



**Republic v Mutula (Criminal Revision E004 of 2023)
[2023] KEHC 20096 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E004 OF 2023**

**FR OLEL, J
JULY 5, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

MARGARET KANINI MUTULA RESPONDENT

RULING

1. By an application dated February 9, 2023, the office of the director of Public Prosecution did move this court and applied for this court to call for the lower court file and review the bail/bond terms of the Respondent, upward since it was their firm belief that the bond conditions/terms granted to her did not pass the test of reasonableness, was glaringly too low in the circumstances of the case and offended the established terms of dealing with the question of bail/bond.
2. The applicant stated that the accused persons and others were jointly charged with the offence of cheating and obtaining Ksh.17,259,617/= (Seventeen million two hundred and fifty nine thousand, six hundred and seventeen shillings only). The Respondent appeared before the trial magistrate Honourable A. Nyoike (PM) on 16th February 2023 and she was granted bond of Ksh.200,000/=plus one surety of a similar amount or in the alternative a cash bail of Ksh.100,000/=. The applicant was aggrieved by the above bond terms on grounds that;
 - i. The imposed bail/bond terms are too low and are not proportionate to the charges in question. The cash bail of Ksh.100,000/= is the equivalent of a paltry 0.5793871324% of the amount alleged to have been obtained. The bond amount is equally non-commensurate. While we appreciate the presumption of innocence on the part of the accused persons, we believe that the court ought to have taken into account the prosecution's submissions to take judicial notice of the whooping high sum claimed to have been obtained and imposed bond terms that reasonably guarantee the attendance of the accused person to court. Unfortunately, this was never the case and neither was the above submission recorded by the honourable court.



- ii. The bail/bond terms fail the test of reasonableness. Whereas the court enjoys discretion in determination what is suitable bond in each case, that discretion must be exercised judiciously and within the law. Article 49(i)(h) of Constitution provides for release on ‘reasonable’ conditions. Section 123A (1) of the Criminal Procedure Code provides for the considerations to be taken into account while determining bail/bond inter alia as the nature or seriousness of the offence. The provision of the Bail and Bond Policy Guidelines provide that bail of bond amounts should not be excessive. Conversely, bail or bond amounts should not be too low as this may entice the accused person into forfeiting the bond amount and fleeing.
 - iii. The imposed bail/bond terms offend public policy and interest for being disproportionate to the nature and seriousness of the offence in question, thereby sending a wrong message to the public that one can commit an offence and be released on easy bail terms irrespective of the seriousness and nature of the alleged offence. Whereas cheating is a misdemeanour punishable by imprisonment of up to three years, the amount involved presently is considerably high and the court has power under section 175 of the Criminal Procedure Code to order for compensation of the sum obtained in the event of a conviction.
 - iv. Whereas it remains to be seen whether the accused persons will abide by the set bond terms, the complainant has a legitimate expectation that not only shall justice be done, it shall also be seen to be done. The court ought to have balanced the rights and expectations of all parties by granting the accused persons reasonable bail/bond terms to the satisfaction of both the accused persons and the complainant and to inspire confidence on the judicial system in members of the gallery present.
 - v. Whereas the court accorded the defence ample chance to address the court on bail/bond and items belonging to accused 1 that were in police custody, the complainant though the prosecution was blatantly and in open court denied opportunity by the Honourable Magistrate to respond and it was only upon insistence by the prosecutor to respond that the court in between writing a pre-determined ruling squeezed in a fraction of what the prosecutor stated largely leaving out the sentiments presented by the prosecutor, conduct that smacks of bias against the prosecution and the complainant by extension and therefore lack of neutrality resulting in the unreasonable bail/bond orders.
 - vi. The honourable magistrate ought to have known that it was especially important for the court to have acted in a manner that inspired confidence in all the parties, seeing that the honourable magistrate went ahead to allocate the matter to her court for trial. Going by the events of the 6th February, 2023 the complainant is already apprehensive that justice may not be served after all.
3. The Respondent did not file any response to this review application but both parties filed written submissions in support of their respective positions.

Applicant submissions

4. The applicant clarified that the charges against the 2nd and 3rd accused persons in Machakos CMCR No. E050/2023 were dropped on February 21, 2023 in lieu of the two accepting to testify as prosecution witnesses. The applicant also clarified that they were not opposed to the Respondent being granted bail/bond but stated that the terms granted/set by court were low and this failed the test of reasonableness in the eye of the common man.
5. Under article 49(1)(h) of the Constitution of Kenya 2010, any arrested person had a constitution right to be released on bond or bail on reasonable terms, pending a charge or trial unless there were



compelling reason not to be released. Further section 123(2) of the [Criminal Procedure Code](#) provided that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive, the said section also provided that the court shall have regard to inter alia “the nature of seriousness of the offence” while considering bond terms.

