



**Republic v Mohammed (Miscellaneous Application E156 of 2022)
[2023] KEHC 1444 (KLR) (Crim) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E156 OF 2022
GL NZIOKA, J
FEBRUARY 8, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

KOWTHAR ABDIRIZAK MOHAMMED RESPONDENT

RULING

1. By a notice of motion application dated May 31, 2022 brought under the provisions of article 165 (6) (7) of the Constitution of Kenya, and section 364 (1) (b) and 367 of the Criminal Procedure Code, the applicant is seeking for orders as follows: -
 - a. spent
 - b. spent
 - c. That the honourable court be pleased to review and set aside and/or enhance the order of the honourable Mercy Thibaru (RM) of May 19, 2022, reviewing the respondents bond terms and granting the accused/respondent bail of Kshs 500,000.
 - d. That the court be pleased to grant any other order in the circumstance to protect the complainant.
2. The application is supported by the grounds thereto; in which it is stated that the respondent is charged with the offence of obtaining goods by false pretence contrary to section 313 of the Penal Code (cap 63) Laws of Kenya, *vide* Chief Magistrate's Court criminal case No 1951 of 2022 at Makadara Law courts.
3. The particulars of the offence are that on diverse dates between March 3, 2022 and March 8, 2022, the respondent obtained from the complainant, 30 pieces of Oppo and 550 pieces of Infinix mobile



phones valued at Kshs 12,769,100, by falsely pretending to be in a position to pay for them a fact she knew to be untrue.

4. That, the respondent pleaded not guilty to the charge, whereupon the prosecution argued against the respondent being granted bail or bond pending the hearing of the case, on the grounds that she is a flight risk, in that she was arrested while preparing to depart to South Africa and that the amount of money involved has not been recovered and is colossal.
5. That, the trial court granted the respondent bond of Kshs 2,500,000 among other conditions which was reasonable. However, on May 19, 2022, the trial court subsequently reviewed the bail to a cash bail of Kshs 500,000 with no option of a surety or a contact person.
6. It is averred that the reviewed terms are grossly insufficient and unlikely to ensure that the respondent turns up for trial. Further it is bound to encourage her to abscond given the severity of the charges she is faced with, the amounts of money stolen and the overwhelming evidence against her. Therefore, it is in the best interest of justice that the bail terms be reviewed and/or enhanced.
7. However, the respondent filed a replying affidavit opposing the application and averred that she was unable to raise the bond of Kshs 2,500,000 as ordered by the court and she was held at Langata Women's remand prison for two (2) weeks. That on May 10, 2022, she instructed the firm of Omwoyo Makori & Company Advocates to apply for a review of her bond terms and request for an alternative cash bail.
8. That, the application was heard in the presence of all the parties and a ruling delivered on May 19, 2022, wherein the bond was retained at Kshs 2,500,000 with an alternative cash bail of Kshs 500,000 with two sureties of a similar amount and the passport and other travel documents be deposited in court.
9. That contrary to the assertion by the prosecution in their application, the two sureties; Ahmed Mohat Mohammed and Yusuf Omar Dakane, were admitted in compliance with court order issued on May 19, 2022. Further she is not a flight risk.
10. Furthermore, there is no evidence that the trial court followed a wrong principle to arrive at its decision in its ruling of May 19, 2022 and subsequent orders to necessitate the filing of the current application. She prayed that the application be dismissed for lack of merit.
11. The application was disposed of by way of written submissions. The applicant submitted that, article 49 (1) (h) of the Constitution of Kenya (herein "the Constitution") gives an arrested person the right to be released on bail or bond unless there are compelling reasons. Further, the bail and bond policy guidelines provide for principles to be considered by a judicial officer in granting bail or bond.
12. That, the main objective of bail or bond is to guarantee an accused persons attendance in court for trial and that as much as the respondent is presumed innocent until proven guilty, the court must be alive to the seriousness of the offence.
13. That, the bond terms set by the trial court are too low and will act as an incentive not to attend trial. Further the court on many occasions has enhanced bond granted after considering that the bond terms imposed should be proportionate and commensurate to the charge against the accused.
14. That the bond terms must reflect the serious nature of the charge against the accused and that it will be a miscarriage of justice if the accused was released on bond or bail terms that are not proportionate to the nature or seriousness of the charges. Reliance was placed on the cases of; Republic v Perez Mawira Riungu & another [2019] eKLR and Republic v Danson Mgunya & another [2010] eKLR where Ibarhim J (as he then was) held that, the more serious an offence the greater the incentive to jump bail.



