



**Hussein & 6 others v Republic (Criminal Revision E540 of 2023)
[2023] KEHC 23263 (KLR) (Crim) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E540 OF 2023
LN MUTENDE, J
SEPTEMBER 19, 2023**

BETWEEN

**MOHAMED SALEEM MOHAMED HUSSEIN 1ST APPLICANT
PAUL KIVULI SOTE 2ND APPLICANT
RAWLING INNOCENT ONDODI 3RD APPLICANT
MOSES LIYAI IMBWANGA 4TH APPLICANT
WESLEY SILVANUS ANDWANYA 5TH APPLICANT
LATIF MOHAMED DAWOOD 6TH APPLICANT
KHAN MOHAMED ASHRAF 7TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. Mohamed Saleem Mohamed Hussein, Paul Kivuli Sote, Rawling Innocent Ondodi, Wesley Silvanus Andwanya, Latif Mohamed Dawood and Khan Mohamed Ashraf, are charged before JKIA, Magistrate’s Court in Criminal Case No.E045 of 2023 with various offences of Trafficking in Narcotic Drugs Contrary to Section 4(a)(ii) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act No. 4 of 1994](#), as amended by [Narcotic Drugs and Psychotropic Substances \(Control\)\(Amendment\) Act,2022](#).Count i, the particulars of the offence are that on the 17th day of June, 2023 along Thika Highway near Pangani Shopping Center within Nairobi County, all the accused persons jointly with others not before court trafficked in narcotic drug namely cocaine to wit 24,076 Grams with a market value of Kshs. 96,304,000.00 by conveying in a motor vehicle Registration No. KDE xxxN



make Nissan X-trail in contravention of the provisions of the said Act.Count ii, the Particulars of the offence are that on the 17th day of June, 2023 along Thika Highway near Pangani Shopping Center within Nairobi County, all the seven accused persons, jointly with others not before court trafficked in psychotropic substance namely Ketamine to wit 40,006 Grams with a market value of Kshs 24,608,080.00 by conveying in a motor vehicle Registration Number KDE xxxN make Nissan X-trail in contravention of the provisions of the said Act.Count iii, the particulars of the offence are that on the 17th day of June, 2023, at Platinum Estate House Number 2, at Ngara Area within Nairobi County, jointly with others not before court trafficked in psychotropic substance namely Ketamine to wit 1, 216, 674 Grams with a market value of Kshs 24,333,480.00 by storing concealed in blue drums in contravention of the provisions of the said Act.Count iv, the particulars are that on the 17th day of June, 2023, at Platinum Estate House Number 2, at Ngara Area within Nairobi County, all the accused, jointly with others not before court trafficked in psychotropic substance namely Ketamine to wit 13,730, Grams with a market value of Kshs 274, 600.00 by storing, concealed in two grey suitcases in contravention of the provisions of the said Act.Count v which is in respect of the 1st Accused, the particulars are that on the 17th day of June, 2013, at Platinum Estate House Number 2, Ngara Area within Nairobi County, jointly with others not before court trafficked in narcotics drugs, namely cocaine, to wit 2 Grams with a market value of Kshs. 8000.00 by storing in contravention of the provisions of the said Act.

2. They denied charges as framed and were denied bail on grounds that they are flight risks and were involved in organized crime. Dissatisfied by the ruling of the court they have approached this court seeking review of the trial court order denying the applicants bail and thereby remanding them in custody until hearing and determination of the case so that they can be released on reasonable bail terms.
3. The substratum of the application by the Applicants can be condensed thus: The application to be released on bail was dismissed on the basis that the applicants are flight risks and were involved in criminal enterprise of drug trafficking, an organized crime; a ruling that was not based on law and not supported by evidence which implied a conviction before hearing of the case. That with the exception of the 1st and 7th Applicants, they are Kenyans without passports and with no negative pre-bail reports. With regard to the 7th Applicant there was no evidence of unlawful stay in the country from the immigration department.
4. That, the ruling having considered irrelevant factors, it is improper.
5. The application was disposed through written submissions. It is urged by the 1st and 6th Applicants that according to the Principles enshrined in Articles 49(1) (h) 50(2) (a) of the *Constitution*, the accused persons are charged with bailable offences and have a right to be released on bail on reasonable conditions.
6. That the presumption of innocence of the Applicants prevails until reasonable doubt is proved. In this regard reliance was placed on the Bail and Bond Policy Guidelines, 2015. That the affidavit evidence by the Prosecution did not warrant denial of bail. That what was alleged against the Applicants was presumptive that should not be relied upon to alter the cause of justice. That the 1st Applicant was found processing his papers at the Immigration Department, plans that should be allowed to materialize so that the documents can be deposited in court. That according to the case of *Abamad Abolfathi Mohammed vs Republic* (2013) eKLR, the court observed that:

“The respondents have a right to enjoy their fundamental rights and freedoms, but it is my humble view that Kenyans and aliens of good will also have a right to the quiet enjoyment of



their rights, and to go about their daily business without threat to life or limb, and without being placed in harm's way”