6. The applicant also relied on the objectives of The bail and bond policy guidelines and in particular paragraph 3.1(d) thereof which provided

“that the accused had a right to be released on reasonable bail or bond terms which would guarantee the appearance of an accused person for trial conversely, bail or bond amount 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. What is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”

7. In this instance case the appellant was charged with the offence of cheating and thereby obtained Kenya shillings seventeen million, two hundred and fifty-nine thousand, six hundred and seventeen shillings only (Kshs.17,259,617/=). The trial court released her and her co accused on bond of Ksh.200,000/= plus one surety of similar amount or in the alternative cash bails of Sh.100,000/=. It was submitted that while the judicial officer in a criminal case had unfettered discretion in determining the appropriate bond terms, the said discretion must be exercised within the law. Reliance was place on [Mohamood Chuta Wote and 2 others v Republic](#) (2021) eKLR. Where it was held that, bail determination must balance the rights of the accused persons and the interest of justice.
8. The applicant submitted that given the nature and seriousness of the present offence, and the amount of money lost, the bond terms ought to have been more stringent. Reliance was placed on [Elizabeth Achien’g Abongo v Republic](#) (2021)eKLR, [Kimanzi and another versus Republic](#) (2022) KEHC 12223(KLR), [Michael Mithamo Gatera v Republic](#) (2018) eKLR and [Mohamood Chuta wote & 2 others v Republic](#).
9. The applicant concluded by submitting that as rightly observed in [Elizabeth Akinyi Abongo v Republic](#) (2021)eKLR, while the facts and the law presumes an accused person is innocent until otherwise proven, that presumption does not mean that the trial court should not impose proportionate and commensurate bond terms on the accused person. There was no guarantee that the accused would attend court in the future. It was therefore of paramount importance that bail/bond terms be enhanced to reflect the seriousness and nature of the case in question as well as reasonably guarantee that the accused person will faithfully appear in court for her trial to the end.

Respondent Submissions

10. The Respondent submitted that this application does not meet the threshold of revision as set out in section 362 of the Criminal Procedure Code and that an application for review of bail/bond terms ought to have been first made to the trial court granting the same. Reliance was placed on the case of [Victor Kiprono Ngeno v Office of the Director of Public Prosecution](#) (2021)(*supra*). Further pursuant to provision of article 165 of [the constitution](#) of Kenya 2010, the high court had supervisory jurisdiction over the subordinate courts and other persons exercising judicial and quest judicial powers, but the same could only be used to correct, clarify and manifest errors or illegalities in the proceedings before the subordinate court but not to micro manage it. Reliance was placed on the Case of [Joseph Nduvi Mbuvi v Republic](#) (2019)eKLR and [WMH v Republic](#) (2022).



11. The Respondent further submitted that the purpose of bail bond terms was to ensure that the accused attend's court for trial. The allegedly obtained sum in the charge sheet was immaterial in determining the seriousness of the charge facing the accused person and such should be weighed based on prescribed penal provision and the probable sentence on conviction. The offence facing the accused person was a misdemeanour punishable by a sentence of 3 years jail term. The Respondent placed Reliance on section 123A of the *Criminal Procedure Code* and the citation of *Kirit Bhangwanda Kanabar v Director of Public Prosecution and another* (2018)eKLR.
12. It had not been demonstrated that the accused person will not attend court when required to do so nor was she a flight risk. As such, there was no compelling reasons as to why her bail terms should be reviewed. Finally, the appellant stated that it was wrong for the applicant to seek punitive bail/bond terms against the accused person contrary to the trite legal principles of presumption of innocence of an accused person which was a fundamental concept of fair trial in any criminal justice system. This right of the respondent was also protected by article 50(2) of *the Constitution* of Kenya 2010. There was no compelling reason put forward as to why bail/bond terms ought to be reviewed and the application ought to be dismissed with costs.

Analysis and Determination

13. Article 165(6) & (7) of the *constitution* of Kenya 2010, empowers the high court to exercise supervisory jurisdiction over subordinate courts or person or authority exercising a judicial or quasi-judicial function and may call for the record of any proceedings before the subordinate court or person or body or authority and make orders or give directions it considers appropriate to ensure the fair administration of justice.
14. 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 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”.
15. Section 364 of the *Criminal Procedure Code* cap 5, which 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 section 354, 357 and 358, and may enhance sentence;
 - (b) in the case of any other order than an order of acquittal, alter or reverse the order.
 - (2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

