



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO 10 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NAOMI NECHESA SANYA.....1<sup>ST</sup> ACCUSED**

**FAITH KANANU.....2<sup>ND</sup> ACCUSED**

**RULING.**

1. The accused persons were initially denied bond by Mutuku J, and by a ruling dated 7<sup>th</sup> May, 2019 she reviewed her earlier order and granted the accused persons bond terms on the ground that she was unable to determine the strength of the prosecution case on the basis of the evidence on record. She granted the accused persons the following bond terms:-

(i) Each to execute a bond of two million (2,000,000) with one surety of similar amount or two sureties of one million each.

(ii) In the alternative each a cash bail of five hundred thousand.

2. By a Notice of Motion dated 11<sup>th</sup> May, 2020 the accused persons approached the court under certificate of urgency for review of the bail and bond terms on the grounds that the said terms were stringent for their meagre means, which was tantamount to denial of bail.

3. The application was supported by an affidavit sworn by their Advocate on record where it was deposed that the applicants had been in custody since January, 2019 and the matter was yet to be concluded. It was stated that due to SARS Cov 2 Virus, which will greatly impact on the court's ability to determine the matter, they were apprehensive that the same will not be expeditiously resolved.

4. When the matter came up for hearing, Mr. Muchuki for the accused persons submitted that they were unable to secure the bond terms and that due to Covid 19 pandemic, there were family members who were willing to stand as personal contact for the accused persons. He submitted that the accused persons had been working as a hair dresser and house help respectively and therefore a cash bail of Ksh.100,000 would have been reasonable.

5. Ms. Onunga for the prosecution submitted that having been admitted to bail, she was not opposed to the application for review but urged the court to take into account the nature of the charge, while imposing terms which will enable them attend court, including personal sureties to be contacted

6. In application for review of bail terms, the court has to take into account the following factors; that there had been a change in circumstances since the order sought to be reviewed was made. This court has had to pronounce itself on the said issue as follows:-

***“14. This court faced with a similar application in REPUBLIC v JOSEPH KURIA IRUNGU alias JOWIE & another [2019] eKLR has this to say: -***

***“14) The Applicant bears the burden on review to show on a balance of probability why the earlier order should be vacated and why it should be unjust not to vacate the order. He must show that the circumstances of the case are so altered that compelling reasons are disclosed for review of the earlier order. This position was clearly stated by Justice Muriithi in his well argued decision in REPUBLIC v DIANA SULEIMAN SAID & ANOTHER [2014] eKLR: -***

*“11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful Applicant for bail may repeat his application if his circumstances changed in such a manner as to favor his release on bail . . .*

*12. I find nothing in the provisions of Article 49(1)(h) of the Constitution or Section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49(h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person is presented 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.”*

*15) This position has been captured by the Judiciary in the Bail/Bond Policy Guidelines 4.2 6 (h) in which the court is required to consider the following additional features in deciding whether to grant an accused person bail: -*

*a) The period the accused person has already spent in custody since arrest.*

*b) The probable period of detention until the conclusion of the trial if the accused is not released on bail.*

*c) The reason or reasons for any delay in the conclusion of the trial and any role of the accused with regard to such delay.*

*d) Change of circumstances during the trial.*

*e) The maximum custodial sentence in case the accused person is convicted. (Emphasis added) See the case of REPUBLIC v. RAPHAEL MUOKI KILUNGI [2020] eKLR.*

*7. Justice R. Nyakundi when faced with the issues of review of bond terms on the ground that the same were not reasonable in the case of RAMATHAN IDDI RAMATHAN & 5 OTHERS v. R [2019] eKLR had this to say:*

*“The question to answer is whether the Honorable trial magistrate imposed an excessive bail. I turn to the Eighth amendment of the American Constitution which prohibits the use of excessive bail. The Supreme Court of the United States of America in the case of Stack v Boyle U.S. 1.3.1951*

*“The court provided guidelines in assessing “whether bail is excessive starting from the premise that the traditional right to Freedom before conviction permits the unhampered preparations of a defense and serves to prevent the infliction of punishment prior to conviction. The court defined excessive as: Bail set at a figure higher than an amount reasonably calculated to assure the presence of the accused. Significantly, the court tied the question of whether a bail determination is excessive to the purpose of bail. As the court explained, the purpose of bail is to help assure the presence of the defendant at subsequent proceedings. Since the freedom of bail is limited, the filing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”*

*In the case of Bearden v Georgia 461 U.S 660. 672-73 1983 Griffin v Illinois 351 U.S 12 19 1956 it has been reaffirmed that: “there can be no equal justice where the trial a man gets depends on the amount of money he has”.*

*I wish also to draw the attention to a report by professor Friedland; On Detention before trial, a study of criminal cases tried in Toronto magistrate’s courts, Toronto Press 1965, where he observed.:*

*“The practical challenges of setting the quantum of cash deposit, as well as the fairness it produced. System which requires security in advance often produces an insoluble dilemma. In most cases it’s impossible to pick a figure which is high enough to ensure the accused’s appearance in court and yet low enough for him to raise. The two seldom if ever overlap. The ability of the accused to Marshall Funds or property in advance whether he or she would be released pauses even a bigger challenge”*

*One may add that a court of law shall not deprive an accused person right to life security and liberty for reason that he or she is facing a criminal charge without due process of law. In determining the amount of cash bail or surety covenant with the court as a condition for release the legitimate goal is to ensure the attendance of the accused on all future schedules set down by the trial court. I hold a strong view that imposing financial conditions or surety terms that result in pretrial detention of the person is in violation of the Constitutional due process and right to equal protection before the law. The Constitutional and statutory provisions emphasize on reasonable terms. It is therefore not clear given the available data where trial courts find their influence to assess high bail terms for accused persons. There is indeed need to adhere to canons of Constitutional interpretation on procedural due process and an opportunity to be heard meaningfully on the ability to raise cash recognizance or surety bonds. It is necessary for the trial court to make an express finding on the record that the accused has the ability to pay the cash bail or raise the recognizance by the sureties. The resulting effect of excessive bail is punishment without conviction.”*

*8. As submitted by the Advocate for the applicants, they were granted bail by the trial court but are yet to secure their release on the ground*

that the amount granted are beyond their means. There is no evidence that the accused persons will abscond trial should the bond terms be reviewed downwards taking into account the prevailing circumstances caused by COVID 19 pandemic.

9. I am alive to the fact that am not the trial court which had set the bond terms but being alive to the materials placed before me, I hereby review the bond terms and order that each of the accused persons be released on the following bond terms:

i) Bond of Kenya shillings five hundred thousand (Ksh.500,000) with two sureties of similar amount.

ii) In the alternative cash bail of Kenya shillings two hundred and fifty thousand (Ksh.250,000) together with two sureties of similar amount.

All other bond terms as issued by the trial court to remain in force.

10. And it is ordered.

**Dated, Signed And Delivered At Nairobi This 11<sup>th</sup> Day Of June 2020 Through Microsoft Google Teams**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Ms Gikonyo for the State*

*Mr. Ondieki holding brief for Muchuki for the 1<sup>st</sup> accused person*

*Mr. Ondieki for the 2<sup>nd</sup> accused person*

*Accused persons present*

*Court Assistant - Karwitha*