



**Kioni & 2 others v Republic (Criminal Revision E018 of 2024)
[2024] KEHC 15782 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION E018 OF 2024
DR KAVEDZA, J
DECEMBER 16, 2024**

BETWEEN

MARGARET WANGUI KIONI 1ST APPLICANT

CHIPIOKE ANDREW MADUKA 2ND APPLICANT

STEPHEN CHIMSIDIRI EMENIKE 3RD APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed a chamber summons application dated 5th June 2024 seeking orders to revise the trial court’s decision denying the 2nd and 3rd applicants bail while admitting the 1st applicant to stringent bail terms. The application is premised on the grounds in the face of the application and supported by an affidavit sworn by the applicants’ advocate of a similar date.
2. The averments made are that the applicants were jointly charged for three counts of the offence of trafficking in narcotic substances contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* no. 4 of 1994 before the Chief Magistrates Court sitting at JKIA. The 1st applicant was admitted to stringent bail terms while the 2nd and 3rd applicants were denied bail. There were no compelling reasons for the denial of bail/bond. They asserted that the trial court unfairly assumed their guilt and denied them bail. The applicants are willing to deposit their passports in court as a condition for grant of bail. They urged the court to grant the 2nd and 3rd applicants bail while also reducing the terms issued to the 1st applicant.
3. The respondent did not file a response to the application despite being given the opportunity to do so. The application was canvassed by way of written submissions with the applicants filing theirs. These submissions have been duly considered by the court. The issue for consideration is whether this court should revise the orders of the trial court denying the applicant’s bail.



4. The revisional jurisdiction of this court is donated by Section 362 of the [Criminal Procedure Code](#) which 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.”

5. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order, or finding is tainted with illegality, errors of law, or impropriety or that there was an irregularity in the proceedings that gave rise to the impugned order, finding or decision.

6. The trial court's record shows that on 23rd May 2024, the applicants entered a plea and denied the charges against them. The court heard an application for bail pending trial. On 27th May 2024, the 2nd and 3rd applicants were denied bail because, as foreigners, they did not demonstrate familial or property ties in Kenya. The court considered this a compelling reason to deny their constitutional right to bail. In contrast, the 1st applicant was granted cash bail of Kshs. 1,000,000, along with two Kenyan sureties of the same amount each, and other conditions.

7. The [Constitution](#) specifically requires under Article 49 (h) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the [Criminal Procedure Code](#), Article 49 (h) places the burden of proof on the state to demonstrate compelling reasons.

8. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of the [Constitution](#), the courts are to be guided by the provisions of section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

- (a) Nature or seriousness of the offence;
 - (b) The character, antecedents, associations, and community of the accused person;
 - (c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;
 - (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 if released on bail, it is likely that he would fail to surrender to custody;
 - (b) Should be kept in custody for his own good.



9. In the *Bail and Bond Policy Guidelines*, it is restated as a general guideline in Paragraph 4.9 that:
- “In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”
10. Moreover, by dint of Article 50(2) of the *Constitution*, every accused person is entitled to the presumption of innocence. Hence, in the *Bail and Bond Policy Guidelines*, it is recommended that:
- The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.
11. According to the trial court's record, the prosecution opposed bail through an affidavit sworn by Sgt. Sheila Kipsoi. The affidavit stated that the 2nd and 3rd applicants, who are Nigerian nationals, arrived in Kenya on 16th March 2024 on a three-month holiday visa. The prosecution argued that they had no known acquaintances in Kenya and were likely to abscond if released on bail, presenting this as a compelling reason to deny bail.
12. The trial court requested for a pre-bail report. The report revealed that the 2nd applicant has been married to a Kenyan wife since 2018, and they have one child, aged five years. The 3rd applicant is also married to a Kenyan citizen, and they have two children, aged five and three years.
13. However, there is no evidence that has been provided to the trial court to confirm the existence of a marriage, either, formal or customary between the 2nd and 3rd applicants and their ‘wives’. Furthermore, no contractual agreement or documentation was tendered before the court to indicate that dowry was paid by the 2nd and 3rd applicants to the respective families of their wives which would otherwise demonstrate a customary marriage arrangement. Additionally, it cannot be true that the applicants are married to Kenyan citizens and yet they had travelled from Nigeria on 16th March 2024 on a three-month tourist visa. The question that begs for an answer is how could persons married to Kenyan citizens be travelling on a tourist visa? I would have expected them to produce permanent resident permits which would have enabled them to get married to Kenyan citizens. The law as I know it does not permit tourists to marry Kenyan citizens.
14. Additionally, birth certificates were presented to the trial court to verify the 2nd and 3rd applicants’ status as parents to the children in question. No evidence has been submitted from any educational institution affirming the applicants’ joint participation in the children’s upbringing, such as attendance at school events or other parental activities. Consequently, there is a lack of proof of both the existence of a marital union and the exercise of parental responsibility by the 2nd and 3rd applicants.
15. It is my finding that the decision of the trial court to deny the 2nd and 3rd applicants’ bail/bond was proper and accordingly, their application for revision is dismissed for lack of merit.
16. On whether the bail/bond terms imposed on the 1st applicant were excessive, 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 the court. Where this is the case, it would be tantamount to a denial of bail, a right that 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.

17. The court must however ensure that the bail/bond imposed is not so low that would entice the accused to forfeit the same and abscond court. That is to say, whatever the bail/bond that the court grants in exercise of its discretion should be commensurate to the offence. In the present case, the 1st applicant is facing three counts of trafficking in narcotic drugs and two counts of being in possession of a passport contrary to section 54(1)(d) as read with section 54(2) of the Kenyan Citizenship and Immigration Act, 2011.
18. From the record, the 1st applicant is not a flight risk and there is no evidence that there were any compelling reasons for the denial of bail/bond. She is a Kenyan citizen with a fixed abode. I hereby partially revise her bail/bond terms as follows:
 - i. The cash bail of Kshs. 1,000,000 in addition to two sureties imposed by the trial court on 27th May 2024 is substituted with a cash bail of Kshs. 1,000,000 with one contact person.
 - ii. The contact person must be a Kenyan citizen who is a direct family member but not a parent.
 - iii. The 1st applicant shall comply with the other bail terms issued by the trial court on 27th May 2024.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Momanyi for the Applicants

Mburugu for the Respondent

Achode Court Assistant.

