



**Hussein & another v Republic (Miscellaneous Criminal Application
E012 of 2023) [2024] KEHC 8927 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2023**

DR KAVEDZA, J

JULY 22, 2024

BETWEEN

MOHAMED SALEED MOHAMED HUSSEIN 1ST APPLICANT

KHAN MUHAMMED ASHRAF 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed a chamber summons application dated 15th November 2023, seeking orders to revise the trial court's decision denying them bail. The application is premised on the grounds in the face of the application and supported by an affidavit sworn by the applicants' advocate of a similar date.
2. The averments made are that the applicants were jointly charged with five others for the offence of trafficking in narcotic substances contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* no. 4 of 1994 before the Chief Magistrates Court sitting at JKIA. They were denied bail pending trial on 29th June 2023. They asserted that the trial court unfairly assumed their guilt and denied them bail. In addition, there are changed circumstances since their denial of bail by the trial court.
3. At the time, it was not brought to the court's attention that the 1st applicant though a Pakistani national, is married to a Kenyan citizen with whom they have three issues. He has been a Kenyan resident for 15 years and their union was solemnized on 17th July 2010 at the registrar of marriages. He is sickly and his health has deteriorated since his incarceration. The 2nd applicant holds a Kenyan permanent residence certificate and is married to a Kenyan citizen. Their union was solemnized on 16th July 2011 under Kenyan law and together they have three issues. It was averred that the 2nd applicant lives with his family in Pangani Nairobi County.



4. It was argued that the applicants have strong familial ties in the country and are not a flight risk. They urged the court to give reasonable bail terms which they will abide by.
5. The respondent did not file a response to the application despite being given the opportunity to do so. The application was canvassed by way of written submissions with the applicants filing theirs. These submissions have been duly considered by the court. The issue for consideration is whether this court should revise the orders of the trial court denying the applicant's bail.
6. The revisional jurisdiction of this court is donated by Section 362 of the [Criminal Procedure Code](#) which 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.”

7. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order, or finding is tainted with illegality, errors of law, or impropriety or that there was an irregularity in the proceedings that gave rise to the impugned order, finding or decision.
8. The trial court's record shows that on 26th June 2023, the applicants took plea and denied the charges preferred against them. The trial court heard an application for bail pending trial. On 29th June 2023, the applicants were denied bail. The reason for the denial of bail was that the applicants were a flight risk given their involvement in the criminal enterprise of drug trafficking and the charges they each faced. The court noted that these were compelling reasons to deny them the enjoyment of the constitutional right to bail.
9. The [constitution](#) specifically requires under Article 49 (h) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the Criminal Procedure Code, Article 49 (h) places the burden of proof on the state to demonstrate compelling reasons.
10. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of the [Constitution](#), the courts are to be guided by the provisions of section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

- (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;
 - (d) The strength of the evidence of his having committed the offence:
- (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;



- (a) Has previously been granted bail and has failed to surrender to custody if released on bail, it is likely that he would fail to surrender to custody;
- (b) Should be kept in custody for his own good.

11. In the [Bail and Bond Policy Guidelines](#), it is restated as a general guideline in Paragraph 4.9 that:

“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the [Constitution](#) of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”

12. Moreover, by dint of Article 50(2) of the [Constitution](#), every accused person is entitled to the presumption of innocence. Hence, in the Bail and Bond Policy Guidelines, it is recommended that:

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.

13. From the record of the trial court, the prosecution through an affidavit to oppose bail sworn by IP Allibashir Olow averred that the 1st applicant who is a Pakistani citizen and was found in possession of an expired Pakistani passport and had no valid visa hence no legal document to be present in Kenya. It was further contended that the 2nd applicant who was believed to be an Indian National had a Kenyan alien card and may be tempted to leave the jurisdiction of the court. It was argued that these were compelling reasons to deny them bail.

