



**Njaombe v Republic (Miscellaneous Criminal Application E258 of 2023)
[2023] KEHC 21775 (KLR) (Crim) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E258 OF 2023
LN MUTENDE, J
JULY 20, 2023**

BETWEEN

NEWTON MUGENDI NJAOMBE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Newton Mugendi Njaombe, the applicant was arraigned for the offence of conspiracy to defraud contrary to Section 317 of the *Penal Code*. Particulars of the offence being that on May 26, 2021 and May 28, 2021 at Acceller Global Logistics Headquarters at Jomo Kenyatta International Airport Nairobi jointly with another before court dishonestly and unlawfully conspired with intent to defraud Acceller Global Logistics Limited by means of preparing and signing delivery notes No 4125, No 4160 and invoice number 5179 falsely pretending to have delivered two hundred and forty (240) rolls of shrink wraps valued at Kshs 495,552/- to the said company.
2. Having denied the charge, the applicant sought to be released on bond pending trial. To make an informed decision in that regard, the trial court sought to be furnished with a pre-bail report.
3. The order of the court prompted the applicant to move this court through an application dated July 12, 2023. In the stated Notice of Motion the applicant sought prayers thus:
 1. That this application be certified as urgent and service of this application be dispensed with in the first instance due to its urgency.
 2. That the Honourable court be pleased to review, vary and/or set aside the orders issued on the July 12, 2023 deferring the setting of bail/bond to July 21, 2023.



3. That the Honourable court be pleased place the accused person on lenient and affordable bail/bond terms.
 4. That this Honorable court do grant any further orders it deems fit.
 5. That the costs be in the cause.
4. The substratum of the application is that the application for bail was deferred to July 21, 2023 pending filing of the pre-bail report. The decision of the court to defer the application is egregious to the applicant's liberty, bail and bond under Article 49 and the right to fair hearing under Article 50 of the *Constitution*; the decision of the court was highly punitive and is tantamount to the accused who is presumed innocent until proven otherwise being punished without the respondent discharging its lawful duty of dispelling his innocence beyond reasonable doubt.
 5. That the accused is not a flight risk and his continued detention has fettered his ability to provide for himself and his young family who may not afford daily needs.
 6. Following the order of this court, the lower court was to avail copies of proceedings on July 20, 2023 to enable it establish what transpired in the subordinate court, since the only annexure to the affidavit deposited in support of the application was a copy of the charge sheet.
 7. On the July 18, 2023 the applicant filed a second Notice of Motion dated July 14, 2023 seeking to have the application heard on July 18, 2023. Its premises on grounds that the lower court matter was scheduled to be mentioned on July 21, 2020 for purposes of taking further directions. That the sole object of lodging the application would be defeated owing to the mention slated for July 21, 2023.
 8. In an affidavit in support of the application, the applicant urges that he is distraught and on the verge of nervous breakdown as the object of the application would be dissipated.
 9. Pursuant to the order of the court the matter was coming up for further directions but Counsel for the appellant insisted on proceeding with the matter in the absence of the respondent. He urged that the trial magistrate erred in asking for a pre-bail report despite the DPP having not opposed the application for release on bail.
 10. The application in question has been brought pursuant to the provisions of Article 49(1)(h) and 50 of the *Constitution* which are in respect of the rights of an accused person who should be released on bail/bond on reasonable conditions unless there are compelling reasons not to do so; and that such a person should be accorded a fair trial.
 11. I have been called upon to review the order of the trial court therefore I should act in accordance with Section 362 of the CPC that 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.'
 12. In order for this court to exercise its revisional jurisdiction it must be demonstrated that the subordinate court acted in excess of its jurisdiction by making an order that was illegal and actuated by material irregularity. It is an accused person's constitutional right to be released on bail unless there are compelling reasons requiring the person being incarcerated. (See Article 49 (1) (h) of the *Constitution* and Section 123 of the *Criminal Procedure Code* (CPC).



13. Failure to oppose bail is evidence of the State not having had any objection to the accused person's release on bail. The bail and bond Policy Guidelines requires a court to impose reasonable bail/bond terms. Ordinarily, the purpose of a pre-bail report would contain views from the community where the accused hails from. It would guide the trial court in making a fair decision as to what bail/bond terms to set or whether to grant bail/bond or not. In making the order, the learned magistrate exercised discretion that is within the mandate of the trial court. The High Court cannot interfere with the discretion as it was not made following wrong principles of the law.
14. Therefore, there was no illegality or irregularity calling for setting aside the order. For that reason, the application lacks merit. Accordingly it is dismissed.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 20TH DAY OF JULY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Swaka for Applicant

Court Assistant - Mutai