15. That, lenient bond terms herein will send a message to the general public that one can commit a crime and be released literally on easy bail terms irrespective of the nature of the crime. Therefore, the court allow the application as prayed.
16. However, the respondent submitted the grant of bail or bond terms is discretionary mandate of the trial court granted under article 49 (h) of the Constitution and to be exercised with consideration of the provisions of; Judiciary Bail and Bond Policy Guidelines, 2015. That it is a cardinal principle that every person is presumed innocent until proven guilty, and every person is entitled to freedom of movement.
17. That the requirement is the bail and bond terms should be reasonable enough to allow freedom of movement of a suspect while securing the attendance of court processes by an accused person.
18. The respondent argued that, the trial court did not error in fact or law in exercising its judicial discretion in reviewing the respondent's bail and bond terms as per the ruling delivered on May 19, 2022. Therefore, this court should be reluctant to interfere with the decision of the trial court unless the present application meets the principles laid down in *Shah v Mobogo and another* [1967] EA 116 and espoused by the Supreme Court of Kenya in *Parliamentary Service Commission v Martin Nyaga Wambora* [2018] eKLR.
19. That the present application amounts to interference with the exercise of judicial discretion of the trial court without attempting to demonstrate how the trial court erred in law by failing to either follow the laid down procedure or following a wrong principle of law in arriving at it decision.
20. Further, for the court to vary bail or bond terms, there has to be a tangible but also compelling reason such that the variation is legally sound and tenable, which the prosecution has failed to justify as such the application lacks merit.
21. I have considered the subject application, the prayers therein, the affidavit and grounds in support. I have also considered the replying affidavit and the submissions by the parties. I find that the application herein is anchored on the provisions of sections 362 and 364 which states: -
 - “362. 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.
22. The provisions of section 364 states as follows: -
 - (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.



- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
 - (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed”.
23. The question is; has the applicant met the threshold set under those provisions? The key parameters thereunder are that, it must be shown that, the impugned order is incorrect, illegal or improper.
24. The impugned order herein is the grant of cash bail of Kshs 500,000 upon which the respondent was released. The order on the face value is not incorrect, illegal or improper. However, it must be viewed in light of the factors the court will take into account while assessing the appropriate terms of bail and bond.
25. The aforesaid factors are tabulated under article 50 (2) (a) of the Constitution which states as follows: -
- “(2) Every accused person has the right to a fair trial, which includes the right—
 - (a) to be presumed innocent until the contrary is proved.”
26. In the same way, section 123 of the Criminal Procedure Code empowers the court to admit an accused person to bond or bail on reasonable terms and states as follows: -
- “(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this part.
 - (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
 - (3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced”.
27. Pursuant to the aforesaid, section 123A provides that: -
- “(1) Subject to article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular—
 - (a) the nature or seriousness of the offence;



- (b) the character, antecedents, associations and community ties of the accused person;
 - (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
 - (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 and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
 - (b) should be kept in custody for his own protection”.

28. In that regard, article 49 (1) (h) of Constitution states that: -

“An arrested person has the right—

“(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.

29. Finally, paragraph 4.9 of the Kenya Bail and Bond Policy Judiciary Guidelines, lays out different factors to be considered by the court when deciding with whether to grant or deny bail/bond and includes: -

- a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
- b. The strength of the prosecution case
- c. Character and antecedents of the accused person.
- d. The failure of the accused person to observe bail or bond terms
- e. Likelihood of interfering with witnesses.
- f. The need to protect the victim or victims of the crime from the accused person.
- g. The relationship between the accused person and potential witnesses.
- h. Child offenders. where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
- i. The accused person is a flight risk.
- j. Whether accused person is gainfully employed.
- k. Public order, peace or security. whether the release of an accused person will disturb public order or undermine public peace or security.
- l. Protection of the accused person. whether pre-trial detention is necessary to protect the accused person.

30. In the instant matter the value of the subject matter is stated to be Kshs 12,769,100. As much as the same is subject to proof beyond reasonable doubt, it remains a factor to be considered. Furthermore,



it does appear when the court initially gave the accused bond, it was live to that issue and gave a cash bail of Kshs 2,500,000 or bond of a similar amount with one surety, in addition to deposit her passport in court.

31. However, the record reveals that, subsequently the court acting suo moto and/or on a letter from the accused's counsel, issued a production order in chambers on May 17, 2022, for the applicant to appear in court on; May 19, 2022.
32. On that date, the prosecution sought for time to respond and was given the same day to respond wherein it maintained that, they were still relying on the affidavit by the investigating officer opposing bail. The court then varied the cash or bond order from Kshs 2,500,000 with sureties to cash bail of Kshs 500,000. The reduction was based on the submissions by defence counsel, as there is no indication that the prosecution's sentiments were considered yet, the variation and/or reduction is quite drastic.
33. It is clear that the value of subject matter is over Kshs 12,000,000 and therefore cash bail of Kshs 500,000 is too lenient. In fact, should the applicant fail to come to court, the entire judicial criminal system will be held in disrepute.
34. Be that as it were, there is no indication that, the applicant is a flight risk and that she will not turn up for trial, unless she is induced by the lenient bond terms against the gravity of the offence.
35. However, as much as the defence argues that the grant of bail and bond is the discretion of the trial court, the same must be exercised judiciously and in the interest of justice. Indeed, justice must not just be done but must be seen to be done. For it to be seen to be done herein, the interest of both parties must be taken into account. Therefore, to achieve that purpose I direct as follows:
 - a. The respondent shall be released on bond of Kshs 2,500,000 with two sureties of similar amount (if the sureties are already approved, the same shall suffice).
 - b. In the alternative, she shall be released on cash bail of Kshs 1,500,000.
 - c. If released on cash bail, she will provide two (2) contact persons, who should be Kenyan citizens and preferably in public service and known place of abode.
 - d. She will deposit her passport in court until the case is heard and determined.
 - e. She will have seven (7) days which to top up the cash bail failure of which she will be held in prison remand custody.

DATE, DELIVERED AND SIGNED THIS 8TH DAY OF FEBRUARY 2023

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr. Kiragu for the applicant

Mr. Mayogi for the Respondent

Mr. Kanyoko for the complainant

Ms Ogutu: Court/Assistant

