



**Mwangi & another v Republic (Criminal Revision E336 of 2022)
[2023] KEHC 23412 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E336 OF 2022
SM MOHOCHI, J
OCTOBER 5, 2023**

BETWEEN

SAMWEL MWANGI 1ST APPLICANT

ERICK THAMU 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(An Application for Review under section 362 and 364 of the Criminal Procedure Code Cap 75)

RULING

1. By Notice of motion supported by the Sworn Affidavit of Mr. Gakuhi Chege Advocate all dated September 28, 2023, the Applicant moves the court for review of the Bail/Bond terms as set by the Trial Court in Nakuru Chief Magistrate’s Court Criminal Case No E2311 of 2023 and that;
 - i. That the Applicant is currently employed by Upstream Group Limited as a Sales Executive earning a monthly gross salary of Kshs 15,000.
 - ii. That the Applicant presented themselves for plea taking at Nakuru Law Courts on 25th September, 2023 following Court Summons by Kaptembwo Police Station who were investigating a report by the Employer of Stealing by Servant against the Applicant and Six other accused persons and entered a Plea of Not Guilty to the Charges.
 - iii. That the Applicant entered a Plea of Not Guilty to the Charges and proceeded to make an application before the Trial Court that the Applicant be granted lenient bond terms noting that he was unwell and needed constant medical attention and further that the Applicant is not a flight risk as he has been attending to the matter during the conduct of Investigations and further during all Court Mentions.



- iv. That the Prosecution Counsel was not opposed to the application for lenient Bond Bail Terms.
 - v. That the Trial Court in its Ruling delivered on 25th September, 2023 in respect to Bond/Bail terms proceeded to admit the 1st Applicant on Bond terms for the sum of Kshs Six Hundred Thousand and in the alternative Cash Bail terms for the sum of Kshs Two Hundred Thousand and the 2nd Applicant Surety Bond of eight hundred thousand and alternative of cash bail of Ksh Two Hundred and Fifty Thousand.
 - vi. That the admission to cash/bail bond is meant to ensure the attendance of an accused person to court and is not meant to punish an accused person, who is at all times presumed innocent until proven guilty.
2. This Court conforms to the school that, disturbing discretion of a subordinate court should be done sparingly and only in the most deserving of cases See *Ogolla S/o Owuor v R* [1954] EACA 270 on when the Court will interfere with discretion of trial court in sentencing, that:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in *R v Shershowsky* [1912] CCA TLR 263 as emphasized in *Shadrack Kipkoech Kogo v R* Criminal Appeal No. 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also *Sayeka v R* [1989] KLR 306)
 3. Owing to the foregoing, it is important for this court to consider its jurisdiction as was held in the case of *Samuel Kamau Macharia Vs. KCB & 2 others*, Civil Application No. 2 of 2011

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
 4. Article 50(2) of the Constitution provides: -

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

 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”
 5. Article 165(6) of the Constitution empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The Criminal Procedure Code is the Statute that expounds on this jurisdiction. Section 362 of the Criminal Procedure provides: -

“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 subordinate court.”
 6. Section 364 of the penal code empowers the High court to exercise its revisionary powers conferred to it as a court of appeal by Sections 354, 357 and 358 and may enhance sentence.



7. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a court when examining the issues pertaining to section 362 of the Criminal Procedure Code as follows: -
- a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
8. In granting bail, the court must ensure that, bail or bond terms must not be excessive or unreasonable and should not be far greater than what is necessary to ensure or guarantee the accused person's appearance before court. Where this is the case, it would be tantamount to a denial of bail, a right which is enshrined in the *Constitution* and the Criminal Procedure Code as outlined above. This position was expounded in the case of *Taiko Kitende Muinya* [2010] eKLR.
9. The Court notes that the Applicants were on a police bond prior to the arraignment and plea taking. The Investigating officers and the OCS Kaptembwa Police Station had admitted the Suspects (including the Applicant) to a police Cash bail of Kes 10,000/-. This should equally act as an indicator informing the court's decision to admit the Applicant to Bail and bond
10. The *Bail and Bond Policy Guidelines* at page 9 paragraph 3.1. (d) underpins the right to reasonable Bail and Bond terms as follows:-
- 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.
- Conversely, bail or bond amounts 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. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case."
11. The above position has been enunciated in various decisions by the courts as in the case of *Andrew Young Otieno v Republic* [2017] eKLR where Kimaru J. stated as follows: -

"This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to a denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms to be imposed by the trial magistrate. He has been in remand custody for a period of over two years."



12. The court must however ensure that the bail or bond terms must not be so low an amount that would make it easy for the accused to be tempted to forfeit the same and abscond court. Whatever the court in its discretion grants should also be commensurate to the offence committed as already stated. See *Hassan Abdulhafedh Zubeidi & Others vs. R*, Nairobi Misc Cr. Application No. 453 of 2015.
13. In the present case, the Applicants has been charged with falsely obtaining Kshs 168, 675/- for the 1st Applicant and Kshs 237,594/- for the 2nd Applicant. The record of the trial court does not indicate whether there was any form of inquiry as to the financial capability of the accused person or a pre-bail report which would act as a guiding factor to the court in deciding the amount of bail. The fact that the accused person is still in custody despite being granted bail demonstrates that the conditions were excessive. Their continued incarceration is therefore a good ground for review of the bail or bond terms.
14. In the upshot, I set aside the orders of the trial court issued on 25th September 2023 and substitute therefor a uniform Order granting the 1st and 2nd Applicants the following bond terms: -
 - i) A personal Bond of Kshs 400,000/= with one surety of a similar amount.
 - ii) In the alternative, cash bail of Kshs 100,000/=.

It is so ordered.

SIGNED, DATED AND DELIVERED IN VIRTUALLY AT NAKURU ON THIS 5TH OCTOBER 2023

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MOHOCHI S.M

JUDGE

