



REPUBLIC OF KENYA



**Manuna v Republic (Miscellaneous Criminal Application
19 of 2023) [2023] KEHC 17221 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION 19 OF 2023**

FR OLEL, J

MAY 9, 2023

BETWEEN

SHADRACK MUNUVE MANUNA APPLICANT

AND

REPUBLIC PROSECUTION

RULING

1. Before court is a notice of motion application dated 20th April, 2023 brought pursuant to Article 25(c), 49(1)(h), 50(1), 165 (6) and (7) and 259(1) of the Constitution of Kenya 2010, Section 362 and 364 (1) (b) and (2), 123 of the Criminal Procedure Code (Cap 75) of Laws of Kenya. The applicant sought for orders that;
 - a. This Honorable court do call for Machakos CMCR case noSO E25 for 2019 Republic versus Shadrack Munuve Manuna coming up in court on 23/5/2023 for purposed of review and issuance of bond/bail to the accused.
 - b. That the ruling of the Chief Magistrate’s court made on 12th April 2023 in Criminal case no SO E25 of 2019 denying the applicant/accused cash bail and bond be revised.
 - c. The applicant be granted reasonable bond terms with an alternative of cash bail in respect of Machakos Chief Magistrate court Criminal case No SO E25 of 2019.
2. The said application was supported by the grounds on the face of the said application, the supporting affidavit of the applicant Shadrack Munuve Manuna and further Affidavit of Mutua J Makau Advocate dated April 26, 2023. The Respondent through Mr Mwongela Advocate (ODPP) did make oral submissions in court and stated that the accused was denied bond for the reasons that he had earlier been released on a bail and absconded court for over two years. He was thus in flight risk and was rightly denied bail/bond.



Brief Facts.

3. The applicant submitted that he was initially arrested and arraigned before the Chief Magistrate court and was charged with the offence of defilement contrary to Section 8(1) and 8(3) of the Sexual Offence Act. The matter did not proceed and was withdrawn under Section 87 A of the *Criminal Procedure Code* and Section 40 of the *Sexual Offence Act*. He was rearrested on 12/4/2023 and recharged afresh with the said offence. The applicant stated that he made a fresh application for bond and averred that he was not a flight risk, but his application was opposed by the state through the investigating officer Evelyne Naini who deponed in her filed Affidavit that he was a flight risk and did not have any fixed abode.
4. The applicant stated that when he was arraigned in court in 2019, Covid 19 pandemic had broke out and courts closed, thus he could not come to court due to the lock own. At some point his advocate also inquired about the court file but it could not be traced since warrants of arrest had been issued and the case withdrawn. Further the applicant stated that he was always been available at his home and was also a community policing officer, therefore tracing him was easy but the state was just indolent as they knew he was not a flight risk and was willing to comply with bond terms.
5. The applicant also submitted that he and the complainant's family were neighbours at home and had initiated the process of settling this matter through ADR. He admitted that an error may have occurred in follow up but prayed for pardon as human beings erred. This court had also directed the applicant to file a further affidavit the attaching the court proceedings. The said proceedings confirmed that the appellant last attended court on 9/4/2021 and was arrested on 6/4/2023. When he absconded, the matter was withdrawn under Section 87(a) of *Criminal Procedure Code* and Section 40 for *Sexual Offence Act*. The applicant's advocate made a fresh application for bond and the same was opposed by the prosecution. The trial magistrate in her brief ruling denied the application for bond on the basis that the applicant not attend court.
6. The Respondent opposed this application and submitted that the applicant had proved that he was a flight risk and was untrustworthy. He had been granted bail before and absconded court for 2 years. The decision to deny bail was thus reasonable. The Affidavit of no 107XXX Cpl Evelyne Naini was relied on and she explained that the applicant was a flight risk and had been granted bond of Ksh 50,000/- and absconded court from February 9, 2021 upto April 6, 2023 when the warrant of arrest were effected. The accused person had been threatening the minor (complainant) and her family leading to the minor and her child being taken to live in a rescue center and living at the mercy of well-wishers to continue with her education. Finally the investigating officer stated that through the offence wasailable, considering the seriousness and gravity of the offence if proved, the likely sentence involved and considering the peculiar circumstance of this case there were compelling reasons to deny the accused person bond.

