



REPUBLIC OF KENYA



**Jamal & 13 others v Republic (Miscellaneous Criminal Application
E223 of 2022) [2023] KEHC 2384 (KLR) (Crim) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E223 OF 2022
JM BWONWONG'A, J
FEBRUARY 7, 2023**

BETWEEN

ABDUL RATIF JAMAL 1ST APPLICANT
ABBAS KASSIM 2ND APPLICANT
ISMAIL SHABAN 3RD APPLICANT
BONFANCE CHAZIMA 4TH APPLICANT
DICKSON MUHATIA 5TH APPLICANT
RAMADHAN MOHAMMED 6TH APPLICANT
KAMOTI EMMANUEL 7TH APPLICANT
KL 8TH APPLICANT
JUSTUS JUNIOR 9TH APPLICANT
YUSUF MOHAMED 10TH APPLICANT
STA 11TH APPLICANT
JI 12TH APPLICANT
HARON SONOZ 13TH APPLICANT
ABDALA KHASHIM 14TH APPLICANT

AND

REPUBLIC RESPONDENT



*(Being an application for revision of the ruling delivered by Hon. Riany
S.R.M on 18th August 2022 in Kibera Chief Magistrates Court in Criminal
Case No. E128 of 2022 Republic vs Abdul Ratif Jamal & 13 others)*

RULING

- 1 The applicants have been charged with the offence of robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code (Cap 63) Laws of Kenya. They pleaded not guilty to the charges and were granted bail/bond. The applicants have filed an application urging the court to exercise its supervisory jurisdiction and review the bail/bond terms imposed by the magistrate's court.
- 2 The application is supported by grounds set out on the face of the notice of motion and an affidavit dated August 18, 2022 sworn by the applicant's advocate. The said averments are as follows. That the applicants were arrested on January 14, 2022 in Kibera within Nairobi County. Upon taking plea, the sought reasonable bail terms from the court. On February 3, 2022, the subordinate court granted bail/bond of Kshs 300,000/= and a surety of a similar amount to each applicant except for the 8th, 11th and 12th applicants. The three accused/applicants who were minors were granted bail/bond of Kshs 200,000 with a surety of a similar amount or a cash bail of Kshs 100,000/-.
- 3 The advocates for the accused/applicants made an application for a review of the bail terms. In a ruling delivered on June 19, 2022, the trial court dismissed their application. That the court discriminated against the minors due to the disparity in the bail/bond terms granted to them. It is economically untenable for a minor to raise the cash bail sought. The effect is that the parent is punished even before the case is heard. The accused persons come from poor families and are unable to raise the bail/bond terms granted. The bail/bond terms are not reasonable as required under the law. The minors are still going to miss a considerable part of their education in violation of their right under article 53 of the Constitution of Kenya. They have therefore urged the court to grant them more lenient bail/bond terms to enable them to continue with their studies.
- 4 In response to the application, the respondent filed grounds of opposition. The grounds raised are that the trial court considered the pre-bail report, which was not favourable to the applicants. The applicants have not placed an affidavit of means indicating their incomes. The school-going minors are being held in a facility which ensures that their academic needs are met. The trial magistrate noted the sensitivity of the matter before her, including position of the minors and she would expedite the trial.

The applicants' written submissions

- 5 Mr Omwenga learned counsel for the applicants submitted that the accused persons are not a threat to the public. Further, no arrangements have been made whatsoever to ensure that the applicants who are school-going at the time of arrest have been enrolled to a learning institution.
- 6 Counsel submitted that the best interest of the child considerations as envisioned in the Children's Act, 2022 and the Constitution of Kenya, 2010 have not been adhered to. He urged the court to review the orders of the trial court and grant the applicants lenient bail/bond terms.

The respondent's written submissions

- 7 Ms Maureen Akunja, Principal Prosecution Counsel, submitted that the High Court exercises the power of revision or supervisory powers only in exceptional circumstances where there has been a miscarriage of justice owing to a defect in procedure or a manifest error on a point of law. That the



applicants have not demonstrated any excessive or unreasonable terms set by the trial court. Further, the court has not taken into account wrong facts or failed to take into account wrong principles to warrant a review of the court orders. Counsel further submitted that the bail/bond terms of the applicants who are minors can be reviewed downwards to the best interest of the child.

Issues for determination

- 8 I have considered the application, the submissions by the parties and the applicable law. The issues that arise for determination are:
1. Whether the applicants have made out a case for the grant of the orders sought.

Analysis and determination

- 9 The power of this court in its revisionary jurisdiction is founded under section 362 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya 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.'

Article 165 (6) of the *Constitution* of Kenya provides that:

' The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.'

- 10 The jurisdiction of this court is not in doubt in view of the above provisions. Where the court finds that the findings, sentence, or order recorded or passed by the subordinate was either not correct, lawful or proper, the remedy under section 364 is either to reverse the sentence where there is a conviction or alter the finding while maintaining the sentence, reduce or increase the sentence as prescribed by section 364 of the *Criminal Procedure Code*.
- 11 The issue that I need to consider therefore is whether to revise the order of the subordinate court on the bond and bail terms that were issued. I have considered the impugned ruling of the subordinate court.
- 12 In granting bail the court must also ensure that bail/bond terms must not be excessive or unreasonable and should not be far greater than what is necessary to ensure or guarantee the accused person's appearance before the court. Where this is the case, it would be tantamount to a denial of bail, a right that is enshrined in the *Constitution* and the *Criminal Procedure Code* as outlined above. This position was expounded in the case of *Taiko Kitende Muinya [2010] e-KLR*.
- 13 The Bail and Bond Policy Guidelines at page 9 paragraph 3.1. (d) underpins the right to reasonable Bail and Bond terms as follows:-

d) 'Right to Reasonable Bail and Bond Terms:

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.'

14 The above position has been enunciated in various decisions by the courts as in the case of *Andrew Young Otieno vs Republic (2017) eKLR* where Kimaru J (as he then was) stated as follows:-

' This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to a denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms to be imposed by the trial magistrate. He has been in remand custody for a period of over two years.'

15 The court must however ensure that the bail or bond terms must not be so low an amount that would make it easy for the accused to be tempted to forfeit the same and abscond court. Whatever the court in its discretion grants should also be commensurate to the offence committed as already stated.

16 In the present application, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th, 13th and 14th accused persons were granted bail/bond of Kshs 300,000/= and a surety of a similar amount for each accused. The 8th, 11th and 12th accused persons were granted bail/bond of Kshs 200,000 with a surety of a similar amount or a cash bail of Kshs 100,000/-. The record of the trial court, shows an inquiry was done and a pre-bail report was filed. This explains the decision of the court to grant different bail and bond terms to the individual accused persons. However, the accused persons are still in custody, despite being granted bail in February 2022. Further, some of them are minors and are missing their education. This demonstrates that they have been unable to raise the cash bail/bond.

17 In the upshot, I set aside the orders of the trial court issued on August 18, 2022 and substitute therefor an order granting the accused persons bail/bond terms as follows: -

1. The accused persons are each granted bail/bond in the sum of Kshs 200,000 with a surety of a similar amount.
2. In the alternative, they are each granted a cash bail in the sum of Kshs 100,000.

Ruling signed, dated and delivered in open court at Nairobi this February 7, 2023{{^}}.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The applicant in person.

Ms Akunja for the respondent

