



Republic v Int'veld alias Teacher alias Dad alias Mzungu (Criminal Miscellaneous Application E464 of 2023) [2024] KEHC 1313 (KLR) (Crim) (13 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E464 OF 2023
LN MUTENDE, J
FEBRUARY 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**JAN INT'VELD ALIAS TEACHER ALIA DAD ALIAS
MZUNGU RESPONDENT**

RULING

1. Jan Int'veld alias Teacher alias Dad alias Mzungu, the Respondent, is charged with various sexual offences. One (1) count of committing an indecent act with a child contrary to Section 11(1) of the [Sexual offences Act](#) (SOA); One (1) count of sexual communication with a child contrary to Section 16 A (1) (ii) of the [SOA](#); Seven(7) counts of Child pornography contrary to Section 16(1)(b) and (g) of [SOA](#); and, one count of Child abuse contrary to Section 22 (1)(b) as read with Section 22(2) of the [Children Act, 2022](#). Upon arraignment and subsequent reading of charges he denied having committed the offences. He sought to be released on bail, an application that was vehemently opposed by the respondent but the trial court granted him bail.
2. It is upon that background that the applicant seeks revision and setting aside of the stated order. The application is premised on the grounds that the respondent, a Netherland national was on one month tour visit to Kenya from 25th October, 2023, his visa has expired and he was arrested on 24th November, 2023 by the Child Protection Unit officers following intelligence that he had been on police radar on suspicion of committing sexual crimes against children. That he was awaiting to board KLM Royal Dutch airline No. KL 566 departing to Amsterdam at 2359 Hours and was attempting to flee the country.



3. That he has no fixed abode having travelled to Kenya through tourist visa; the court did not consider the nature of the offence and seriousness of the punishment to be meted out; the nature of relationship between him and the witnesses and the likelihood of interference and intimidation was also not considered.
4. The application is supported by the affidavit deposed by the Principal Prosecution Counsel, Ms. Linda Ndambiri who deposes that the victims of the crime are vulnerable children who are known to the respondent and are living in Eldoret and Kisumu and are at the risk of being interfered with and intimidated since the respondent lived with them. That the retributive penalties related to the offences he is charged with will not be served if he is released on bond/bail.
5. The application is opposed by the respondent, who deposes in his replying affidavit that he is not a flight risk. That admission to bond is with further directive that he surrenders his passport and that the allegations that he was fleeing the country are unfounded, claims that were considered by the court and found not to hold water.
6. That he had taken care of his wife's children in Kisumu from the time they were one (1) year old and the children are now aged seven (7) and nine (9) years and he has not harmed them. That there is no likelihood of influencing the children considering that the trial has commenced and the duo have already testified.
7. The application was canvassed through oral submissions. It is urged by the applicant that there are compelling reasons not to release the respondent on bond. That the respondent has no fixed place of abode having travelled to Kenya on a tourist visa that has since expired. That the respondent is a father figure to the two (2) minors who have already testified but the seventeen (17) year old's evidence is pending. Therefore, the applicant prays that all witnesses testify before he can be released on bond.
8. It is however submitted by the respondent through Counsel Danstan Omari and Omaiyo that he is 72 years old and that has medical complications. That he has made regular visits to Kenya between 2015 and 2023. He also has two (2) families in Eldoret and Kisumu who depend on him.
9. That his visa expired when in custody and he came to court and applied for renewal of his visa as had been the case, and, he was not fleeing but, going back as usual after visiting his family in Kenya.
10. That severity of sentence is not a reason to deny bond as there are other more serious offences such as treason, terrorism and murder where bail has been granted. Reliance is placed on the case of *Benjamin Njiru Bedan v Republic* (2021) eklr, and, *Michael Juma Oyamo v Republic* (2019) eklr. That the reasons given should be cogent and meet high standard and not based on tangible evidence and not mere apprehension and fear.
11. I have considered rival arguments. Revisional jurisdiction is provided by Statute. Section 362 of the *Criminal Procedure Code* provides that 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.”
12. A person indicted should be released on bail/ bond unless there are reasons that cannot be refuted as to why it should not be the case.



13. Article 49 (1) (h) of *the Constitution* provides that:

An arrested or accused person has right to be released on bond or bail on reasonable conditions pending charge or trial, unless there are compelling reasons not to.
14. The stated right may however be limited if reasons given are reasonable and justifiable. It is for that reason that the prosecution is required to give compelling, satisfactory and cogent reasons that would prevent an accused from benefitting from his constitutional right.
15. An accused person has the right of being presumed innocent until adjudged guilty (See Article 50 (2) (a) of *the Constitution*). This calls upon courts to ensure that an accused person benefits from the presumption of innocence such that bail should be denied as a last resort and only on deserving cases. (Also see *Mohamood Chute Wote & 2 others v Republic* (2021) Eklr).
16. In *Republic v Diana Suleiman Said & Another* (2014) eklr, the court cited *Masroor v State of Uttah Pradesh & Another*. 2009) (14) SCC 286 where the Indian Supreme court held that:

