



**Gicheri v Republic (Criminal Application E032 of 2024)
[2024] KEHC 15556 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPLICATION E032 OF 2024
F GIKONYO, J
DECEMBER 4, 2024**

BETWEEN

HOSBON OMBATI GICHERI APPLICANT

AND

REPUBLIC RESPONDENT

*(Application from the ruling of Hon. W.C. Waswa delivered
on 05/06/2024 in Kilgoris SPMCR No. E238 of 2024)*

RULING

Bond Review and case transfer

1. The applicant and his co-accused were charged with four counts.
2. In count I. The applicant was charged with the offence of obtaining money by false pretense contrary to section 313 of the Penal Code.
3. The particulars of the offence were that on 28/02/2024 at Kilgoris Township in Transmara west sub county within narok county jointly with others not before court with intent to defraud obtained from Rose Bitutu Raini maize 240 bags of 90kg each valued at approximately Kshs. 864,000/= by falsely pretending that they were in a position to pay her using a Credit Bank Cheque No. 00XX60 a fact they knew to be false.
4. In Count II. The applicant was charged with obtaining by false pretenses contrary to section 313 of the Penal Code.
5. The particulars were that on diverse dates between 28 and 29th February 2024, at an unknown place within the republic of Kenya jointly with others not before court with intent to defraud obtained from Rose Bitutu Raini Kshs. 250,834/= by falsely pretending that they had deposited excess money



in KCB Account No. 112XXXX86 for Rose Bitutu Raini from Credit Bank cheque Nos 00XX60 and 00XX54 a fact they knew to be false.

6. In count III. The applicant was charged with issuing a bad cheque contrary to section 316(a) (1)(a) (4) of the Penal Code.
7. The particulars were that on 28/02/2024 at Kilgoris Township in Transmara West Subcounty within narok county jointly with others not before court issued a Credit Bank cheque No. 00XX60 for Kshs. 964,000/= in favour of Rose Bitutu Raini KCB account No. 112XXXX86 from credit bank account 00510XXXXXX68 for the applicant with the knowledge that the said credit bank account 00510XXXXXX68 from the applicant had insufficient funds.
8. In count IV. The applicant was charged with issuing a bad cheque contrary to section 316(a) (1)(a) (4) of the Penal Code.
9. The particulars were that on 29/02/2024 at Kilgoris Township in Transmara West Subcounty within narok county jointly with others not before court issued a Credit Bank cheque No. 00XX54 for Kshs. 800,000/= in favour of Rose Bitutu Raini KCB account No. 112XXXX86 from credit bank account 00510XXXXXX68 from the applicant with the knowledge that the said credit bank account 00510XXXXXX68 from the applicant had insufficient funds.
10. The trial court (Hon. W.C. Waswa(SRM) vide the ruling dated 05/06/2024 noted the applicant was granted bond terms in the Kisii case and he is still in custody. The trial court stated that it is only proper that the applicant secures the bond in the Kisii case before issuing him with any bond terms to avoid confusion and or conflict between the two courts which would cause unnecessary embarrassment.
11. These expressions by the trial court are not strange. They reflect some realities; where an accused with more than one case uses bond in one of the cases to gain freedom despite denial of bond in those other cases. A blatant abuse of court process. A rude embarrassment of the court and its process.

The application.

12. The applicant vide notice of motion filed on 23/10/2024 has sought for review of the bond terms and transfer of his matter to another court of competent jurisdiction.
13. The application is premised on sections 81 and 362 of the Criminal Procedure Code.
14. The application is supported by the supporting affidavit of Hosbon Ombati Gicheri.
15. The applicant averred that the conditions for the bond were not favourable to him as the sureties have been rejected by the court trying in matter.
16. The applicant prayed that his matter be transferred to another court within Kilgoris Court as the trial court has violated his constitutional rights by subjecting him to trial while sick and refusing to approve his bond without cogent reasons.

The response

17. The respondent opposed the application vide replying affidavit sworn by PC John Wanyoike on 07/11/2024.
18. The deponent averred that on 06/11/2024, the complaint informed him that an unnamed representative of the applicant had called one of her witnesses namely Evans Obwogi on Monday 04/11/2024 requesting the said witness that should he be called to speak at the high court he should



retract his testimony. The witness was also offered a bribe of Kshs. 150,000/= to retract his testimony should the matter start afresh as they were working on how to start the case afresh.

19. The deponent averred that the case is nearing conclusion at the trial court as only two witnesses; the IO and an expert witness yet to testify. All other eyewitnesses including the said Evans Obwogi have testified.
20. The respondent contends that the present application is merely a scheme to have the case begin afresh by invoking section 200 of the CPC which allows for such a fresh trial upon the transfer of the case to another court.
21. The respondent averred that the fact that the trial court gave the applicant a bond of 1,000,00 with two sureties of a similar amount is not prima facie evidence of bias. The applicant is alleged to have obtained Kshs. 846,000 and issued the complainant with bad cheques totaling Kshs. 964,000. The applicant has similar cases in other courts including Kisii and Kehancha law courts.
22. The respondent averred that from the record the defense has been suspiciously adducing various excuses to adjourn the case during hearing dates.
23. The respondent contends that despite the allegation of bias, the co-accused has secured sureties and has been released on bond.

