



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL REVISION NO. E003 OF 2021**

**VICTOR KIPRONO NGENO.....APPLICANT**

**VERSUS**

**THE OFFICE OF THE DIRECTOR**

**OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

1. This Revision has come to me through a Notice of Motion under Certificate of Urgency dated 28<sup>th</sup> April 2021. The Applicant seeks that the court revises or sets aside the orders of the Resident Magistrate in respect of the bond terms issued on the grounds that the same are excessive and enforcing them will amount to a miscarriage of justice.

2. The Application is brought under Articles 49, 50 (1), 165(6) and 165(7) of the Constitution of Kenya 2010 together with Section 362, 364, 365, 366 and 367 of the Criminal Procedure Code, Cap 75.

3. The background to this Revision is contained in the trial file which I have perused. The Accused person was arraigned before the Resident Magistrate's Court at Bomet in respect of Criminal Case No. E502 of 2021 and charged with the offence of obtaining by false pretenses contrary to Section 313 of the Penal Code Cap 63. The particulars are that on diverse dates between 22<sup>nd</sup> September, 2020 and 18<sup>th</sup> November, 2020, in Bomet township within Bomet Central Sub County in Bomet County, with intent to defraud, obtained Kshs.930,000 (Nine Hundred and Thirty Thousand Kenya Shillings) from Caroline Chepkorir by falsely pretending that he was in a position to help her secure employment in the Judiciary, a fact which he knew to be false and untrue.

4. The Accused failed to attend court on 9<sup>th</sup> April 2021 to take plea. Consequently, the court ordered that he forfeits cash bail to the State and issued a warrant of arrest. He was subsequently arraigned in court on 28<sup>th</sup> April 2021 and he pleaded not guilty to the charge.

5. Upon making a prayer for fresh bond terms through the defense counsel, the court granted the Accused bond terms as follows: ***“That the Accused be released on a bond of Kshs.200,000/= with two sureties of a similar amount subject to his finger prints being taken by the investigating officer or in the alternative, the Accused be released on a cash bail of Kshs.200,000/= subject to the same conditions.”*** This forms the basis of this Revision Application.

6. The grounds listed in the Notice of Motion are as follows:

- i. That the bond terms as stipulated by the learned magistrate are excessive in light of the charge brought against the accused person;
- ii. That there will be a great miscarriage of justice on the Accused person if the Court does not exercise its supervisory role to intervene on the issue of the stipulated bond terms;
- iii. That the Accused person has also been charged in another case in Kibera Law courts and is required to attend court on 29 April 2021 and because of his inability to raise the bond, he risks absconding court on the above-mentioned date and may have a warrant of arrest issued against him and his bond cancelled in that other matter.
- iv. Finally, that the Accused person has an ailing three-year-old child who is suffering from a heart condition and requires to be taken for checkup in early May. Thus, the child is likely to suffer irreparably.

7. The Revision application is supported by an affidavit dated 28 April 2021 sworn by the defense counsel, Chemutai Carolyne.

8. The High Court is vested with Revisionary powers under the Constitution and **Section 362 to 366** of the Criminal Procedure Code Cap 75. More particularly, **Article 165 of the Constitution** provides as follows:-

*(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

9. The Criminal Procedure Code, Cap 75 under Section 362 states as follows:-

**“Power of the High Court to Call for Records:**

*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.”*

10. **Section 364** further outlines the manner in which the revision jurisdiction should be exercised. It states as follows:-

**“Powers of the High Court on Revision**

*(1) In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –*

*(b) In the case of any other order other than an order of acquittal, alter or reverse the order.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defense:*

*Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

11. The threshold for determining whether a decision is correct, proper and legal is found in Constitutional and statutory provisions. The Oxford English Dictionary Vol. VIII defines the word propriety to mean **fitness, appropriateness suitability, conformity with requirements, rule of principle rightness, accuracy, correctness, justness**. The depth of revisional jurisdiction of the high court was set out by the court of appeal in which cited the case of **Sriraja Lakshmi Dyeing Works vs. Pangaswamy Chettair [1980] 4SCC 259** where the Supreme Court of India elucidated the principles as follows:-

*“The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words ‘to satisfy itself’ under section 25 read (which has similar provisions with Kenya’s section 362 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya) is essentially a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, is quite obviously a much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied).”*

