



REPUBLIC OF KENYA



**Adedeji & another v Republic (Criminal Revision E002 of 2023)  
[2024] KEHC 1756 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL REVISION E002 OF 2023  
DR KAVEDZA, J  
FEBRUARY 26, 2024**

**BETWEEN**

**MICHAEL ADEYEMI ADEDEJI ..... 1<sup>ST</sup> APPLICANT**

**SELINA NDINDA NDONYO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants filed a chamber summons dated 14<sup>th</sup> November 2023, seeking an order to set aside the decision delivered by the Chief Magistrate’s Court sitting at JKIA on 6<sup>th</sup> September 2023 in MCCR No. E087 of 2023 and admit the 1<sup>st</sup> applicant to reasonable bail terms. In addition, the also prayed that the bail/bond terms to which the 2<sup>nd</sup> applicant was admitted to, be revised. The application is supported by an affidavit sworn by the applicants’ advocate Omondi Samuel of a similar date.
2. The averments made in support of the application are that: The applicants were jointly charged with the offence of trafficking in narcotic drugs contrary to section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* no. 4 of 1994. They pleaded not guilty and applied to be admitted to reasonable bail terms. Vide a ruling dated 6<sup>th</sup> September 2023, the trial court denied the 1<sup>st</sup> applicant bond and granted the 2<sup>nd</sup> applicant a bond of Kshs. 5 million with one surety of a similar amount. In the alternative she was admitted to a cash bail of Kshs. 2 million.
3. The applicants, represented by their learned counsel, argued that the trial magistrate imposed excessively stringent bond terms for the second applicant, which she has been unable to meet. They asserted that the trial court unfairly assumed the guilt of the first applicant by denying him bond, with no evidence supporting the assertion that he was a flight risk. Furthermore, there was no evidence indicating that he possessed the means to tamper with witnesses. Learned counsel also noted that the second applicant is a Kenyan citizen with a permanent residence and is married to the first applicant.



Additionally, the first applicant is willing to surrender his passport to the court as a condition for bail or bond. The applicants affirm that they are not likely to flee and undertake to appearing in court as required.

4. In response, the respondent filed grounds of opposition. The raised grounds argued that the applicants failed to demonstrate any justification for this court to intervene in the discretion of the trial court. The bail terms granted to the second applicant were deemed not only reasonable but also fair given the circumstances of the case. The court's decision aimed to secure the attendance of the applicants for trial while acknowledging the presumption of innocence. The applicants have neither established nor proposed any rationale to challenge the decision of the trial court. Therefore, the application should be dismissed for lack of merit.
5. The respondent filed written submissions in support of their position which have been duly considered. The issue for determination is whether there were compelling reasons to deny the 1<sup>st</sup> applicant reasonable bail/bond and to review the bail/bond terms granted to the 2<sup>nd</sup> applicant.
6. The revisional jurisdiction of this court is donated by Section 362 of the [Criminal Procedure Code](#) which provides that:

“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.”

7. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order, or finding is tainted with illegality, errors of law, or impropriety or that there was an irregularity in the proceedings that gave rise to the impugned order, finding or decision.
8. The trial court's record shows that on 5<sup>th</sup> September 2023, the applicants took plea and denied the charges preferred against them. The trial court heard an application for bail pending trial. On 6<sup>th</sup> September 2023, the 1<sup>st</sup> applicant was denied bond, on the other hand, the 2<sup>nd</sup> applicant was granted bail/bond. The reason for the denial of bail was that the 1<sup>st</sup> applicant was a flight risk having no fixed abode within the court's jurisdiction. The court noted that these were compelling reasons to deny him the enjoyment of the constitutional right to bail.
9. [The constitution](#) specifically requires under Article 49 (h) that the terms of bail to be attached to an accused who is released on bail shall be reasonable. Besides the exceptions limiting the right to bail under section 123A of the [Criminal Procedure Code](#), Article 49 (h) places the burden of proof on the state to demonstrate compelling reasons.
10. In determining whether the interest of justice dictates the exercise of discretion under Article 49 (h) of [the Constitution](#), the courts are to be guided by the provisions of section 123A of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya which provides:

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

- (a) Nature or seriousness of the offence;
- (b) The character, antecedents, associations, and community of the accused person;



- (c) The defendants record in respect of the fulfilment of obligations under previous grant of bail;
  - (d) The strength of the evidence of his having committed the offence:
- (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;
- (a) Has previously been granted bail and has failed to surrender to custody if released on bail, it is likely that he would fail to surrender to custody;
  - (b) Should be kept in custody for his own good.

11. In the Bail and Bond Policy Guidelines, it is restated as a general guideline in Paragraph 4.9 that:

“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of *the Constitution* of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”

12. Moreover, by dint of Article 50(2) of *the Constitution*, every accused person is entitled to the presumption of innocence. Hence, in the Bail and Bond Policy Guidelines, it is recommended that:

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.

13. From the record of the trial court, the prosecution through an affidavit to oppose bond sworn by CPL Luke Washiko averred that the 1<sup>st</sup> applicant who is a Nigerian citizen is not a resident of Kenya and arrived in Kenya three months before his arrest. It was further contended that the 1<sup>st</sup> applicant lacked a permanent fixed abode and was therefore a flight risk.