Analysis and Determination

24. This court has considered rival arguments of the parties. The court should determine: -
 - i. Whether this court should review the bond terms.
 - ii. Whether this court should transfer the case to another court of competent jurisdiction.

Review of Bond Terms

25. In principle, an accused person is entitled to be released on bond on reasonable conditions; which should not be excessive or arbitrary or oppressive as the major objective of bond is to guarantee attendance of the accused at the trial. Nevertheless, the court should also ensure that, the release of the accused on bond does not prejudice the trial. But, what amounts to reasonable terms and conditions depends on the circumstances of each case. Taiko Kitende Muinya -vs- Republic (2010) eKLR Ochieng J (as he then was)
26. This subject has been well treated in the Bail and Bond Policy Guidelines 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.” (See paragraph 3.1 (d) (page 9)

27. It is apparent that the accused has been in custody since 15/12/2020 and he opines that the bond terms should be reviewed in the interest of justice.
28. Apart from consideration that bond terms must be reasonable and further requirement that the accused personal circumstances must be considered, the court’s discretion is also guided by other preconditions as follows: -

Bond terms should not be too lenient to encourage forfeiting or absconding, bond should also tally with the nature of the offence and circumstances of the victim.

Secondly, it is also trite that serious offences with severe sentences come with the temptation to abscond and even frustrate the trial when the accused considers what is ahead of him. The interest and right of the victim must also be considered as per the provisions of the *Victim Protection Act*.
29. The IO has indicated that, the accused was granted a bond of Kshs. 1,000,000 (One Million) with two sureties of a similar amount.
30. Determination of whether the terms and or conditions of bond are reasonable conditions is by references to the facts and circumstances prevailing in each case; not any defined mathematical formula.
31. The trial court considered the circumstances of the case, including the fact that the accused is facing similar charges in other courts, the seriousness of the offence, the amounts involved, the nature of charges, in fixing the bond terms and conditions. In the circumstances of this case, a bond of Kshs. 1,000,000 (One Million) with two sureties of a similar amount is reasonable. Notably also, the accused person is causing delay in his own case; and as is said delay is the ally of the defaulter-something that a court of law should never countenance.
32. Accordingly, the request for review of bond terms is declined. The trial to be fast-tracked.

***Transfer of case to another court**

33. Section 79 of the Criminal Procedure Code (CPC) provides for the transfer of cases between Magistrates within the local limits of the subordinate court’s jurisdiction.
34. Section 81 thereof donates wide powers to the High Court to transfer criminal cases from one Subordinate Court to another, and also to itself, upon exercise of Judicial discretion, and upon tangible reasons that demonstrate that a fair trial will not be had if the case is not transferred to another court.
35. In the case Joseph Mutua Klungu v Daniel Musyoki Musiu & 4 Others [2012] eKLR the court considered the application of section 81 and stated: -

“Indeed, this court, as per the provisions of Section 81 of the Criminal Procedure Code (Cap 75) has wide discretion in transferring criminal cases from one subordinate court to another, and also to itself. However, that discretion, being judicial discretion has to be exercised judicially. The court has to act on tangible reasons that clearly demonstrate that a fair trial will not be had if the case is not transferred to another court. In coming to this court, the applicant has levelled serious allegations. the burden was on him to demonstrate the particular facts that would persuade the court to exercise its discretion. This court cannot act on mere allegations, however alarming those allegations might be.”



36. Other than making generalized statements that the trial court is biased and has violated his constitutional rights, the applicant has not demonstrated to this court any reason showing that fair trial will not be had unless the case is transferred. The generalized allegations have not any basis. The case is substantially heard, and the best interest of justice would be served through expeditious disposal of the case by the trial court and all parties playing their role towards that end. The material presented before the court tends to show that, the applicant is bent on delaying the conclusion of the case. Impelling to repeat that, delay is always the ally of the defaulter; but, great prejudice to the compliant; the court should never countenance it.
37. Accordingly, the prayer for transfer of the matter is hereby denied.

Conclusion and orders.

38. In the upshot, this court issues the following orders;
- i. The application for review of bond terms as well as transfer of the case is denied.
 - ii. The trial court remains in situ; to fast-track the hearing of the case.
 - iii. The trial court's file be returned to the trial court for hearing and disposal.
39. It is so ordered

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 4TH DAY OF DECEMBER, 2024.**

**F. GIKONYO M
JUDGE**

In the presence of:-

1. Applicant
2. Okeyo for respondent
3. Nyangaresi C/A

