



**Republic v Ekai (Criminal Miscellaneous Application E009 of 2023)
[2023] KEHC 22154 (KLR) (12 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL MISCELLANEOUS APPLICATION E009 OF 2023
GL NZIOKA, J
SEPTEMBER 12, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

JACKSON EKIRU EKAI RESPONDENT

RULING

1. By an undated notice of motion application filed in court on May 12, 2023 under the provisions of Article 49(1)(h) of the *Constitution of Kenya, 2010*, the applicant seeks that, the court reinstate the bond and/or bail cancelled by the trial court and/or issue fresh bond and/or bail terms.
2. The application is supported by the applicant's affidavit wherein he avers that he was charged vide Chief Magistrate's Criminal Case No 41 of 2018 at Naivasha with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. That, he was granted bond of Ksh 200,000 with one surety of like amount with an alternative cash bail of Ksh 50,000.
3. However, on November 16, 2022 the trial court forfeited the cash bail for non-attendance of court and issued a warrant of arrest. He was subsequently arrested charged and sentenced to serve six (6) months imprisonment. He avers that he has since served the sentence and seeks for reinstatement of bond and/or bail.
4. The applicant also relied on a document labelled "memorandum of bail/bond application" where he states his non-attendance of court was due to the fact he was indisposed and that he provided medical records from Naivasha Referral Hospital in support of the same. Furthermore, Covid-19 pandemic hit the country and crippled various services including the court.
5. That he is ready to abide by the bond terms set by the court. He prays that a pre-bail report be ordered for to help ascertain the bond terms.



6. However, the respondent opposed the application through a replying affidavit dated, July 7, 2023, sworn by Atika Dennis, a Prosecution Counsel in the office of the Director of Public Prosecutions, Naivasha. He averred that the trial court granted the applicant bond terms of Kshs 200,000 and/or a surety of a similar amount with an alternative cash bail of Kshs 50,000.
7. That, the applicant absconded court when his matter came up for mention on September 30, 2020 and the trial court issued summons through the investigating officer and set the matter for mention on November 23, 2020. However, the investigating officer was unable to trace and serve the applicant with the summons since he was not at his place of stay and his phone number was not going through.
8. That, the trial court issued warrants of arrest and ordered the cash bail be forfeited. That, despite the efforts by the investigating officer, the applicant was not traced until November 15, 2022, when he arrested and arraigned in court, and sentenced to serve six (6) months imprisonment as aforesaid.
9. He avers that the applicant has not come to court with clean hands as he absconded court and impeded the expeditious determination of the matter for more than twenty-four (24) months, in contravention of Article 159(2)(b) of the Constitution. Further, he has not shown the court any efforts he made to contact the trial court through a friend or relative to support his claim that he was unwell.
10. Further, the application to reinstate bond is not supported by Article 50(1)(h) of the Constitution which provides for cancellation of bond terms where there are compelling reasons. Furthermore, the applicant is a flight risk and threat to the course of justice and therefore the case should be heard and determined while he is in custody. In the circumstance, the application is unfounded, lacks merits and is a waste of the court time and should be dismissed.
11. The respondent further filed submissions of the even date and reiterated that the applicant had been granted bond as enshrined in Article 49(1)(h) of the Constitution, however, he absconded court from September 30, 2020 until December 14, 2022 when he was arrested.
12. That, he impeded the expedition of the case violating the rights of the victim as provided in Article 159(1)2(b) of the Constitution and therefore he should remain in custody until the matter is heard and determined.
13. Having considered the application I find that the matter herein relates to bail and/or bond and in determining whether to grant an accused person bail/bond terms the court is guided by inter alia, Article 49 (1) (h) of the Constitution that states that: -

“An arrested person has the right—
“(h) 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. In addition Article 50 (2) (a) of the Constitution 2010, stipulates that every person is presumed to be innocent unless otherwise proved and states as follows:-

“(2) Every accused person has the right to a fair trial, which includes the right—
(a) to be presumed innocent until the contrary is proved.”



15. In the same way, section 123 of the *Criminal Procedure Code* empowers the court to admit an accused person to bond or bail on reasonable terms and states as follows: -

“(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(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”.

16. Pursuant to the aforesaid, section 123A provides 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”.

17. Finally, Paragraph 4.9 of the Kenya Bail and Bond Policy Judiciary Guidelines, provide the factors to be considered by the court when deciding with whether to grant or deny bail/bond and which includes: -

a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.



- b. The strength of the prosecution case
- c. Character and antecedents of the accused person.
- d. The failure of the accused person to observe bail or bond terms
- e. Likelihood of interfering with witnesses.
- f. The need to protect the victim or victims of the crime from the accused person.
- g. The relationship between the accused person and potential witnesses.
- h. Child offenders. where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.
- i. The accused person is a flight risk.
- j. Whether accused person is gainfully employed.
- k. Public order, peace or security. whether the release of an accused person will disturb public order or undermine public peace or security.
- l. Protection of the accused person. whether pre-trial detention is necessary to protect the accused person.

18. Finally, the Court of Appeal in the case of *Michael Juma Oyamo & another v Republic* [2019] eKLR while dealing with the issue of bail and/or bond stated that: -

“23. We have carefully considered the record of appeal, the submissions by counsel and the various authorities cited. Article 49(1) (h) of the Constitution states that an arrested person has the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons”. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in *R v Joktan Malende and 3 Others* Criminal Case No. 55 of 2009 as follows:

“..... 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 standards set by the Constitution.”

24. According to the recently launched publication, Criminal Procedure Bench Book at pages 48 – 51 paragraph 105, compelling reasons may include the likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused.”

19. Pursuant to the aforesaid legal principles I have considered the application in light of the same and I note from the record of the trial court that when the applicant was arraigned in court, he was granted



bond as envisaged under Article 49 and 50 of the [Constitution 2010](#), and the other statutory and/or legal authorities quoted herein.

20. It is not in dispute that, he did not trial after his last appearance on April 19, 2020 to November 16, 2022, a period of two (2) years and six (6) months. That is a prolonged period of time. It does appear that, he was arrested and charged vide Chief Magistrate's Criminal Case No 1659 of 2022, where he was convicted and sentenced to serve six (6) months imprisonment. I believe that he had an opportunity then to canvass the reasons of his failure to attend court. The conviction therein confirms the fact that, the explanation offered was not found to have merit. In that case his guilty is confirmed by the conviction and he is thus deemed to be a flight risk.
21. Furthermore, it is suffice to note that he was released on cash bail and it proved quite hard to trace him. Even more so, the subject case is at an advanced stage and the interest of justice demands that it be concluded expeditiously. Justice is a double edged sword. The victim is entitled to a speedy trial just as the accused is. This matter has been pending in court since June 4, 2018, the order that informs the court is not for the bail and/or bond terms to be reinstated but speedy conclusion of the matter so that, it is not only brought to an end but once it is decided, the bail and/or bond application herein will become moot.
22. In that regard, I direct that, the trial court do prioritize this mater and conclude it at the earliest in view of the fact that, the applicant's bond has been cancelled until the case is heard and determined.
23. Furthermore, the applicant is at liberty to renew the bond application before the trial court as the case progresses, the trial court will be well placed to determine the appropriate bond terms to give if it deems it fit to reinstate the bond or bail.
24. The upshot is that the application for reinstatement of bond is declined and is dismissed.
25. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 12TH DAY OF SEPTEMBER 2023.

GRACE L. NZIOKA

JUDGE

