter to delay for a whole five (5) years. This matter should proceed forthwith without further delay, for justice delayed is justice denied to both the complainant and the accused.
18. To revert back to the matter, the appellant has not produced before this court any document to prove that he was indisposed to an extent that he could not attend trials on the days he failed to do so. Even



the documents to that effect produced in the trial court have not been availed. How then can this court evaluate his application on merit.

19. Furthermore, the surety is on record as having stated that when he requested the appellant to expedite the matter herein, the appellant was reluctant necessitating the surety to withdraw his security. It is therefore clear that the appellant is taking advantage of his release on bond to slow the wheel of justice to the prejudice of the victims.
20. Furthermore, his general conduct of delay in the matter does not accord him the mercy of the court to consider the application positively. The arguments in the grounds of appeal, which as it were, are not grounds but narration of the background facts of the case, do not hold much water.
21. Finally, the main factor for the court to consider when granting bail is whether the accused will turn up for trial and whether there are substantial grounds to believe that he will abscond if released on bond. By the fact that the appellant has absconded proceedings in the trial court on several occasions there is no guarantee that, if released on bond, he will turn up for trial and/or will not abscond.
22. Consequently, the Application herein lacks merit and it is dismissed accordingly. To expedite this matter and mitigate on the continued incarceration of the appellant in custody, I direct this matter be heard on priority basis and the trial court ensure the matter is concluded in not more than three (3) months of the date of this order. The lower court file be returned forthwith as it should not have been detained as there was no order staying the proceedings.
23. It is so ordered.

DATED, DELIVERED, SIGNED THIS 23RD DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Ms. Chepkonga for the respondent

Ms. Hannah: court assistant