Analysis and Determination

7. I have considered the application by the applicant as well as the response by the state counsel in opposing to the same.



8. The powers of the High Court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (Cap 75) Section 362 specifically provides as follows;

“The high court may call for and examine the records of any subordinate court for the purposes 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 the proceedings.”

9. What the high Court can do is stated in Section 364 of the *Criminal Procedure Code* (cap 75) which states that;

1. In the case of a proceedings 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 conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357,358 and may enhance sentence;
 - b). in the case of any other order then 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 had an opportunity of being heard either personally or through an Advocate in his own defence. Provided that this sub section 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 a 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 had committed then 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 acquitted into one of conviction.
5. Where an appeal arises from a finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

10. Thus by dint of provision of section 362 and 364(1) (b) and (2) this court while exercising supervisory powers can call for and examine the record of any criminal proceedings before the subordinate court for purpose of satisfying itself as to the correctness, legality or propriety of any findings and/or order recorded and where appropriate can alter or reverse the same.

11. The appellant has sought review of the order made by Hon HM Mbatia (PM) on April 12, 2023 denying him bail/bond and stated that he was entitled to bond under provision of Article 49(1)(h) and 50(1) of the *Constitution* of Kenya 2010. That he had not absconded court proceedings as during the initial time he was arrested and arraigned in court there was covid 19 pandemic and courts were closed. He was at some point also down with Covid 19 symptoms and due to his recurring health conditions could not attend court to find out position of the case. His counsel too, tried to follow up on the court file but at some point the court file could not be traced since warrant of arrest had been issued and later on the file was closed.

12. The applicant further stated that he was not a flight risk, had a known abode, was a community policing officer under watch of the government hence tracing him would be easy. He and the complainant's



family were neighbours at home and had initiated the process of settling this matter through ADR which was encouraged by the Constitution of Kenya. There was then no basis of denying him bond as he was ready to abide by all conditions that the court may set. He further relied on the letter from his local church and area chief annexed to his application to emphasize that he had a fixed abode and would be readily available to attend court.

13. Article 49(1)(h) of the Constitution of Kenya provides that;

“An accused person has a right to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

14. The Constitution does not define what qualifies under the term “compelling reasons”. The ordinary meaning according to “Thesaurus English Dictionary” of the word “compelling” is forceful, convincing, persuasive, unreliable and gripping. From this plain meaning it is apparent that the court would consider any facts or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice. Each case will be considered on its own merit and the primary consideration is whether or not the accused will attend court and /or if there are other compelling reasons as to why he should not be granted bail/bond.

15. The provision of the Criminal Procedure Code (cap 75) were amended to define what constitutes/edifies to be considered as “compelling reason”. Section 123A gives the parameters as follows;

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 regards to all the relevant circumstances and in particular;
 - a. The nature or seriousness of the offence
 - b. The character, antecedent, associations and community ties of the accused person.
 - c. The defendants 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 been previously granted bail and he 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.

16. The consideration in determining whether to grant bail are set out also in the Kenya Judiciary’s Bail and Bond Policy Guidelines March 2015 and page 25 where the policy stated that;

The following procedure should apply to bail hearing;

- i. The prosecution shall satisfy court on a balance or probability of the existence of compelling reasons that justify the denied of bail. The prosecution must therefore state the reasons that in its view should persuade the court to deny the accused bail, including the following;
 - a. The accused person is likely to fail to attend court proceedings; or



- b. The accused person is likely to commit or about to commission of a serious offence; or
- c. That the exception to the right of bail stipulated under section 123A of the *Criminal Procedure code* 18 applicable in the circumstances; or
- d. The accused person is likely to endanger the safety of victims, individuals or the public; or
- e. That the accused person is likely to interfere with witness of evidence or;
- f. That the accused person is likely to undergo national security; or
- g. That it is in the public interest to detain the accused person in custody.

