



**Kizungu & another v Republic (Criminal Appeal 22 of 2023)  
[2024] KEHC 6377 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 22 OF 2023  
DR KAVEDZA, J  
JUNE 4, 2024**

**BETWEEN**

**NANCY INDOVERIA KIZUNGU ..... 1<sup>ST</sup> APPLICANT**

**EUGENE OTIENDE JUMBA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> applicant filed a notice of motion dated February 24, 2024, seeking an order to review the ruling delivered by this court on December 20, 2023 and admitting the 2<sup>nd</sup> applicant to a cash bail of Kshs. 500,000. The application is supported by an affidavit sworn by the applicants' advocate Danstan Omari of a similar date.
2. The averments made in support of the application are that: The applicants were jointly charged with the offence of being in trafficking in narcotic drugs contrary to section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* no. 4 of 1994 as Amended with *Narcotics Act 2022* and the offence of possession of proceeds of crime contrary to section 4 (c) as read with section 16 (1) (a) of the *Proceeds of Crime and Anti-Money Laundering Act*, 2009. They pleaded not guilty and applied to be admitted to reasonable bail terms. Vide a ruling dated August 31, 2023, the trial court denied them bond. They challenged the said decision before this court. On December 20, 2023, this court admitted each of them to a bond of Kshs. 3 million with one surety in addition to a cash bail of Kshs. 1 million.
3. The 2<sup>nd</sup> applicant has since been unable to raise the said amount. In his affidavit in support, it was averred that the 1<sup>st</sup> applicant is the mother of the 2<sup>nd</sup> applicant. The 2<sup>nd</sup> applicant is a child and requires protection from the law. He has a permanent place of abode. He has no property and terms of bail set by the court were too steep which amounted to a denial of bail.



4. The application was canvassed by way of written submissions which have been duly considered. The issue to be determined is whether the terms of bond/ bail set should be reviewed. This is not an application for revision but a variation of the bond terms set by this court. In the case of *Republic vs. Diana Suleiman Said & Another* [2014] eKLR Muriithi J was of the view that the court does not become functus officio on a first application for bond, that Section 123 of the *Criminal Procedure Code (CPC)* (as amended) following the *Constitution* of Kenya, 2010 makes bail available at all times.
5. In this case, the accused person has remained in remand custody despite the grant of bond terms which is proof that he cannot find a surety or raise the bail terms imposed. In the case of *Harish Mawjee & Another vs. Republic* [2020] eKLR, it was stated that:

“... courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has a right to seek review of bond terms from trial court or high court or appeal.”(Emphasis added)
6. The court exercises this duty in furtherance of the provisions of Article 49 (1) (h) of the *Constitution* which provides that an arrested person has the right to be released on bond or bail on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released. Although the court can grant and /or review bond terms at any stage of the proceedings in furtherance of the accused’s constitutional right under Article 49 of the *Constitution*, due regard should be given to the gravity of the offence.
7. Importantly, any bond terms granted by the court must be balanced against any injustice or prejudice that would likely be suffered by the society and/or the victim. It is trite law that that the paramount principle to be considered in granting bail, is to secure the attendance of the accused during trial. It’s for this reason that bail terms set should neither be so lenient as to entice the accused to abscond nor should they be so excessive so as to amount to ‘indirect’ denial.
8. In this case, this court already found that the 2<sup>nd</sup> applicant was eligible for bond, he was not a flight risk and there were no alleged threats to the witnesses. Section 123 (2) of the *Criminal Procedure Code* provides that:

The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
9. The *Judiciary Bail Bond Policy Guidelines* similarly provide that bond terms shall be reasonable. Although bail terms must be reasonable to enable the accused person to comply and benefit from his constitutional right, the court must also not be seen to encourage absconding and thus interfere with the administration of justice.
10. The *Bail and Bond Policy Guidelines* at page 9 paragraph 3.1. (d) provides that:

“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.”

11. I find the holding in *Harish Mawjee & Another vs. Republic* (*supra*), relevant to the circumstances of this case. The 2<sup>nd</sup> applicant herein was arrested and arraigned before the trial court where they were denied bail. Upon an application for revision before the High Court he was granted bond. However, he has been unable to meet the bond terms set by the court hence, the application for review. It is my view that his inability to get out of prison despite having been granted bond of Kshs. 3 million with one surety and a cash bail of Kshs. 1 million, implies that he been unable to raise the said bond.
12. As was held in the case of *Harish Mawjee* (*supra*), and a myriad of other decisions, this court is vested with jurisdiction to review its orders if there are changed circumstances. The changed circumstance in this case is that although the applicant has been granted bail, he is unable to meet the terms.
13. Consequently, I exercise my inherent jurisdiction and review the orders issued by this court on December 20, 2023, which are hereby set aside and substituted as follows:
  - I. The 2<sup>nd</sup> applicant Eugene Otiende Jumba is granted a cash bail of Kshs. 500,000 with one contact person, the depositor of the said amount.
  - II. The contact person shall avail a copy of his/her National Identity Card, a passport photo and a Chief’s letter indicating that he/she has known the 2<sup>nd</sup> applicant for a period of more than 12 months, all to be approved by the trial court.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF JUNE 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Nekesa h/b for Omari for the 2<sup>nd</sup> applicant

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

