

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**  
**APPELLATE SECTION**  
**CRIMINAL APPEAL NO E049 OF 2025**

**NANCY INDOVERIA KIZUNGU .....**  
**APPELLANT**

**VERSUS**

**REPUBLIC .....**  
**RESPONDENT**

**(Being an appeal against original ruling of the learned Magistrate delivered on 10<sup>th</sup> September 2024 at JKIA law Courts in Criminal case no E102 of 2024)**

**JUDGEMENT**

1. The appellant was charged with the offence of trafficking in narcotic drugs contrary to section 4(a)(11) of the Narcotic drugs and Psychotropics substances (control) Act No 4 of 1994 , the particulars of which were that on divers dates between 8<sup>th</sup> and 9<sup>th</sup> august 2024 at Georgina apartment s in Mastore area along Juja -juja Farm road within Juja sub county ,Kiambu county , jointly with others not before the court trafficked in Narcotic Drugs namely cannabis to wit 189,300 grams with a market value of kshs 5,679,000 by storing in contraventions of the provisions of the Act.
2. She pleaded not guilty and by a ruling thereon dated 10<sup>th</sup> September 2024 , the subject matter of this appeal , the trial court (Hon. R Kitagwa ) admitted the applicants co-accused to bond of Kenya shillings one

million (kshs 1,000,000) plus one surety of like amount but denied the appellant bond .

3. In denying the appellant bond , the trial court had this to say :

***“I have keenly considered the fact that the 1<sup>st</sup> accused was previously charged and convicted, she has an ongoing case and now this suit. Coincidentally and undisputedly so, the offences are of similar nature, that of trafficking in narcotics. At paragraph 10 herein above, it is apparent that the accused person right to bail is not absolute and therefore where the court is satisfied that the accused may commit further offences, then that forms a formidable ground for denial of such right because that forms part of the compelling reasons as envisaged under section 123 of CPC and also as stipulated in the bail and bond policy.***

17. It is my finding that it has been demonstrated that the incident and character of the 1<sup>st</sup> accused is such that she is likely to commit or abet the commission of other offences or even serious. I therefore find merit in the application in opposition of the grant of bond terms against the 1<sup>st</sup> accused”

4. Being aggrieved by the said determination , the appellant herein filed this appeal originally at the High Court Criminal registry at Kibera being Criminal Appeal No E151 of 2024 under a certificate of Urgency

together with a notice of Motion dated 26<sup>th</sup> November 2024 in which she sought for leave to file an application for appeal for reasonable cash bail terms out of time .

5. The said file was transferred to this court by an order of the Judge Kavedza J on the 28<sup>th</sup> January 2025 and upon perusal of the pleadings and proceedings from Kibera it became apparent that the appellant did not file any Memorandum of appeal and on 27<sup>th</sup> March 2025 directions were issued on the filing and service of the memoranda of appeal herein.

6. By a memorandum of appeal herein dated 15<sup>th</sup> March 2025 the appellant raised the following grounds of appeal:

- a) The learned trial court erred in law and fact by declining to grant bail to the appellant despite the non-existence of compelling constitutional circumstances warranting her release on reasonable bail terms.
- b) The denial of bail was based on unsubstantiated assertion by the prosecution that the appellant was a repeat offender, which ground they failed to establish.
- c) That the trial court failed to properly apply the guiding principles set out in Republic v Danson Mgunya & another [2020] e KLR which affirms that an arrested person is entitled to bail unless compelling reasons are established.

- d) That the appellant remains un-convicted and is constitutionally presumed innocent under Article 50(2)( a) of the Constitution , a principle which was not accorded adequate weight in the ruling by the trial court
- e) The learned Magistrate did not sufficiently consider the deteriorating health condition of the appellant and her age which is a critical factor in evaluating bail especially under Article 43(1)(a) of the Constitution on the right to health
- f) That the lower court acknowledged the appellant recent surgical procedures but failed to factor in her need for urgent specialized medical attention when determining the application for bond
- g) That continued detention of the appellant in a facility lacking the capacity to provide the necessary medical care puts her health at grave risk and undermines her right to prepare for her defence
- h) That the trial court erred in treating the alleged repeat offender as a compelling reason without any evidential basis or judicial scrutiny as required under the policy guidelines.

### **SUBMISSIONS**

7. Directions were issued on the disposal of the appeal by way of written submissions and on behalf of the appellant it was submitted that the prosecution in this cause simply alleged that the appellant was a repeat

offender but did not adduce any documentary evidence to prove past convictions. It was contended that mere allegations do not amount to compelling reasons as was stated in the case of **Michael Juma Oyamo & another v R [2019] KECA 953 (KLR)**

8. It was contended that the prosecution failed to satisfy the requirement of the appellants alleged antecedent through verified records of previous conviction or evidence of absconding in support of which the case of **Republic v Danson Mgunya & another [2010] KEHC 4116 (KLR)** where the court held that the burden of proof was on the state and not accused person and **Republic v Dwight Sagaray & others [2013] eKLR** on what constitute compelling reasons.

9. It was finally contended that to deny the appellant right to liberty should not be made on speculation or conjecture as was stated in **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR**.