17. Thus while the right to bail/bond is guaranteed under the *constitution*, it is not an absolute right and where there are compelling reasons, it may be restricted. It is also the prosecutions obligations to show the compelling reasons, the basis upon which the accused can be denied bond. Further what the compelling reasons are however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The court also has to consider and take into account the circumstances of the accused person as well as that of potential witnesses.

18. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the condition of his release. In *S versus Nyaruviro and another* (HB 262 – 17, HCB 122 – 17, XREF CRB 1454A – B – 170(2017) 2WBHC 262(August 31, 2017) the court held as follows;

“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question...the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk



by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S v Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S v Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken v AG* 1992 (2) ZLR 249 and *Norman Mapfumo vs The State* HH 63/200. The other relevant factor to be considered is the relative strength of the state’s case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case.”

19. The undisputed facts herein are that the applicant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offense Act* no 3 of 2006. The case number was Machakos MCCR (SO) 25 of 2019. The accused was released on bond of Ksh 50,000/- and absconded court on 9/2/2021. His bail was forfeited to the state and warrant of arrest issued as against him. The warrant of arrest were not effected immediately and eventually the criminal case was terminated under Section 87(a) of the *Criminal Procedure Code*. On 6/4/2023 acting on a tip off, the investigating officer arrested the applicant and arraigned in court on 12/4/2023, when the criminal case was re-opened and the applicant took fresh plea.
20. The applicant through his counsel applied for fresh bond terms. He stated that the applicant had a fixed abode, the family involved were neighbours, and the applicant was a community policing officer and was known to the area chief. The applicant admitted his mistake of failing to attend court, but was willing to abide by new bond terms even if bond was enhanced.
21. The applicant’s bond application was opposed by the prosecution who relied on the affidavit of the investigating officer one Cpl Evelyne Naini. She stated that the appellant absconded court for 2 years until arrested and he had been posing a threat to the minor, her child and the family (presumably of the minor) over this case to the extent that the minor and her child were currently being held at a rescue center and living at the mercy of well-wishers. The applicant was a flight risk and considering the above circumstances, the gravity of the offence, severity of the sentence provided in law the Honourable court should find that there are compelling reasons to deny the accused person bond.
22. Having considered provision of Section 123 of the *Criminal Procedure Code* and provision of the Kenya Judiciary bail and bond policy guidelines March 2015, it is clear that there exist compelling reasons as to why the applicant was denied bond/bail. He had previously been granted bond and absconded court for 2 years until arrested under warrant of arrest yet he is a community policing officer who presumable is aware of importance of obeying the law and adhering to court terms on being released on bond. But more importantly the applicant did not deny or rebut the investigation officer averment that he has been posing a threat to the minor, the child and the family over this case and the minor and her child had to be taken to a rescue center to get a conducive environment to enable her continue with schooling. I do find that there are serious and compelling reasons which justify the denial of bond at this stage and the trial magistrate cannot be faulted in arriving at this decision. See *Felity Sichongi Nyangesa versus Republic* (2014)eKLR where it was held that where there is evidence of



the accused interfering with witness's that was compelling reasons not to exercise discretion in favour of the applicant.

Disposition

- 23. I have considered the material place before me and do find and hold that there are compelling reasons to justify the applicant being denied bond/bail at his stage, but the trial court may reconsider releasing him on more stringent term and once all the crucial witness have testified and is satisfied as to their safety.
- 24. The notice of motion dated April 20, 2023 is thus not merited and is dismissed.
- 25. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 9th day of May, 2023.

In the presence of;

Appellant

.....for DPP

.....Court Assistant

