



**Kasina & another v Republic (Miscellaneous Criminal Case
E021 of 2024) [2024] KEHC 5381 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CRIMINAL CASE E021 OF 2024**

AK NDUNG’U, J

MAY 16, 2024

BETWEEN

DOMINIC MULWA KASINA 1ST APPLICANT

JANEROSE MUTHONI WACHIRA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for revision of the orders of court in Nyahururu
Anti-Corruption Case No. E002 of 2024 – S.O. Mogute SPM)*

RULING

1. The Applicants are aggrieved by the orders of bond/bail terms of the subordinate court and through a letter dated 8th May, 2024 written by their counsel, the court is implored to review the orders of the lower court.
2. The Applicants are the 8th and 10th Accused in the lower court file. 13th accused is a company where the Applicants are directors/shareholders.
3. The Applicants are charged at Count I jointly with others with the offence of Corruption Contrary to Section 47A (3) as read with Section 48(1) of the *Anti-Corruption and Economic Crimes Act, 2003*, and Count XVI with the offence of Fraudulent Acquisition of Public Property Contrary to Section 45(1) of the *Anti-Corruption and Economic Crimes Act, 2003*.
4. Upon charges being read out to the Applicants on their behalf and that of their company, they pleaded not guilty and upon a strenuous application for reasonable bond/bail terms, the trial court handed them a bond of Kshs.5,000,000/- and surety of similar amount with an alternative of Kshs.2,000,000/- cash bail each.



5. It is the Applicant's case that they were cooperative during the investigations carried out by the EACC.
6. The Applicants are of the view that the bond terms meted out by the court were informed by the value of the subject matter of the proceedings as per the charge sheet.
7. The Applicants feel that the well settled principles on bail were not properly considered by the trial court and the result is that the objective of the right to bond/bail as enshrined in *the Constitution* of Kenya 2010 has been watered down by the bond/bail terms ordered by the trial court.
8. The Applicants are said to have a 6 and 3 year- old children who fully depend on them being sole bread winners of their family. The 2nd Applicant is a house wife doing small business of baking cakes for sale at home. The 1st Applicant is a businessman in transport of building materials within Nyahururu.
9. The terms of bond where the Applicants are required to raise Kshs.5,000,000/- and or cash bail of Kshs.2,000,000/- each are hefty for them.
10. The Applicants were able to raise the police cash bail of Kshs.50,000/- each despite having no consistent source of income and invariably, the said cash bail was sufficient to secure and ensure their attendance to court on the 6th May, 2024 for plea taking.
11. The Applicants are of the considered opinion that the police cash bail did achieve the objectives of Article 49(1) (h) and that it is secured and ensured their attendance to court as and when they were required to attend.
12. In the circumstances the children of the Applicants have been left with no parent to look after them and the raising of bond terms invoked by the trial court remains bleak.
13. The Applicants application is for this Honourable Court to invoke its revisionary powers as provided under Section 362 of the Criminal Procedure Code by calling of the record in Nyahururu CMC, Acc. No. E002 of 2024 Republic vs John Kariuki Kimani & 12 others and satisfying itself as to the propriety or otherwise of the proceedings contained therein in so far as the issues raised herein above are concerned.
14. The Applicants humbly pray that this Honourable Court set aside the hefty bond terms metted out by the trial court and admits them to the affordable cash bail of Kshs.50,000/- as had been granted to them among any other terms and conditions that this Honourable Court may find just to impose and which conditions the Applicants are ready and willing to comply with in the interest of justice.
15. Learned counsel for the Applicants submitted that the bond terms made against the Applicants were excessive. That the court was called to grant bond terms based on the figures in the charge sheet. He made calculations to demonstrate that assuming the yardstick was the figures in the charge sheet, the terms ought to have been lower.
16. Counsel added that if figures were to be the guiding factor in grant of bond terms, poor offenders will never access bail. He urges that the presumption of innocence should prevail.
17. Notably, counsel urges that bond was not opposed by the prosecution and it was therefore at the discretion of the court to consider the matter including consideration of the ability of the Applicants to meet the bail terms. It is submitted that the trial court failed to consider the individual cases of each accused person with the result that the Applicants herein, who are husband and wife, lost their freedom.
18. It is contended that arising from the need to have one of the parents go home, the Applicants borrowed Kshs.2,000,000/- at an interest of Kshs.100,000/-. The agreement requires that the money be refunded



on or before 9th June, 2024 with a default clause for payment of 30% of interest as liquidated damages. It is urged that this is a burden on the Applicants.