12. According to Black’s Law Dictionary, 10<sup>th</sup> Edition, Review has been defined as a consideration, inspection or re- examination of a subject or a thing. It entails a second view or revision; consideration for purposes of correction. Bail review means, **“A process of re-examination of bond terms to an accused person who has been unable to post bail before the same court.”**

13. The above means that an application for reviewing bail or bond terms should be made to the trial court granting the same. A person is therefore expected to seek redress in a higher court after seeking review in the trial court. This position was clearly articulated by Lessit J. in the case of **Harish Mawjee & another vs. Republic [2020] eKLR Criminal Revision case no 545 of 2020**, as follows:-

*“There are certain overarching principles that govern the administration of bail and bond by Courts. First of all, 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’s ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court or appeal..... an accused can apply for review of bond terms given by the trial court. The application should be made before the trial court which granted the bond. If, however the accused is still aggrieved by the decision of the trial court, he can still approach the higher court for relief.”*

14. In the present case, the record shows that the applicant did not seek review in the trial court. Needless to state, it is the duty of the trial court to determine whether to grant bail or bond and under what terms. The judicial power with respect to such application is discretionary and exercisable in the first instance by the trial court. While the High Court is vested with wide powers to supervise the subordinate courts, it is the trial court that is seized of the facts and circumstances of the case and the socio-economic circumstances of the accused person which are key in determining whether or not to grant bail and on what terms and conditions.

15. Where an application for bail has been made and the trial court under the circumstances is unable to make a determination due to inadequacy of information, it is at liberty to seek more information from the accused person or other necessary parties in order to arrive at an informed decision. This may be done through further inquiries as outlined in the **Judiciary Bail and Bond Guidelines** which states at paragraph 4.26 (c) that:-

***“The court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision, including the following instances – (c) Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms.”***

16. Following the above, I consider it procedural that an application for review ought to have been made in the trial court in the first instance and that a revision or appeal to the High Court would follow upon dissatisfaction. Be that as it may, I now consider the grounds set out in the Application within the parameters of Section 362 of the Criminal Procedure Code for incorrectness, illegality or impropriety. For certainty, I restate in the succeeding paragraphs the principles that usually guide a court in considering an application for bail bond.

17. This court must be reluctant to interfere in the exercise of judicial discretion in a lower court unless it is convinced that doing so would be in furtherance of the administration of justice. This principle was clearly stated by the court of appeal in **Mbogo v. Shah (1968) EA 93** thus:-

***“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”***

See also **Mwangi vs. Wambugu (1984) KLR**.

18. Judicial discretion is exercised judiciously. **The Judiciary Bail and Bond Policy Guidelines of 2015** have provided parameters to assist the court in exercising discretion judiciously. With respect to bail and bond, they require that the court in granting bail should consider the seriousness of the offence, the strength of the case, interference of witnesses, failure of the accused to attend or where the accused is charged with another case, the need to protect the victim(s), the security and safety of the accused, the likelihood of absconding from the jurisdiction of the court and other factors which must be weighed by the court in the interest of justice. Such an exercise of discretion requires a holistic approach and the court must, in close circumspection, take to account the circumstances of the case and the accused person individually.

19. Section 123 of the Criminal Procedure Code provides that:-

***(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.***

**Section 123A CPC** provides as follows:-

Exception to right to bail

***(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 fulfillment of obligations under previous grants of bail; and;***

***(d) the strength of the evidence of his having committed the offence;***

20. 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**.

21. 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."*

22. The above position has been enunciated in various decisions by the courts as in the case of **Andrew Young Otieno vs. 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."*

23. 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**.

24. In the present case, the accused has been charged with falsely obtaining Kshs.930,000. 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. The continued incarceration is therefore a good ground for review of the bail or bond terms.

25. In the upshot, I set aside the orders of the trial court issued on 24 May 2021 and substitute therefor an order granting the accused the following bond terms:-

i) A personal Bond of Kshs.50,000/= with one surety of a similar amount.

ii) In the alternative, cash bail of Kshs.100,000/=.

iii) The order on the taking of on fingerprints remains unchanged.

26. Orders accordingly.

**Ruling delivered dated and signed at Bomet this 13<sup>th</sup> day of May, 2021.**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the absence of the parties who shall be served the Ruling and Orders through the office of the Deputy Registrar of this court.**