



**Republic v Azubuike (Criminal Case E1803 of 2023)
[2023] KEMC 313 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEMC 313 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CRIMINAL CASE E1803 OF 2023
PA NDEGE, SPM
AUGUST 1, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

BENJAMIN OBUKO AZUBUIKE ACCUSED

RULING

1. The Accused person herein, Benjamin Obuko Azubuike is facing two counts of serious cybercrime of Being in Possession of Devices Adapted Primarily for the Purpose of Committing an Offence c/s 18(2) of the *Computer Misuse and Cyber Crimes Act*, 2018 and one immigration offence of Being Unlawfully Present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the *Kenya Citizenship and Immigration Act* of 2011. He is alleged to be a Nigerian Citizen of Passport No. A1xxxxxxx who was found at Mariakani Estate in Nakuru Town within Nakuru County without a Kenyan Visa. He is however still being presumed to be innocent until proven otherwise by the prosecution and at the conclusion of the trial herein.
2. His counsel, Mr. Ondieki, has prayed for the release of the accused on alternative cash bail terms. That the constitutional rights to a fair trial and release on bond terms apply to all, including foreign nationals. That the accused person is not a flight risk. That he has a Kenyan girlfriend. The learned prosecution counsel, Ms. Chinga, opposed the release of the accused on cash bail. She did not however object to the release on surety bond on condition that his passport being deposited in court until this case is finalized.
3. I do agree with the learned defensecounsel that Articles 24 and 49 of the 2010 *Constitution* prohibit discriminatory processes in relation to the enjoyment of rights of arrested persons. The rights are guarantees to all persons, which would include citizens and non-citizens. Similarly, the *CPC* refers to an accused person, presumably of any nationality.



4. Whereas there is the right to be released on bail/bond upon the presumption of innocence until proven guilty, I am still aware that the Constitutional right to be released on bond is not absolute. The Constitution itself limits the right in 2 respects as held in the case of Republic v Joktan Mayende & 4 Others (High Court of Kenya at Bungoma, Criminal Case No. 55 of 2009) in a ruling by F. Gikonyo, J. that: -
 - a. The release on bond or bail is on condition albeit reasonable;
 - b. The accused may not be released on bond or bail when there are compelling reasons.
5. It is for the Court, and not any other person or authority to determine the conditions of bond or bail; or if the reasons adduced or circumstances are compelling enough to deny the accused bond or bail in the sense of Article 49(1)(h) of the Constitution. The compelling reasons must be reasons that are forceful and convincing as to make the Court feel very strongly that the accused should not be released on bond. It is therefore upon the prosecution to prove that it is disproportionate and justified in the circumstance of the case to deny the accused bail¹. The standard of proof is on a balance of probabilities.
6. The prosecutions in this case has objected to the release of the Accused on cash bail on the reason that he is a foreigner. Let me clarify that Article 49(1)(h) of the Constitution imposes a high standard on the part of the Prosecution and bond/bail will not be denied on flimsy grounds but on Real and Cogent grounds which meet the high standard set in the Constitution. From what I can deduce from the grounds hereinabove, the opposition is only geared towards cash bail, and not towards the release on surety bond.
7. It is trite that bail and bond decision-making is however often guided by certain principles such as the right to liberty, accused's obligation to attend trial, right to reasonable bail and bond terms, balance between the rights of the accused persons and the interest of justice and consideration for the rights of victims.
8. The courts thus have powers under the Constitution and the CPC to admit an accused person to bail or to release them upon executing a bond with sureties for his or her appearance and to review the bail terms and conditions. In, practice, the courts have made this evaluation by considering factors such as the nature of the charge or offence and the seriousness of the punishment to be met if the accused person is found guilty, the strength of the prosecution case, character and antecedents of the accused person, the failure of the accused person to observe bail or bond, likelihood of interfering with witnesses, the need to protect the victim or victims of the crime from the accused person, the relationship between the accused person and potential witnesses, child offenders, the accused person is a flight risk, whether the accused person is gainfully employed, public order, peace or security, protection of the accused persons.

Determination

9. The accused person herein is not a Kenyan. We have not been informed what he does in Kenya or whether he is gainfully employed or not. There is in fact a charge of him being unlawfully present in Kenya. We have only been informed from the bar that he has a girlfriend. That means he is not yet settled in Kenya. The circumstances herein make him not suitable for a cash bail. There must be a Kenyan surety to guarantee his attendance. I do therefore agree with the prosecution that this is a compelling reason not to impose a cash bail herein.

¹ See Republic v Joktan Mayende & 4 Others, supra



10. It is now well settled that the court's main consideration when determining an application for bail pending trial is whether or not the accused will voluntarily and readily present himself to court for the trial and throughout the trial. I do therefore impose the following bond terms:
- a. The accused may be released on a bond of Kshs. 3,000,000/= and 1 Kenyan Surety of a similar amount.
 - b. The Accused passport be deposited with the court till the conclusion of the trial herein; or as may otherwise be ordered by the court during the pendency of the trial herein.
11. It is so ordered.

DATED,SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 01ST DAY OF AUGUST , 2023

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Court Interpreter:Janet

Present for the prosecution: Chinga

Defense Counsel: Ondieki

Accused: Present

Ondieki: Praying for a PTD. Also, the trial bundles to include the inv. Diary, covering report and crime and incident report.

Chinga: The accused present in court. Shall supply all the documents and material required

CT: PTD on 04/09/2023. The accused if still in custody be produced within 14 days for the normal mentions for remandees.