19. Mr. Mathea gives a history of the Applicant's obedience to police summons, and cooperation during investigations. He urges that when the Applicants were eventually booked at the police station and released on a cash bail of Kshs.50,000/-, they duly appeared in court for plea taking. Plea was deferred to the next day and they still appeared.
20. It is emphasized that the purpose of bail is to procure attendance of an accused before court. Counsel seeks that the Applicants be admitted to bail in the terms granted by the OCS Nyeri Police Station, that is, cash bail of Kshs.50,000/-. It is sought that the cash bail of Kshs.2,000,000/- already deposited be refunded less the cash bail deemed fit by the court to avert action for recovery of the money.
21. In rejoinder, Ms. Macharia for the Respondent has stated that the cash bail granted by the OCS should not be compared with the bond now granted by the court since, at the time the OCS granted the bail, there were no charges then.
22. Counsel agreed with her counterpart on the principles set by Justice Muriithi in *Kipruto Serem v Republic* [2020] eKLR. She added that the amount of bond is not an approximation of the value of the criminal charge. She urges that the calculations by counsel for the Applicants are irrelevant.
23. Ms. Macharia adds that terms of bail should be tailored to secure the attendance of the accused for purposes of trial. She appreciated that the Applicants are husband and wife. They have minors. She agreed that the bond terms were hefty but based on these circumstances only.
24. Counsel is opposed to the terms being reduced to Kshs.50,000/- considering the offences faced. Reliance has been placed on the decision by Githua Judge in *Eliud Muli Musyoka v Republic* [2022] eKLR.
25. It is further urged that the bond terms should not be so low that the accused will be entitled to forfeit the same and flee. The bond terms should take into account the personal circumstances of the accused. The court is urged to, in reviewing the bail, ensure that the terms are reasonable enough to guarantee accused's attendance to court.
26. I have considered the application for review of the bail terms. I have had due regard to the learned submissions by counsel on record. The issues for determination are:
 - a. Whether this court has the requisite jurisdiction to review bond/bail terms set by the trial court.
 - b. Whether adequate ground has been laid for interference with the bail terms set.
27. On jurisdiction of this court to review bail terms, the law is settled. This court under Section 123 (3) of the Criminal Procedure Code has wide and unfettered discretion to revise bond terms issued by the lower court in the interest of justice. The provision states as follows:

“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.”
28. Secondly, the revisional jurisdiction of this court is well set out in Section 362 of the Criminal Procedure Code which provides as follows:

“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.”

29. This jurisdiction though limited is wide and ensures that the ends of justice are met by superintending over the propriety and correctness of proceedings in the subordinate courts. The Supreme Court of India in *Slaw Wallace & Co. Ltd v Govindas Paru Slothamdas & Another* [2001] 3SCC 445 put the scope of this jurisdiction in the following terms;

“The High Court is entitled to satisfy itself as to the regularity of the proceedings of the correctness, legality or propriety of any decision or order passed therein and if, on examination, it appears to the High Court that any such decision or order should be modified, annulled, reversed, or remitted for consideration it may pass such order accordingly.”

30. On the question whether fertile ground is established for this courts intervention by way of review of the bond terms, a good starting point would be Article 49(1)(h) of *the Constitution* which provides that an arrested person is entitled to be released on bond or bail on reasonable conditions. The right to bail is an inalienable right and can only be restricted by the court if there were compelling reasons for an accused not to be released. In granting bail or bond, the trial court was called upon to exercise its discretion and if there were no compelling reasons to deny an accused person bail or bond, the trial court should exercise its discretion in favour of the accused. Grant of bail is a discretionary power exercised by a trial court. The legal criteria for grant of bail includes;

- a. The nature of the charges;
- b. The strength of the evidence which supported the charge;
- c. The gravity of the punishment in the event of conviction;
- d. The previous criminal record of the accused, if any;
- e. The probability that the accused would not surrender himself for trial;
- f. The likelihood of the accused interfering with witnesses or suppressing any evidence that could incriminate him;
- g. The likelihood of further charges being brought against the accused;
- h. The probability of guilt;
- i. Detention for the protection of the accused; and
- j. The necessity to procure medical or social reports pending final disposal of the case.