14. The main concern raised by the state was that the applicants were a flight risk and therefore unlikely to turn up for trial. In cases where the accused is a foreigner, the courts have come up with certain principles to be taken into further consideration in determining whether or not to release the accused on bail pending trial. The cases this court has considered include [Republic vs Kokonya Muhssin](#) [2013] eKLR, [Republic vs Dwight Sagaray & 4 Others](#) [2013] eKLR, [Republic vs Makoy Madhak Deer](#) [2015] eKLR and [Republic v Richard David Alden](#) [2016] eKLR. Being a foreigner per se is not an inhibiting consideration in determining whether or not the accused should be released on bail pending trial. Some of the factors that the court should take into consideration are; whether the accused has a fixed abode in Kenya and whether he has property or familial connections in Kenya, the nature of the charge that the accused is facing and whether the likely sentence to be meted out may serve as an incentive or impetus for the accused to abscond from the jurisdiction of the court and the antecedents and subsequent conduct of the accused before and after being charged. The factors listed above are by no means exhaustive and each case will depend on its facts and circumstances.

15. The fact that the 1st applicant is a foreigner is indeed a material factor that should be considered in determining whether or not he should be released on bail pending trial. The 1st Applicant told the court that he is a Pakistani citizen married to a Kenyan and that their union which was solemnized under Kenyan law and that together they have three issues. The prosecution contended that the 1st applicant was in Kenya illegally having been found in possession of an expired Pakistani passport, and further, that he had no valid visa. This claim was not refuted by the 1st applicant.



16. From the evidence produced, the 1st applicant has indeed been married to a Kenyan citizen since 2010. He has also produced the birth certificates of the issues born out of the union. However, he did not deny that he was illegally present in Kenya, having failed to renew his tourist visa or apply for a permanent residence permit. Additionally, having established that he came to Kenya on a tourist visa which expired, he has not demonstrated to the court what business he does for a living without valid papers. Accordingly, the 1st applicant being illegally in Kenya, he is not entitled to the privilege of the right to bail under Article 49 (1) (h) of the Constitution of Kenya. It is therefore my considered view that the trial magistrate therefore properly exercised her discretion in denying him bail.
17. Having so stated, I direct that the hearing be fast-tracked as far as possible since the 1st applicant shall be remanded in custody during the trial. However, should the case not determined within three months from the date hereof, the applicant shall be at liberty to apply for bail review.
18. With respect to the 2nd applicant, the prosecution contended that he is a flight risk. From the documentary evidence produced, the 2nd applicant is a holder of a Kenyan permanent residence permit. In addition, he produced a certified copy of a marriage certificate to prove that he is married to a Kenyan citizen under Kenyan law. This evidence was not rebutted by the prosecution. Finally, birth certificates were produced in evidence to show that their union is blessed with three issues. Again, this evidence was not rebutted. According to the investigating officer, the 2nd applicant was arrested at his residence in Pangani. This indeed confirms that he has a permanent residence in Pangani with strong familial ties.
19. In the end, the burden was on the prosecution to prove the existence of exceptional circumstances for the denial of bail, which in my view, they failed.
20. There was therefore no evidence to support the contention that the 2nd applicant a flight risk and lacked a fixed abode. In any event, his attendance to court can be secured by the court granting an order for appropriate sureties.
21. Consequently, the application is merited and is hereby allowed in the following terms:
 - I. Khan Muhammed Ashraf, the second applicant herein is granted a bond of Kshs. 8 million with one Kenyan surety of a similar amount or an alternative of a cash bail of Kshs. 2,000,000.
 - II. The second applicant is directed to provide two contact persons who are Kenyan citizens by birth.
 - III. The second applicant is directed to report to the investigating officer every fortnight until the conclusion of the trial.
 - IV. The second applicant is directed to deposit his passport in court which shall be retained during the period of the trial.
 - V. This order shall be served upon the Indian High Commission by the Court, who are directed not to issue the second applicant with a new/replacement passport.
 - VI. This order shall be served upon the Immigration Department who shall issue a red alert against the second applicant, barring him from travelling outside the jurisdiction of the court during the period of his trial.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF JULY 2024



D. KAVEDZA

JUDGE

In the presence of:

Kang'ahi for the Applicants

Mong'are for the Respondent

Naomi Court Assistants.