7. That the court relied on International case law yet the accused had not been charged with suspicion of being members of organized groups.
8. On the part of the 2nd, 3rd and 5th Applicants, it is submitted that according to Article 49(1)(h) of the Constitution every arrested person has the right to be released on reasonable bail terms unless there are compelling reasons not to be released. That Section 123(2) of the Criminal Procedure Rules (CPC) requires the court to consider circumstances of each case so that bail/bond is not excessive. Further that Section 362 of the CPC grants this court the power to examine the correctness, legality and propriety of the order/finding of the subordinate court. That according to the holding in Aboud Rogo Mohamed & Another vs Republic. (2011) eKLR Ochieng J. stated that while security considerations make granting of bail most unattractive, unlikely and unfavourable, courts must be allowed to fulfil its traditional function of balancing the interest of the State and those of individuals, and, proceeded to grant bail.
9. That in the case of Republic Vs. Muneer Harron Ismail & 4 Others (2010) eKLR, the court released the applicants on bail despite facing serious charges under the Terrorism Act.
10. That the court should have considered unique circumstances of each accused person. That a drug trafficking case is not a compelling reason to deny an accused bond. In this regard reference was made to the case of Republic vs. Julius Mwiti M’Toimethiu (2018) eKLR.
11. For the 4th Applicant, it is urged that denial of bail is targeted at violating the Applicant’s constitutional right as enshrined in the Constitution. That the learned magistrate failed to consider the Applicant’s application for bail on its own merit hence delivering an omnibus ruling for all the accused persons. That the fact of the 4th Applicant being a Kenyan Citizen with a fixed abode; a fact not controverted was not considered and the presumption of innocence was disregarded, the Prosecution did not present evidence that the 4th Applicant was likely to abscond.
12. The 7th Applicant argued that the prosecution emphasized the... “Compelling reasons” but did not adduce any concrete evidence to support the same. That it did not present any evidence to show that the Applicant was likely to abscond in event the Applicant is admitted to bail. That the Applicant, an Indian National who recently acquired a certificate of Permanent Residency in Kenya and a holder of a Kenyan Alien Card is legally in Kenya with a fixed abode, is unwilling to deposit his original passport and any other travelling documents in court. That he is married to a Kenyan National with three (3) issues of the Marriage.
13. That the Bill of Rights enshrined in Article 20 (1) and (2) of the Constitution requires every individual whether Kenyan National or Foreigner to enjoy the rights and fundamental freedom to a greatest extent. Consistent with the nature of the right or fundamental freedom; and that in the case of R Vs. Richard David Alden (2016) eKLR the accused, though a foreigner, was granted bail.
14. That by terming the 7th Applicant as part of the “criminal enterprise, was presuming him guilty as charged which went against the irrebuttable presumption of innocence.
15. The State/Respondent submits that in as much as the Applicants are presumed innocent until proved otherwise, the court must be alive to the fact that the main objective of bail or bond is to guarantee the accused person’s attendance to court for trial, the court must be alive to the seriousness of the offence they are facing which is trafficking in narcotic drugs of extremely high values. That the gravity of the offence was appreciated by Mbogholi J. (As he then was) in Twayba Hashim Mtandi & 3 others Vs. Republic; Criminal Application No. 118 of 2014, eKLR. This court is called upon to note



- the punishment to be imposed and due to the seriousness, there is more probability and incentive to abscond.
16. That the mere fact that the court found compelling reasons having existed is sufficient reason for the court not to interfere with the discretion of the trial court.
 17. That Applicants should be treated on case-to-case basis depending on circumstances of each individual. That in the instant case, the 1st Applicant is a Pakistani National found to be illegally present in the country while the 7th Applicant is an Indian National. That Kenya does not have any bilateral extradition agreement with the two (2) countries hence in event that the two (2) Applicants abscond, it would be impossible to get them.
 18. With regard to Applicant 2-6, all Kenyan Nationals, the court is called upon to take into account the need to attend trial and the seriousness of the offence.
 19. I have taken into account the application by respective Applicants, affidavits in support of the applications and rival arguments.
 20. Revisional jurisdiction of the High Court over subordinate courts is provided for by Statute. Section 362 of the *Criminal Procedure Code* (CPC) provides that:

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.
 21. This court is seized of jurisdiction to supervise the lower court in respect of orders granted or findings reached but the power is restricted to correctness, legalities or propriety of the same.
 22. Article 49(1) (h) of the *Constitution* accords an accused person the right to “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released”.
 23. The trial court denied the Applicants bail prompting them to seek redress from this court. Section 123(3) of the *CPC* provides that:

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.
 24. For that reason, this court has the jurisdiction to interfere with orders granted by the lower court in respect of bail pending trial.
 25. According to the law all offences are bailable but the right enshrined in the *Constitution* is not absolute. This therefore gives the court the discretion to deny or grant bail. It depends on the circumstances of the case. It is spelled out that the court would be justified in denying the accused person bail if compelling reasons exist.
 26. It has been clearly expressed that the term compelling reasons expressed by Article 49(1) (h) of the *Constitution* is not defined by the fundamental principles. In the case of *Republic Vs. Joktan Mayende & 4 other* (2012) eKLR the court defined the term compelling reasons thus:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail



should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the *Constitution*.”