31. It is trite law that an appellate court should not interfere with the exercise of the discretion of a trial court unless it was satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it was manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there had been injustice visited on a party.

32. I hasten to add that the constitutional right to bail can only be realized if the dictates of *the constitution* that bail should be on reasonable terms is upheld. In the end, the discretion to grant bail and determine the conditions rested with the court. In exercising that discretion, the court, however, had to seek to strike a balance between protecting the liberty of the accused person and safeguarding the proper administration of justice.



33. The Applicants face serious charges of corruption. Corruption by its very nature is abhorrent. It is a serious threat to the country's economic and social fabric. It must be fought on all fronts and the fact that the court's role in this war is central cannot be gainsaid. We are a country governed by the rule of law and therefore the war against corruption as well as against other crime must be within the confines of the law and with strict observance of the protection of the rights and liberties of individuals as guaranteed in *the constitution*. Terms as bail should therefore not be punitive and I associate with Muriithi J who in *Kipruto Serem v R* [2020] eKLR stated:

“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*.”

34. From the submissions by the Respondent, it is appreciated that the circumstances of the Applicants are that they are husband and wife and this should be considered. In essence therefore there is no serious objection to review of the bail terms.

35. This leads to the determination of which terms would be appropriate in the circumstances. Mr. Mathea proposes that the Kshs.50,000 Cash Bail posted with the police be maintained as the term of bail in court. This is opposed. There is material to show that the Applicants cooperated with the investigators all along during the pendency of the investigation. They also honoured the bail terms posted at Nyeri police station by dutifully appearing in court on the first date of plea and on the second date after plea had been deferred. I would however draw a distinction between the appearance before an investigator and attendance to court. Hitherto, the Applicants were just suspects assisting in investigations. The investigation is complete and the recommendation to charge has been made by the DPP under the independent power bestowed on that office by Article 157 of *the constitution*.

36. It is a truism that the presumption of innocence on the part of the Applicants is not washed away by the conclusion of the investigations and charging. However, the court ought to be free to make an independent decision on grant of bail weighing all relevant factors including, but not limited to, the accused previous obedience to summons by investigators and obedience to a police bond to attend court. Before court are not mere suspects to a crime but accused persons answering to charges and therefore, the court has the unfettered jurisdiction to put into account all relevant factors in setting the terms of bond/bail to ensure attendance to court for trial. The Applicant's conduct of obeying summons and bail terms before should only be considered as a factor winning favour in the eyes of the court in its decision making.

37. Bond terms should not be too high as to be out of reach of the citizenry. The cardinal purpose of bail is to secure the accused person's attendance to court and it should not be a pre-punishment before a trial and a finding of guilt if at all. Muriithi J was spot on when in *Kipruto Serem v R* (supra) he stated:

“The amount of bail or bond is not supposed to be in 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.”

38. The learned Judge proceeded to note, that:

“Terms of bond are not meant to punish the accused for any perceived guilt for the charges levelled 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 purposes of his trial.”

39. Bond terms should be too low as to give an incentive to an accused person to abscond and forfeit the bail security. Reasonable bail terms must in my view mean terms that place an obligation on the accused to attend court in a manner that if he absconds he stands to suffer some loss either of property or liberty if the bond is unsecured.

40. In *Eliud Muli Musyoka v Republic* [2022] eKLR Githua J alluded to this requirement quoting from the Judiciary’s Bail and Bond Policy Guidelines at p.9 paragraph 3.1 (d)

“.....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.

55. 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.”

41. Upon review of the case before me and noting that the paramount consideration is whether the Applicants would attend court if the bail terms were to be reviewed downwards, and, alive to their special circumstances as admitted by both divides, and further, based on their conduct during investigations and at the plea stage, am persuaded that the application before court has merit.

42. I reach the conclusion that had the trial court considered the personal circumstances of the 2 Applicants, it would have arrived at different terms of bail. It is manifest from the facts laid down by the Applicants that the trial court was clearly wrong in the exercise of its discretion and that as a result there had been a miscarriage of justice.

43. With the result that this revision is successful. I review the terms of bail in respect of the applicants to read a personal bond of Kshs.2,000,000 with a surety of like sum with an alternative cash bail of Kshs.500,000.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MAY, 2024

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A.K. NDUNG’U

JUDGE

