



**FMO v Republic (Criminal Revision E130 of 2023)
[2024] KEHC 98 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 98 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E130 OF 2023
RE ABURILI, J
JANUARY 17, 2024**

BETWEEN

FMO APPLICANT

AND

REPUBLIC RESPONDENT

(Revision application from Nyando SPM SO Case NO. E025 of 2023 Ruling delivered on 26th July 2023 by Hon L. N. Kiniale, Senior Principal Magistrate)

RULING

1. The application dated 6th October, 2023 seeks for review of the ruling of Hon L.N. Kiniale, Senior Principal Magistrate at Nyando law Courts made on 26th July 2023 in Nyando SPM Sexual Offence Case No E025 of 2023, wherein the trial court declined to grant the applicant herein bond pending trial.
2. The applicant laments that the trial magistrate erred in disregarding the prebail report which clearly found that the applicant was not a flight risk; that the victims of the alleged offences had been relocated to far off locations and that there was no chance of interfering with witnesses; and that she erred in relying on affidavit in opposition to bond filed by the investigating officer which was factually shallow and unsupported by any facts.
3. Upon the application being filed on 13th October, 2023, this file was placed before Hon. M. S. Shariff Judge on 2/11/2023 who directed that Nyando SPM SO Case No. E025 of 2023 be availed and the file be placed before me for consideration of the Review Grounds. She also called for a prebail review report to be filed within 14 days.



4. The Original trial file from Nyando Law Courts was availed to this court on 11th January 2024 while the prebail review report was filed on 5th January, 2024 hence the delay in the consideration of the matter herein.
5. The matter for review of refusal to grant the applicant bond pending trial is now before me for consideration on its merits.
6. Although it is titled review, essentially, applications to this court from pending criminal proceedings are for revision and not review since review applications could have been made before the same court that made the order which is impugned. Nonetheless, this court considers the application on grounds as filed to be for revision and not review.
7. No submissions were made by the applicant.

Analysis and determination

8. I have considered the trial court record as submitted to this court and the impugned ruling. Article 49 of the Constitution guarantees every accused person the right to be released on reasonable bond terms pending trial.
9. Article 49(1)(h) of the Constitution provides that:

An accused 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.
10. The Constitution however has not identified what qualifies under the term “compelling reasons.” The ordinary meaning according to Thesaurus English Dictionary of the word “compelling” is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning, it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.
11. However, the right to bail is not absolute and where there are compelling reasons, the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail.
12. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial.
13. Therefore, the real question that the court must answer is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put



differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release.

14. The conditions to be imposed should also not be so punitive as it would offend the constitutional principle of presumption of innocence or be seen to be a clear denial of the right. See the case of Republic v Robert Zippora Nzilu, Criminal Case No. 4 of 2018.
15. Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent on the one hand and the public interest on the other. The cornerstone of the justice system is that no one should be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle.
16. This Court is vested with Revisionary powers under Article 165 of the Constitution which provides that:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
17. Further, Section 362 of the Criminal Procedure Code Cap 75 Laws of Kenya provides that:

“Power of the High Court to Call for Records:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

18. From the foregoing, the cardinal consideration in granting bail/bond is to ensure that the accused person avails himself in court whenever he is required. Additionally, the bail/bond terms must be pegged on the consideration that the accused person is presumed innocent until proven guilty, as espoused in Article 50(2)(a) of the Constitution of Kenya which provides that:

‘Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.’

19. The Bail and Bond Policy Guidelines at page 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.”

18. In *Andrew Young Otieno v Republic* [2017] eKLR, it was held that:

“This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to a denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms to be imposed by the trial magistrate. He has been in remand custody for a period of over two years.”

20. In this case, the applicant is facing two cases both of defilement. In one case, he was granted bond pending trial while in the case subject of this revision application, the prosecution opposed the application for bail. The trial court also received the prebail assessment report which was in favour of the release of the applicant on bond as the victims had been relocated from the home of the applicant where they lived with him to a far off safe areas and that there was no possibility of him absconding or interfering with witnesses.

21. This court also called for a pre revision of bail assessment report which was filed in court on 5th January, 2024 and the probation officer’s report concurs with the prebail assessment report filed in the lower court.

22. Based on the above, I find that although the trial court did not err in denying the applicant bail since she directed that it be considered after the complainants have testified, that was on the basis that the complainant was living in the vicinity of the applicant and therefore the likelihood of interfering with her was very high as she was a niece to his wife. Now that it is clear that the victim is not resident in the area, there is no likelihood of interference with the witnesses, the applicant having been in prison since his arrest in June, 2023.

23. For the above reasons, I find that the application for revision of the ruling of the trial court made on 26th July, 2023 in Nyando SPM SO Case No. E025 of 2023 declining to grant bail to the applicant pending trial is merited. That ruling is hereby set aside and substituted with the following orders:

- i. The applicant/accused person Fredrick Milton Oluoch may be released on bond of Kshs. 400,000 with two sureties, each of similar amounts.
- ii. In the alternative, the accused will deposit cash bail of Kshs. 100,000 into court.
- iii. The two sureties shall deposit into court copies of their national Identity Cards two passport photographs and written undertakings that they will avail the accused in court as and when required to attend without fail and in default, they will each forfeit into court Kshs 400,000.

24. The lower court file together with copy of this ruling and order be transmitted forthwith to enable the hearing continue as scheduled for 23/1/2024.

25. This file is closed.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF JANUARY, 2024

R.E. ABURILI



JUDGE

