



**Hussein & another v Republic (Miscellaneous Criminal Application
E012 of 2023) [2024] KEHC 16837 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2023**

**DR KAVEDZA, J
DECEMBER 17, 2024**

BETWEEN

MOHAMED SALEED MOHAMED HUSSEIN 1ST APPLICANT

KHAN MUHAMMED ASHRAF 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed an application dated 14th November 2024, seeking an order to vary the bail/bond terms imposed. The application is premised on the grounds in the face of the application and supported by an affidavit sworn by the applicant's advocate of a similar date.
2. The averments made are that they have been unable to raise the bail/bond terms imposed. They claim that the bond terms are punitive hence their inability to meet them. It was asserted that the High Court has jurisdiction to review its own decision with regard to bail/bond terms which shall not be excessive in view of the circumstances of the case.
3. The application was not opposed by the respondent.
4. The issue to be determined is whether the terms of bond/ bail set should be reviewed.
5. This is not an application for revision but a variation of the bond terms set by this court. In this case, the accused persons have remained in remand custody despite the variation of the initial bond terms which is proof that they cannot find a surety or raise the bail terms imposed. In the case of Harish Mawjee & Another vs. Republic [2020] eKLR, it was stated that:

“... courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary.



Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has a right to seek review of bond terms from trial court or high court or appeal.”(Emphasis added)

6. The court exercises this duty in furtherance of the provisions of Article 49 (1) (h) of *the Constitution* which provides 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 not to be released. Although the court can grant and /or review bond terms at any stage of the proceedings in furtherance of the accused’s constitutional right under Article 49 of *the Constitution*, due regard should be given to the gravity of the offence.
7. Importantly, any bond terms granted by the court must be balanced against any injustice or prejudice that would likely be suffered by the society and/or the victim. It is trite law that that the paramount principle to be considered in granting bail, is to secure the attendance of the accused during trial. Its for this reason that bail terms set should neither be so lenient as to entice the accused to abscond nor should they be so excessive so as to amount to ‘indirect’ denial.
8. In this case, this court already found that the accused persons were eligible for bond. The court also found that the accused persons were not a flight risk and there were no alleged threats to the witnesses. Therefore, whether the witnesses are likely to be threatened or influenced and whether the accused persons are a flight risk are issues already determined earlier by this court.
9. Section 123 (2) of the *Criminal Procedure Code* provides that:

The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
10. The Judiciary bail bond policy guidelines similarly provide that bond terms shall be reasonable. The accused persons face five counts of offences related to trafficking in narcotic drugs. Although bail terms must be reasonable to enable the accused person to comply and benefit from his constitutional right, the court must also not be seen to encourage absconding and thus interfere with the administration of justice.
11. The applicants herein were arraigned in court on 20th June, 2023 for plea taking before the trial court where they were denied bail. Upon an application for revision before the High Court he was granted bond. However, he has been unable to meet the bond terms set by the court hence, the application for review. It is my view that his inability to get out of prison despite having been granted bond implies that they have been unable to raise the said bond.
12. The changed circumstances in this case are that although the applicants have been granted bail, they are unable to meet the terms.
13. In the premises, this court is obliged to grant reasonable bail terms. The application dated 14th November 2024 is allowed in the following terms:
 - i. The applicants Mohamed Saleem Mohamed Hussein and Khan Muhammed Ashraf are each admitted to a bond of Kshs. 3,000,000 with one surety.
 - ii. The security shall be a fixed asset owned by a Kenyan citizen.



- iii. In the alternative to order 'i' above, the applicants are each admitted to a cash bail of Kshs. 1,000,000.
- iv. The applicants shall report to the investigating officer every Friday until the conclusion of the trial.
- v. The contact person(s) (surety) must provide a copy of their National Identity Card, a passport-sized photograph, and a letter from the chief confirming that they have known the respective applicant(s) for a period of no less than five (5) years.
- vi. The respective landlords of the applicants shall provide confirmation that the applicants have been their tenants for a period of no less than two (2) years.
- vii. The applicants shall not leave the jurisdiction of this court until the matter is heard and determined.

RULING DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER, 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mburugu for the state

Mr. Dome for the applicant

Achode, court assistant

