



REPUBLIC OF KENYA



**Haji v Republic (Miscellaneous Criminal Application  
E014 of 2023) [2024] KEHC 8524 (KLR) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8524 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
MISCELLANEOUS CRIMINAL APPLICATION E014 OF 2023**

**DR KAVEDZA, J**

**JULY 15, 2024**

**BETWEEN**

**HAJI KHATIB HAJI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant is charged with another not before this court for the offence of trafficking in narcotic drugs contrary to section 4 (a)(ii) of the *Narcotic and Psychotropic Substances (Control) Act* No. 4 of 1994. He applied and was denied bond by the trial court in a ruling delivered on 8<sup>th</sup> May 2023. He has filed the present chamber summons dated 16<sup>th</sup> November 2023 seeking a revision order of the trial court denying him reasonable bail/bond terms. The application is supported by an affidavit sworn by the applicants' advocate Stanley Kang'ahi of a similar date.
2. The averments made are that vide a ruling delivered on 8<sup>th</sup> May 2023, the trial court denied him bail and admitted his co-accused to bail terms. The applicant is a Tanzanian National married to a Kenyan citizen. Their union has been blessed with four issues. They have a fixed abode in Majengo Saba Saba in Mombasa. He has been residing in Kenya for the past eight years. He is sickly and his health and deteriorated due to his continuous incarceration. He is willing to abide by the reasonable bail terms set by the court.
3. The matter was canvassed by way of written submissions, which have been duly considered and there is no need to rehash them.



4. 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.”

5. 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.

6. The trial court’s record shows that on 20<sup>th</sup> April 2023, the applicant and his co-accused took plea and denied the charges preferred against them. The trial court heard an application for bail pending trial. On 8<sup>th</sup> May 2023, the applicant was denied bond, on the other hand, his co-accused was granted bail/ bond. The reason for the denial of bail was that the applicant was a flight risk having no fixed abode within the court’s jurisdiction. The court noted that these were compelling reasons to deny him the enjoyment of the constitutional right to bail.

7. 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.

8. 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 fulfilment 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.”



9. 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.”
10. 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.
11. From the record of the trial court, the prosecution through an affidavit to oppose bond sworn by CPL George Odhiambo averred that the applicant who is a Tanzanian citizen is not a resident of Kenya and arrived in Kenya on a tourist visa and was living in a hotel before his arrest. It was further contended that the applicant lacked a permanent fixed abode and was therefore a flight risk.
12. The main concern raised by the state was that the applicant was a flight risk and therefore unlikely to turn up for trial. This court is guided by Article 49(1)(h) of the *Constitution*, the *Bail/Bond Policy* by the Judiciary, and decided cases. In the present application, the main concern of this court is whether the Applicant will attend court if he is released on bail pending trial. That fact that he is innocent until proven guilty by a court of competent jurisdiction is without doubt.
13. 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/bond pending trial. The cases this court has considered include *Republic v Kokonya Muhssin* [2013] eKLR, *Republic v Dwight Sagaray & 4 Others* [2013] eKLR, *Republic v 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. Another factor is whether the accused has a fixed abode in Kenya and whether he has property or familial connections in Kenya. Another factor is 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. Also, to be taken into consideration is the antecedent and subsequent conduct of the accused before and after being charged. The factors listed above are by no means exhaustive. Each case will depend on its facts and circumstances.
14. The fact that the applicant is a foreigner is a material factor when this court is determining whether or not he should be released on bail pending trial. The Applicant told the court that he married one Jamila Ali Omar a Kenya citizen and had been living with her as husband and wife for eight years. In addition, their union has three issues. He produced a Tanzanian Marriage Certificate to that effect.
15. Indeed, the pre-bail report on record indicates that for the married to a Kenyan wife. The report further revealed that he is also married to another wife who resides in Tanzania. The report further indicated that the applicant only visits his second wife (Jamila) occasionally. His residence in Mombasa can therefore not be considered permanent. In addition, he was in Kenya on a tourist visa.



16. In my view, the prosecution supplied the court with cogent and credible evidence to support the contention that the applicant was a flight risk by being a foreigner and had no fixed abode in the country. Despite having familial ties, he was still a flight risk.
17. Having considered the provision of Section 123 of the *Criminal Procedure Code* and the provisions of the Kenya Judiciary bail and bond policy guidelines for March 2015, I do find that there was a compelling reason that justified the denial of bond. The trial magistrate cannot be faulted for the decision.
18. The upshot of the above analysis is that the application 16<sup>th</sup> November 2023 is found to be devoid of merit and is dismissed.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 15<sup>TH</sup> DAY OF JULY 2024**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Applicant present

Omurokha for the Respondent

Nelson/Naomi Court Assistants.

