



**Republic v Mwenda & 2 others (Miscellaneous Criminal Case
E055 of 2023) [2023] KEHC 17496 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL CASE E055 OF 2023**

TA ODERA, J

MAY 11, 2023

BETWEEN

REPUBLIC ACCUSED

AND

JEREMIAH MWENDA 1ST ACCUSED

FRANCIS KIMATHI KINYUA 2ND ACCUSED

PIUS MUTHOMI M'KURICHIA 3RD ACCUSED

RULING

1. Jeremiah Mwenda Akula. Francis Kimati Kinyua and Pius Muthomi M'Kurichia herein after referred to as the 1st, 2nd and 3rd applicants herein filed notice of motion dated 2.5.23 seeking;
 - a.spent.
 - b. That this Honourable court be pleased to review and/or set aside the bail/bond terms issued on 17.4.2023 by Hon. E. Soita (SRM) against the applicants in Chief Magistrate's Criminal Case no. E 932 OF 2023.
 - c. That the applicants be and hereby granted granted reasonable cash bails and bonds on respect of criminal case no. E932 of 2023 to be ascertained by this Honourable court.
 - d. Costs of the application be provided for.
2. The application is based on the grounds that;
 - i. The applicants have been charged with an offence of trafficking in narcotic drugs in Criminal Case No. E932 OF 2023.



- ii. That Hon. Soita (SRM) granted each of them bond of Kshs.5,000.0000/= without an alternative of bond on 17.4.23.
 - iii. That the bail terms are excessive and enforcing them will amount to miscarriage of Justice.
 - iv. That the right to fail bail /bond is an accused person constitutional right and should be observed.
 - v. That it is in the interest of Justice that this Honourable court reviews or sets aside the bail/ bond terms issued by the Honourable court on 17.4.2023.
3. 1st applicant swore the supporting affidavit on his own behalf and on behalf of his co -applicants as per the authority - “JMA 1”and he annexed a copy of charge sheet and proceedings “JMA 2 & 3 “. He deponed that they are unable to raise the cash bail granted as it is excessive and that they have a right to fair bails /bond under the constitution and sought for review of the bail terms.
 4. The application came for interpartes hearing on 11.5.23 and the Mr Mongare learned counsel for the applicant and Mrs Mburu learned prosecution Counsel proceeded by way of oral submissions. Mr Mongeri submitted that this court has Jurisdiction to review the said bond terms and asked the court to apply article 49 and 50 of the Constitution, and the judiciary bail/bond policy in reviewing the bail/ bonds terms. Also that the constitution provides for reasonable bail/bond terms. Further that accused are still innocent until proven guilty. They are not a flight risk and are willing to abide by such terms as this court may impose.
 5. Mrs Mburu for the state objected to the application and submitted that the purpose of bond is to secure attendance of an accused person, value of the subject matters is Kshs 8.1 million, the abode of the applicants is not known and so they are a flight risk. It was submitted that the bond terms granted are sufficient and that the trial magistrate considered the value of the subject matter in grating the same.
 6. Mr Mongare submitted that applicants are still innocent till proven guilty and that stiff bond/bail terms is not a guarantee for not absconding and that the applicant will abide by bond terms to be set by this court.
 7. I have carefully considered the application for bond/bail review and the able submissions by both counsel. Right to Bail/Bond is generally available to accused persons in Kenya under article 49 (1) (h) of the Constitution unless there is a compelling reason not to grant the same. The purpose of bond is also to ensure that an accused person attends court without fail.
 8. The Jurisdiction of this court to review bond terms granted be the Magistrate’s court is derived in section 123 (3) of the criminal procedure code which provides that “ 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.”
 9. The High court has revisionary powers over the magistrate’s court under section 364 of the Criminal Procedure Code.
 10. The Judiciary bail and bond policy guidelines at page 9 paragraph 3.1 also provides for reasonable bond terms to wit;-
 - 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.

11. I note from the charge sheet that applicants are facing a charge of Trafficking Narcotic drugs contrary to section 4 (a) (ii) of the [Narcotic Drugs and Psychotropic substances \(control\) Amendment Act 2022](#) and that the street value of the subject matter is Kshs.8,150,000/= .
12. Applicants were granted bail of Kshs 5,000,000/= each by the trial court. There is no alternative of Bond. Prosecution says that the bond is sufficient considering the value of the subject matter and that they were arrested while on transit and thus they are a flight risk but defence have challenged the same saying it is excessive since applicants have not been proved guilty and that it has not been established by way of an affidavit that applicants are a flight risk. It is true that the punishment for the offence of trafficking under section 4(a) (ii) of the [narcotic drugs Psychotropic substances \(control\) Amendment Act 2022](#) is a fine of not less than Kshs 50,000,000/= or 3 times the market value of the narcotic substance whichever is greater or 50 years imprisonment or to both fine and imprisonment. [Cyril Kipruto Serem v Republic \[2020\] eKLR](#) it was held "5. The amount of bail or bond is not supposed to be an approximation of the value of the subject matter of the criminal charge. It does not follow that the higher the value of the property subject of the trial the higher the bail bond terms. It is with respect faulty reasoning because, were it so, those poor offenders on charges, for example, of destruction or attempted fraudulent obtaining, of property of high value would never secure hefty bail and bond terms imposed. Terms of bond are not meant to punish the accused for any perceived guilt for the charges leveled against him. Nor are the terms meant to ensure he is detained awaiting trial to avoid his escape or to ensure punishment. Terms of bail or bond should be tailored to secure and ensure the attendance in court of the accused for purpose of his trial.

If the case meets the criteria for grant of bail in that there are no compelling reasons to deny bail, then the conditions for bail must be such as the accused in the particular case is able to meet. So that grant of bail is not a backdoor denial of liberty contrary to, and in mockery of, article 49 (1) (h) of [the Constitution](#). The accused is innocent until proved guilty and he is entitled to the article 25 fair trial protections afforded an accused under [the Constitution](#)."
13. In this case there were no compelling reasons to deny applicants bond and so they were granted bail which is the subject of this application.
14. I have considered that the case is still pending trial and therefore applicants are still innocent unless proved guilty, nature of the charge and sentence it has not been shown that accused is a flight risk though it has been submitted that they were arrested while on transit and I have also considered the need to ensure that applicants comes back to court for trial without fail.
15. I find that applicants have a right to reasonable bond terms under article 49 (1) (h) of [the Constitution](#) and the bond terms set by the trial court were excessive considering the aforesaid circumstances.
16. I proceed to allow the application and substitute the bail of Kshs.5,000,000/= with cash bail of Kshs 2,000,000 for each applicant. In the alternative, I also grant each applicant bond of Kshs 5,000,000/= with surety of immovable property in the like sum.

T.A. ODERA - JUDGE

11.5.2023

Delivered Virtually in the presence of;

Miss Moenga hold brief for Mr Mongeri for the applicants,



Mrs Mburu for prosecution.

Court Assistant; BOR

T.A. ODERA - JUDGE

PARA 11.

5.2023

Order:

File is closed.

T.A. ODERA - JUDGE

PARA 11.

5.2023

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