



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

HCCR NO. E003 OF 2020

REPUBLIC.....APPLICANT

VERSUS

JEFFERSON KIMUTAI BIL.....RESPONDENT

RULING

1. The Revision Application dated the 26th of October 2020 is seeking to review the orders of the Magistrate Court releasing the accused on a personal bond of Kshs. 100,000.

2. The Prosecution opposed the application for grant of free bond to the accused person on the grounds that: -

- (a) The accused person took plea and was granted bond of Kshs. 100,000 with one surety;
- (b) That the case has been proceeding well and witnesses have been attending court on all hearing dates;
- (c) That the complainant is a traumatized minor living with disability;
- (d) That the accused bond terms were reviewed to personal bond without the prosecution being given an opportunity to respond to the application and the said terms were maintained despite objections from the prosecution;
- (e) That the accused person is likely to abscond if released on a personal bond noting that he is an orphan and his only sister is married; and
- (f) That accused person is facing serious charges and the evidence on record is overwhelming.

3. Article 49 (1) (h) of the Constitution provides for the rights of arrested persons to be released on bond or bail. It states as follows: ***“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.”***

4. The right to bail or bond is not absolute, the courts have to weigh an accused person's right to bail or bond against the opposition to bail or bond by the state.

5. Justice Mativo, in ***Republic versus Danford Kabage Mwangi (2016) eKLR*** stated as follows; ***“the right to bail or bond is not absolute and can be curtailed where there exists compelling reasons.”***

6. Justice Gikonyo, in ***Republic versus Joktan Mayende & 3 others (2012) eKLR, Criminal Case No.55 of 2009*** defined compelling reasons as follows: ***“... the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.”***

7. Justice Mativo, in ***Republic versus Danford Kabage Mwangi (2016) eKLR*** listed the instances when an accused person can be denied bail, the court stated as follows: ***“The “relevant and sufficient” reasons which may permit the accused to be remanded in custody rather than being granted bail (also known as the “grounds for refusing bail”) are limited to:***

- i. Risk that the accused will fail to appear for trial if they are released on bail;***
- ii. Risk that the accused will interfere with the course of justice while on bail (e.g. that he will destroy evidence that could be***

used against them at their trial or that they could interfere with witnesses who are due to give evidence at their trial);

iii. Risk that the accused will commit further offences while on bail;

iv. The accused would be at risk of harm (from himself/herself or from others) against which they would be inadequately protected if released on bail; or

v. Risk to the preservation of public order if the accused is released on bail.”

8. Similarly, the High Court, in *Republic versus Lucy Njeri Waweru & 3 Others*, stated as follows in regards to considerations that are to be made by the courts in an application for bail, justice Ogola, stated as follows:

“In considering whether the court will grant bail, the established principles applicable are the following:

a) whether the accused are likely to turn up for trial should they be granted bails;

b) Whether the accused persons are likely to interfere with witnesses;

c) The nature of the charges;

d) The severity of the sentence;

e) The security of the accused if released on bond;

f) In case of illness of the accused, the severity and nature of the illness;

g) Whether the accused person have a fixed abode within the jurisdiction of the court.”

9. The Judiciary bail and bond policy guidelines, 2015 at paragraph 4.10 provides that the burden of proof lies on the prosecution to establish the existence of compelling reasons that would justify the denial of bail, or the imposition of suitable bail terms and conditions. The onus therefore lies on the prosecution to prove the existence of compelling reasons that would justify the review of orders made by the magistrate court.

10. The High Court in *Republic versus William Mwangi wa Mwangi* stated as follows: ***“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus to demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail.”***

11. This was also the position in *Republic versus Mbiti Munguti (2020) eKLR*, where Justice Odunga stated as follows: ***“From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution.”***

12. The prosecution in their application indicated that the accused is likely to abscond if released on a personal bond, owing to the fact that the accused person is an orphan and his only sister is married away.

13. In the case of *Jackline Ahimidiwe Swai versus Republic (2019) eKLR*, the court stated as follows: ***“...it is clear that the paramount consideration that the court must take into account in determining whether or not to release an accused person on bail pending trial is whether the accused will attend court if so, released on bail pending trial. Whereas, the court may take into consideration other factors, such as the serious nature of the charges facing the accused, and antecedents of the accused’s arrest and subsequent arraignment in court, such considerations will not overwhelm the primary and main consideration of ensuring that the accused person will attend court during trial.”***

14. I find that there is no guarantee that the accused person will attend court if released on a free bond, also noting that the charges levied against him are of a serious nature.

15. The prosecution in their application also indicated that the Magistrate reviewed the bond terms of the accused person without being given a chance to respond to the application and even when they objected to the review the court maintained the terms.

16. Lack of meaningful participation by the prosecution in the process of review of the bond terms by the court is an irregularity and cannot be allowed to stand.

17. In the case of *Republic versus David Some Barno & 6 Others (2021) eKLR*, the court stated as follows: ***“... the law is settled vide various cases that, the prosecution must be involved in the bond/surety approval process, as the court has no machinery to undertake verification of documents or sureties’ process. That, without the participation of the prosecution, the whole process is irregular, illegal and improper.”***

18. Further to this, the Victim Protection Act No. 17 of 2014 protects the rights and welfare of victims of crime, **section 10 (b)** of the Act states that a victim's safety and the safety of their family should be considered in determining conditions for bail and subsequent release of the offender into society, the complainant in this matter is a minor living with disability as such the trial court ought to have taken cognizance of the circumstances of the complainant before granting bond.

19. The discretion of the trial court in imposing bail or bond terms for accused persons is subject to statutory review vide **section 123 (3)** of the Criminal Procedure Code Chapter 75 Laws of Kenya, revisionary jurisdiction vide **section 362 and 364** of the Criminal Procedure Code Chapter 75 Laws of Kenya and general supervisory jurisdiction of the High Court under article **165 (6) and (7)** of the Constitution of Kenya, 2010.

20. I hereby review and set aside the order to release the accused on a personal bond of Kshs. 100,000 and order that the accused be remanded in custody until the case is heard and determined since there is a compelling reason not to grant him bond.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 5TH DAY OF NOVEMBER 2021.

A. N. ONGERI

JUDGE