



**Ochwang v Republic (Miscellaneous Criminal Application E108 of 2024)  
[2024] KEHC 10851 (KLR) (Crim) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10851 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E108 OF 2024  
LN MUTENDE, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**JESUSA NAWADE OCHWANG ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Corrigendum**

1. Jesusa Nawade Ochwang' through the firm of Wangalwa Oundo Advocates; has yet again approached this court by a Notice of Motion dated 11<sup>th</sup> October, 2024 seeking review of the Ruling of this court delivered on 20<sup>th</sup> September, 2024 to include the word 'cash bail'.
2. The substratum of the application is that the impugned Ruling stated thus:  

“Therefore, I review the terms of bail set by the lower court to Ksh. 30,000/- with a surety in like sum”
3. That upon processing a release order, the Honourable Magistrate declined to sign the same as the Ruling is unclear. That the Ruling needs to expressly have the word “Cash bail” in order for the release order to be fully processed.
4. That this is an error apparent on the face of the record and in the interest of justice, the court should review the order to specify the sum of Ksh. 30,000/- as cash bail.



5. The application is brought pursuant to the provisions of Order 45 of the *Civil Procedure Rules* that is not applicable to criminal matters. However, review under the *Criminal Procedure Code* (CPC) would ordinarily be brought under Section 362 of the *CPC* which provides thus:

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.

6. This court determined whether or not bail/bond granted by the lower court was reasonable and reached a considered determination following circumstances of the case where the applicant (Accused) was to be released upon making an undertaking to be out on bond of Ksh. 30,000/- with a surety in a like/similar sum.

7. Section 346 of the *CPC* provides thus:

The court may at any time amend a defect in substance or in form in an order or warrant, and no omission or error as to the time and place, and no defect in form in an order or warrant given under this Code, shall be held to render void or unlawful an act done or intended to be done by virtue of that order or warrant, provided that it is therein mentioned, or may be inferred therefrom, that it is founded on a conviction or judgment, and there is a valid conviction or judgment to sustain it. ( Emphasis Mine)

8. The *Black's Law Dictionary* defines 'bail' as:

“Security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time.”

9. The *Bail and Bond Policy guidelines* defines:

“Bail – An agreement between an accused person or his/her sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.

Bond – An undertaking, with or without sureties or security, entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond.”

10. It is clear that the accused was to avail a surety in the sum of Ksh. 30,000/- In the premises, for avoidance of doubt I do hereby correct the error occasioned to read thus:

“Therefore, I review the terms of 'bond' set by the lower court to be Kenya Shillings Thirty Thousand (30,000/-) with a surety in a like sum.”

## **Ruling**

1. Jesusa Nawade Ochwang<sup>3</sup>, the Applicant, approached this court through an application dated 9<sup>th</sup> April, 2024 seeking review, variation and/or modification of the order of the lower court issued on 9<sup>th</sup> April, 2024 concerning bail.



2. The applicant seeks reduction of bond terms to a figure that is not excessive and which does not defeat the spirit, intention and purpose of the Constitution, and, in particular to grant the applicant a cash bail of Ksh. 15,000/-
3. The application is based on grounds that the applicant was granted a bond of Ksh. 300,000/- which she is unable to raise. That following the order of the court a pre-bail report was filed which recommended release of the applicant on a cash bail of Ksh. 15,000/-. That the court reviewed the bond terms from Ksh. 300,000/- to Ksh. 180,000/- with one (1) surety; terms that are still beyond the applicant hence the applicants' fundamental rights would only be served by substantial review of the bond terms.
4. The application is supported by an affidavit sworn by Mary Amurono Ochwang' the mother of the applicant who deposes that neither the applicant nor her family member can raise bond terms set by the court. That the parents of the applicant are of meagre means, peasants in the village without land or any property in their name and as such are unable to raise a bond of Ksh. 180,000/-
5. That to protect the spirit of the Constitution and specifically the fundamental right to bail it is necessary for the court to further review the bail terms to ensure that the rights for an applicant are not frustrated by bail terms that are excessive and not achievable.
6. The respondent filed grounds of opposition stating that there is no ground for justification of interference with the discretion of the lower court on matters of granting bond to the accused person unless it is shown by way of demonstration that the bond terms thereof were manifestly harsh, excessive and unreasonable in the circumstances of the case.
7. The application was disposed through oral submissions. Mr. Wangalwa learned Counsel for the applicant reiterated the averments on the body of the application and added that the applicant has been behind the bar for the last two (2) years. That the parents of the applicant are reliable and they will ensure the applicant turns up for trial if released on a cash bail of Ksh, 15,000/-
8. The application is opposed by the Respondent who argue through Mr. Mutuma learned Prosecution Counsel that the applicant faces a charge of Sexual Assault contrary to Section 5(1)(a)(2) of the Sexual Offences Act and the bond granted and reviewed to Ksh. 180,000/- is sufficient given the nature of the offence.
9. I have duly considered rival arguments and perused the lower court record. The supervisory jurisdiction of the High Court upon the lower court is enshrined in the Constitution. (See Article 165(6) of the Constitution).
10. Article 49(1) (h) of the Constitution provides for release of an accused person on reasonable bail terms. Conditions and terms of bond should be proportionate to the offence alleged and must also take into consideration the circumstances of the accused. The court which adjudicates over a matter must exercise sound judgment in reaching the decision to impose bail terms. The order granted should be fair and sensible.
11. At the outset the applicant was granted bond of Ksh. 300,000/- with a surety. The order was made by the court suo moto. Five months later the court reduced the bond to Ksh. 180,000/- with a surety. Bail information report filed recommended that the applicant be released on a cash bail of Ksh.15,000/-. However, a court is not bound by recommendations of a Probation Officer although It may be persuaded by the proposal if favourable.



12. Be as it may, the *Judiciary Bail and Bond Policy guidelines* provide 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.<sup>24</sup>”

13. Clearly bail terms should be reasonable but not too low so as to entice an accused to abscond. With that in mind I do note that the applicant herein is unable to meet bail terms set which means that bail terms set in her case were not equitable, but, harsh and excessive. In the circumstances, I find the application meritorious. Therefore, I review the terms of bail set by the lower court to Ksh. 30,000/- with a surety in a like sum.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT  
NAIROBI, THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. N. MUTENDE**

**JUDGE**