16. The respondent submitted that this application does not meet the threshold of revision and that, the applicant had to first seek to review the bond terms before the same trial court before, the could move to the high court. secondly the respondent submitted that the jurisdiction of this court should not be invoked so as to micro manage the lower courts in conducting and management of their proceedings. The Republic ought to have exhausted their remedies before the trial court before invoking this courts supervisory jurisdiction.
17. The respondent’s contention on jurisdiction cannot be correct as the provisions of article 165(6) &(7) of the Constitution of Kenya 2010, as read together with provisions of section 362 and 364(1),(b) of the criminal procedure code are succinct and clear that this court has a supervisory role over the subordinate court and may call for the record of any proceedings before the subordinate court or person or body or authority and make orders or give directions it considers appropriate to ensure the fair administration of justice.
18. The finding in Victor Kiprono Ngeno vs Office of the Director of Public Prosecution (2021)(*supra*) too does not support the respondent’s contention, that an applicant must first seek for review before the trial court before, he/she can move to the high court. In the said citation, the applicant moved court for review due to high bond terms granted to him by the trial magistrate , the high court upon determination of the said review application reduced his bond to Ksh.50,000/= with one surety .
19. Having found that this court is properly clothed with jurisdiction to hear and determine this application for review, I do find that the only issue for determination by this court is whether, the bond/ bail terms granted to the respondent were reasonable giving due regard to the circumstances of the case, seriousness of the offence, while at the same time being guided by the bail and bond terms policy guidelines.
20. The facts herein are not in dispute; the appellant was charged with the offence of cheating and thereby obtaining, Kenya shillings seventeen million, two hundred and fifty-nine thousand, six hundred and seventeen shillings only (Kshs.17,259,617/=). The trial court released her and her co accused on bond of Ksh.200,000/= plus one surety of similar amount or in the alternative cash bails of Sh.100,000/= . The case as against the other co accused was dropped and they were turned into prosecution witnesses.
21. The applicant’s contention is that the bail/bond terms issued were unusually low and did not balance the rights of the accused person with public interest including the rights of the victim. Further the trial magistrate did not exercise her discretion judiciously within the law and hence the bond terms should be reviewed upwards.



22. The respondent on the other hand submitted that, the review application was not founded on any sound legal grounds and the applicant had not shown any compelling reasons as to why bond terms should be enhanced. At this stage the respondent was presumed to be innocent and the sum allegedly obtained was immaterial. Finally, the seriousness of the charge should only be weighed as against the prescribed penal provisions and probable sentence on conviction. The offence the respondent faced was a misdemeanour punishable by sentence of three (3) years jail term and thus there was no need to prescribe high bond terms.
23. The respondent final submissions were that she was not a flight risk, and it had not been demonstrated that she would not attend court, when required to do so. Seeking punitive bond terms, was contrary to provisions of article 50(2)(a) of the Constitution of Kenya 2010 and therefore this review application ought to be dismissed.
24. Article 49(1), (h) of the Constitution of Kenya provides that “an arrested person, had a right to be released on bond, bail, on reasonable condition’s, pending a charge or trial, unless there were compelling reasons not to be released.”
25. Section 123A of the criminal procedure code provides that;
 1. Subject to article 49(1) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstance’s 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 defendants record in respect of the fulfilment of obligations under previous grants of bail; and;
 - d. The strength of the evidence of 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 is-
 - 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;
26. The Bail and Bond policy Guidelines at para 2.2 states that the guidelines which the court should consider while determining bond applications. They include;
 - a. Ensure that bail and bond decision-making process complies with the requirements of the Constitution.
 - b.
 - c. Balance the rights of the suspects and accused persons with the public interest, including the rights of the victims.
 - d. Streamline and address disparities in bail and bond decision making, with a view to enabling fair administration of bail and bond measures



- e.
- f.
- g.
- h. Safeguard the interests of victims of crime in bail decision-making.
- i.

27. Reviewing the bond terms granted herein as against provisions of article 49(1), (h) of the *Constitution* of Kenya, the provisions of the Bail and Bond policy guidelines, and section 123(A) of the criminal procedure Code it is obvious that the trial magistrate erred and failed to use the right parameters, while granting the respondent low bond/bail terms. The court;
- a. Failed to consider the unique circumstances of the case at hand and failed to ensure the reasonableness test was complied with, while considering the nature and seriousness of the offence.
 - b. Failed to balance the right of the suspect and the accused persons with the public interest including the victims’ rights and thus her decision was not in conformity with requirements of law. See *Mohamood Chute wote & 2 others v R* (2021) eKLR.
28. The respondent was charge with the offence of cheating and thereby obtained Kenya shillings seventeen million, two hundred and fifty-nine thousand, six hundred and seventeen shillings only (Kshs.17,259,617/=). The trial court released her and her co accused on bond of Ksh.200,000/= plus one surety of similar amount or in the alternative cash bails of Sh.100,000/=. It is my finding that the bond / bail terms granted were disproportionately low and therefore not commensurate to the charge against the respondent. It was also not balanced taking into account public interest and the victims’ rights.

Disposition

29. I therefore find that this application for review has merit. I therefore exercise my discretion and set aside the order of Honourable A Nyoike, (PM) to wit granting a bond of Kshs 200,000/= plus one surety of a similar amount or in the alternative a cash bail of Ksh100,000/= and substitute the same with and order that the respondent shall be released on her own bond of Ksh.1,500,000/= plus one surety of a similar amount. In the alternative she maybe released on cash bail of Ksh.1,000,000/=.
30. The Respondent shall have 7 days to raise new Bond terms from the date of this ruling.
31. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 5th day of July, 2023.

In the presence of;

.....for Appellant
for Respondent



.....Court Assistant