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend on the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”
17. The list of compelling reasons is set out under Section 123 A of the *Criminal Procedure Code* and the Judiciary guidelines on Bail and Bond, this list also forms points of consideration for the court in an application for bond.
18. The stated list was summarized in *Republic v Pascal Ochieng Lawrence* (2014) eKLR where Sitati J stated as follows:

“...The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:- the seriousness of the offence although this carried greater weight under the old constitutional dispensation; the weight of the evidence so far adduced if the case is partly heard; the possibility of the accused interfering with witnesses; the safety and protection of the accused once he/she is released on bail/bond; whether the accused will turn up for trial; Whether the release of the accused will jeopardize the security of the community.”
19. In the impugned ruling the trial court held that it was not persuaded that the prosecution established compelling reasons requiring the respondent to be denied bail. That the fact that he is a foreign national does not disentitle him to bond .That it is possible to impose conditions to ensure a foreign national does not jump bail. That there is no evidence that the respondent is a globe trotter and that the only entry on his travel documents were entry and exit stamps for Kenya and Tanzania. Further that the fact that he is a flight risk is unfounded. That his tour visit seemed to have expired while he was in custody. Although he was arrested when he was about to leave the country, the court could not determine whether he was fleeing the country because of investigations or because his visa was due to expire.
20. The court also found that there was no evidence that the respondent was married to a Kenyan and that he ran a charitable organization in Eldoret and Kisumu.



21. Of all reasons given why an accused should be denied bail, the paramount one is if he will not turn up for trial. It was demonstrated that the respondent is a foreigner who was in Kenya on a one month tourism visit and his visa has since expired. And, at the time of arrest he was leaving the country. Faced with a myriad of accusation there are high chances of not turning up for trial. The fact that the respondent is a flight risk and chances of fleeing the jurisdiction of the court before he was charged was evident. This can be implied from the constant applications brought before where the investigators sought and were allowed to detain the respondent. There is also no dispute that the respondent was on tour visit and that his visa has expired. That during the same period he was investigated for commission of crime and the circumstances of his arrest were that he was about to exit the country.
22. On whether the respondent had a known place of abode, the trial court observed that there was no evidence that he was married to a Kenyan citizen as alleged by counsel or that he runs a charitable organization.
23. It was irregular to hold that it was not a ground to consider before granting bail. It is trite that bail is dependent on whether the accused has a fixed and known place of abode, where it is not definite and ascertained there is a lacuna left and the respondent might abscond trial and never be traced. It was important in this case considering that the respondent is not a Kenyan National and has no business engagement to keep him here. This was sufficient ground to deny him bond.
24. On the question of interference with witnesses, if proved that there is a likelihood of witnesses being interfered with by an accused person, then bail should be denied. It has been held in a myriad of cases that it should not be on mere allegations but there should be cogent evidence. The prosecution that alleges is obligated to demonstrate the existence of compelling reasons. The prosecution advised court that the respondent was known to the witnesses. The court was of the view that there were ways to prevent witness interference, and, only warned the respondent against such attempt.
25. In *Republic v Joktan Mayende & 3 others* (2012) eKLR the court held at paragraph 24 that :

“... In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the *Constitution* of Kenya, 2010..”
26. In *Republic v Dwight Sagaray & 4 others* (2013) eKLR, the court held that:

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others”
27. An argument has been advanced that two of the minors have already testified, however there is no doubt that the victims are vulnerable by virtue of their age hence require protection being children in need of care and protection.
28. Further, the other victim has not testified and it is apparent that the respondent, if released on bond would have access to the victim / witness who is a resident of Uasin Gishu County. It is submitted that the respondent has a place of abode in Eldoret where he also runs a children home. It is also disclosed



that the respondent was living with his companion and her children in Uasin Gishu, Eldoret. If this is the case, there would be no doubt that he will return to the victims and their mother and other relevant witnesses.

29. Under such circumstances, the trial court simply cautioning the respondent against interfering with witnesses was not only insufficient but irregular. From the foregoing, the prosecution proved that there was a high chance that the respondent would access, influence and intimidate the witnesses and in the long run affect the entire case such that the criminal justice would be jeopardized.
30. The upshot of the above is that the application is merited. In the result, I call to this court the trial court orders issued on 11th December, 2023 that I quash and set aside and substitute with an order denying the respondent bail until circumstances change.
31. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 13TH DAY OF FEBRUARY, 2024.

L. N. MUTENDE

JUDGE

In the presence of:

Ms. Ntabo for Applicant

Mr. Omaiyo for Respondent

Mr. Danson Omari for Respondent

Ms. Nekesa for Respondent

Court Assistant - Habiba/Hadija