27. Section 123A of the *CPC* enacts 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. The *Kenya Judiciary Bail and Bond Policy Guidelines* Provide that:

- “(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:
- a) That the accused person is likely to fail to attend court proceedings; or.
 - g) That it is in the public interest to detain the accused person in custody.”

29. The learned trial magistrate in reaching the decision to deny the Applicants bail was persuaded that the Applicants were flight risks. She also alluded to their involvement in organized crime.

30. Article 50(2) (a) of the *Constitution* provides that:

Every accused person has the right to a fair trial, which includes the right—

- (a) To be presumed innocent until the contrary is proved;

31. An Accused person is not to be prejudged guilty. The presumption of innocence ought to be upheld so as to maintain the rights of the accused. The presumption of innocence would call upon the court to release an accused person on bail whenever possible. (Also see the *Bail and Bond Policy Guidelines*)

32. As correctly pointed out by the learned trial magistrate, in determining whether or not an accused should be granted bail the most important consideration is whether the individual will turn up for trial. The Respondent/State is required to provide sound reasons as to why bail must be denied.



33. The basis of the court’s finding, emanated from an affidavit deposited by the Investigation Officer. The averments raise three issues:
- i. Gravity of the charges.
 - ii. Interest of justice, and;
 - iii. The accused being flight risks.
34. In the Nigerian Supreme Court Case of *Alhaji Mujahid Dukubo- Asari Vs. Federal Republic of Nigeria* S. C. 20A/2006. It was stated by Ibrahim Tanko Muhammad J. S. C. that:
- “When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include, among others, the following:
- (i) The nature of the charge;
 - (ii) The strength of the evidence which supports the charge;
 - (iii) The gravity of the punishment in the event of conviction;
 - (iv) The previous criminal record of the accused if any;
 - (v) The probability that the accused may not surrender Himself for trial;
 - (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.
 - (vii) The likelihood of further charge being brought against the accused;
 - (viii) The probability of guilt;
 - (ix) Detention for the protection of the accused.
 - (x) The necessity to procure medical or social report pending final disposal of the case.”
35. The question of gravity of charges attracting serious consequences when it comes to punishment is not questionable. But this depends on the strength of evidence to be adduced. An accused person is not supposed to be subjected to pretrial detention unless evidence has been tendered and it turns out to be so strong such that he can abscond as a result (See *Bail and Bond Policy Guidelines*) In the case *Republic vs Danson Mgunya & Another* (2010) eKLR it was stated that:
- “...the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence” This would therefore not be a ground for denying an accused bail.
36. It is urged that it is in the interest of justice for the accused to be denied bail so that they do not continue poisoning the society. The argument raised suggests that the persons arraigned in court are already proven guilty, which is not the case.
37. On the issue of the accused persons being flight risks, the prosecution was required to put forward convincing evidence of the accused falling into the category of such individuals. With regard to the



- 1st Applicant, Mohammed Saleem, it was demonstrated that his Pakistan Passport No. PH77799 had expired and he has no valid visa. Therefore he is illegally in Kenya.
38. For the 7th Applicant, Khan Mohammed Ashraf, an Indian National, holder of Passport No. Pxxxxx also holds Kenyan Alien card No. xxxxxxxxxxxx. These facts according to the Prosecution may tempt them to escape so as to evade trial. And, Kenya not having bilateral extradition agreement with India/Pakistan, they may not be available for trial.
39. Therefore, for the 1st and 7th Applicants, reasons given requiring them to be denied bail were plausible, hence I hereby affirm the orders of the trial court.
40. For the 2nd to 6th Applicants, the Prosecution endeavored to give a practical explanation showing existence of facts calling for their incarceration during trial; however, the reasons given were not cogent enough to have them denied bail for being flight risks.
41. The court has been called upon to release them on reasonable bail terms. Reasonableness depends on proportionality to the offence for which bond should be granted. The Bail should not be too low so as to motivate an accused to abscond. Each case should be determined according to its circumstances.
42. The upshot of the above is that I do revise the decision of the trial court in respect of the 2nd – 6th Applicants by quashing and setting aside the order denying them bail which I substitute with orders as follows:
- a. Each Applicant/Accused (2nd, 3rd, 4th, 5th and 6th) shall be released on bond of Ksh. 80 million with three (3) sureties of similar sums.
 - b. Upon release they will be required to report to the Deputy Registrar, High Court, Milimani Criminal Division on each and every 5th day of the month until the case is heard and determined.
 - c. In default, the bond will be cancelled.
 - d. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19TH DAY OF SEPTEMBER 2023.

L. N. MUTENDE

JUDGE

In the Presence of:

Applicants.

Mr. Otieno for the 1st and 6th Applicants.

Mr. Mandale and Mr. Ogutu for the 2nd 3rd & 5th Applicants.

Ms. Dome for the 4th Applicant.

Ms. Ofwa for the 7th Applicant.

Ms. Odour for ODPP

Court Assistant - Mutai