10. On behalf of the respondent it was submitted that the right to bond was not absolute and that in this cause the trial court rightly held that the appellant had antecedents as she had previously been convicted in MRCCE093 of 2022 for a similar offences of trafficking which is one of the compelling reasons provided for in section 123 A of the CPC and that the court had to balance the right of the appellant to be released on bond against the public interest of prevention of crime

as was stated in **Republic v Patrick Ntarangwi [2020] KEHC2140(KLR) .**

### **DETERMINATION**

11. The jurisprudence on appeals against interlocutory orders and decisions in criminal trial has not been fully settled in Kenya amongst the superior courts. When it comes to the decisions of the trial court in determining the issues of bond, one side of the divide takes the view that an accused person denied bond at the trial stage has only option of approaching the trial court by way of review. This was the position taken by the Court of Appeal in the case of Thomas Gilbert Cholmondeley.

12. On the other hand Section 357 of the CPC give an accused person who has been denied bond a right of appeal to the High Court, a position taken by the court in the case of

13. The grant of bond is not absolute; the court will exercise its discretion on whether to grant bond

14. In this matter the only ground upon which the appellant was denied bond was that the same had a live case at Kahawa Law courts where she had not been convicted and had been granted bond and the court at paragraph 14 of the ruling thereon had this to say “ ..... *it is not disputed that she was previously charged and convicted at Kahawa law courts in a similar charge. It is equally not disputed that she is also facing another similar charge at JKIA Court (MCCRE079 of 2023). There is equally*

*no contention to the existence of a fixed place of abode. In my view, the ground relied upon are largely by the prosecution is the 1<sup>st</sup> accused probability to commit another offence*

15. Bond/bail is a constitutional right of every accused person under Article 49(1) (h) of the Constitution which can only be limited where there is compelling reasons advanced by the prosecution to the satisfaction of the court on a balance of probability.

16. What constitute compelling reasons has now been settled in Kenya, through the Bail/Bond Policy Guidelines and as captured by the Court of Appeal in Oyamo case that bond is a constitutional right of every accused person under Article 49 and may only be limited if the prosecutions provide to court compelling reasons which the Court of Appeal in **Michael Juma Oyamo & another versus Republic [2019] eKLR** stated to be forceful and convincing as to make the court feel strongly that the accused should not be released on bond, thus the accused should not be denied bond on flimsy ground but on real and cogent grounds that meet the constitutional standards.

17. These reasons are captured in section 4.9 of the Bail and bond Policy Guidelines which were further captured in section 123A (1) of the Criminal Procedure Code

18. The court however should not lose sight of the fact that the purpose of bond is and remains to secure the attendance of the accused to court during the period of

his trial and that the right to liberty should never be curtailed as was stated in **Republic versus NUSEIBA MOHAMED HAJI OSMAN [2018] eKLR**, denial of a constitutional right is not to be treated lightly and any claim made against an accused person towards curtailing his liberty must not be made on speculation and conjectures.

19. I keenly considered the fact that the 1<sup>st</sup> accused was previously charged and convicted, she has on going case and now this suit. Coincidentally and undisputed so, the offences are all similar in nature, that of trafficking in narcotics. At paragraph 10 herein above it is apparent that an accused person right to bail is not absolute and therefore where the court is satisfied that the accused may commit further offences, then that forms a formidable ground for denial of such right because that forms part of the compelling reasons as envisaged under section 123 of CPC and also as stipulated in the bail and bond policy

17. It is my finding therefore that has been demonstrated that the antecedent and character of the 1<sup>st</sup> accused is such she is likely to commit or abet the commission of other offences or even serious offence .....

18. The issue for determination is whether in denying the appellant bond the court erred so as to make the decision thereon amenable to be interfered with by this court on appeal? the appellant compliant is that the prosecution did not provide the court with the evidence to confirm that the

appellant was a repeat offender. I have looked at the record of the proceedings herein and I will agree with the submissions by the appellant that prosecution did not supply with court with any evidence in support of the said allegation and therefore the said ground was not supported with evidence.

19. This being a first appeal, I have considered the issues raised by the appellant including her current medical condition and is of the considered view and hold that the compelling reasons advanced by the prosecution would have been adequately ring-fenced by appropriate terms and condition noting that there was no evidence tendered before the court to show that the appellant failed to attend court during the period of her trial at Kahawa and or during the period of the other matter that is pending before the JKIA.

20. Whereas the court can be sympathized with noting that the appellant seems to be creating unnecessary work to the court, to deny her bond on that ground alone without more, will not be in advancing the right under Article 49(1)(h) of the Constitution.

21. I would therefore allow the appeal herein by setting aside the decision by the trial court in declining to grant bail to the appellant and substitute the same with one granting her bail/bond on the following terms and conditions:

a) Bond of Kenya shillings one million Five Hundred Thousand (Kshs 1,500.000/=) together with one surety of similar amount

- b) In the alternative cash bail of Kenya Shillings One Million Shillings only (Kshs. 1,000,000/=) with one recognized Kenyan citizen.
- c) During the period of the trial the appellant shall not commit an offence of a similar nature failure of which he bonds shall stand revoked without any further order of the trial court.
- d) The Appellant shall during the period of the trial report to the investigating Officer herein after every thirty (30) days until the conclusion of the case and or as reviewed by the trial court .

22. The lower court file to be returned to the said court for trial and determination.

23. And it is ordered.

**SIGNED DATED AND DELIVERED THIS 19<sup>th</sup> DAY OF NOVEMBER 2025**

**J.WAKIAGA  
JUDGE**

In the presence of

Court Assistant - Irene

Ms Kariuki for the State

Mr. Ondieki for the appellant