14. The main concern raised by the state was that the 1<sup>st</sup> applicant was a flight risk and therefore unlikely to turn up for trial. This court is guided by Article 49(1)(h) of *the Constitution*, the Bail/Bond Policy by the Judiciary, and decided cases. In the present application, the main concern of this court is whether the 1<sup>st</sup> Applicant will attend court if he is released on bail pending trial. That fact that he is innocent until proven guilty by a court of competent jurisdiction is without doubt.

15. In cases where the accused is a foreigner, the courts have come up with certain principles to be taken into further consideration in determining whether or not to release the accused on bail/bond pending trial. The cases this court has considered include *Republic vs Kokonya Muhssin* [2013] eKLR, *Republic vs Dwight Sagaray & 4 Others* [2013] eKLR, *Republic vs Makoy Madhak Deer* [2015] eKLR and *Republic v Richard David Alden* [2016] eKLR. Being a foreigner per se is not an inhibiting consideration in determining whether or not the accused should be released on bail pending trial. Another factor is whether the accused has a fixed abode in Kenya and whether he has property or familial connections in Kenya. Another factor is the nature of the charge that the accused is facing and whether the likely sentence to be meted out may serve as an incentive or impetus for the accused to abscond from the jurisdiction of the court. Also to be taken into consideration is the antecedent and



subsequent conduct of the accused before and after being charged. The factors listed above are by no means exhaustive. Each case will depend on its facts and circumstances.

16. The fact that the 1<sup>st</sup> applicant is a foreigner is a material factor when this court is determining whether or not he should be released on bail pending trial. The Applicant told the court that he had been living with the 2<sup>nd</sup> applicant since 2015 as husband and wife. The social inquiry report of the trial court's record for the 2<sup>nd</sup> applicant confirms that indeed the two applicants are married and have been living together in Umoja InnerCore Estate.
17. The contention that he lacked a fixed abode in Kenya was not supported by any material evidence. From the trial court's record, law enforcement agency executed a search within the confines of the applicants' residence where they were arrested in possession of the alleged narcotic drugs. It is this acknowledgement. It is perplexing, however, that they now claim that the 1<sup>st</sup> applicant had no fixed abode thus contradicting their solemn affirmations.
18. As to equating living in rental premises to having no fixed abode, surely that cannot be a reason for the denial of bond. Most urban dwellers do not live in their own houses. Such a ground would mean that anyone living in a rental house would be found to have no fixed place of abode. No evidence has been placed before the court to show that the 1<sup>st</sup> applicant changes residences so frequently that they can be assigned such a label. In addition, he has not been charged with being illegally in Kenya.
19. In my view, the prosecution did not supply cogent and credible evidence to support the contention that the 1<sup>st</sup> applicant was a flight risk by virtue of being a foreigner. It was shown that he had a fixed abode and family ties in the country. In the end, the burden was on the prosecution to prove the existence of exceptional circumstances for the denial of bail/bond. The fact that the 1<sup>st</sup> applicant is a foreigner, is not sufficient grounds to deny him bail. His attendance to court can be secured by the court granting an order for appropriate Kenyan sureties. However, I am alive to the fact that our borders are porous. That notwithstanding, this court will issue appropriate orders.
20. The prayer by the 2<sup>nd</sup> applicant was to revise her bail/bond terms. It was argued that the terms were manifestly excessive which amounted to a denial. The trial court admitted the 2<sup>nd</sup> applicant to a bond of Kshs. 5 million with one surety of a similar amount. In the alternative, she was admitted to a cash bail of Kshs. 2 million. Other conditions were that she was to provide two contact persons provided one is an adult blood relative. She was also to deposit her passport in court and not be issued with a replacement. It is these conditions that the 2<sup>nd</sup> applicant wants to be revised.
21. The provisions of; bail and bond policy guidelines, states first and foremost, bail or bond amount should not be excessive, that is, it 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 (see; *Republic v Taiko Kitende Muinya* (2010) eKLR)
22. I have considered the charge the 2<sup>nd</sup> applicant is facing, and the likely sentence to be imposed if she is found culpable. Taking all these factors into account, I am of the view that the bond terms imposed by the trial magistrate were harsh and excessive.
23. From the foregoing, I find merit in the application and it is hereby allowed on terms that the orders made by the trial court in the ruling delivered on 6<sup>th</sup> September 2023 denying the 1<sup>st</sup> applicant herein bail/bond is hereby set aside and consequently are substituted by the following orders:



- i. Michael Adeyemi Adedeji, the 1<sup>st</sup> applicant herein is granted a bond of Kshs. 3 million with one Kenyan surety of a similar amount.
- ii. The 1<sup>st</sup> applicant is directed to provide two contact persons who are Kenyan citizens.
- iii. The 1<sup>st</sup> applicant is directed to report to the investigating officer every fortnight until the conclusion of the trial.
- iv. The 1<sup>st</sup> applicant is directed to deposit his passport in court which shall be retained during the period of the trial.
- v. This order shall be served upon the Nigerian Embassy by the Court Process server who are directed not to issue the 1<sup>st</sup> applicant with a new/replacement passport.
- vi. This order shall be served upon the Immigration Department by the Court Process server who shall issue a red alert against the 1<sup>st</sup> applicant barring him from travelling outside the jurisdiction of the court during the period of his trial.

The orders of 6<sup>th</sup> September 2023 granting Selina Ndinda Ndonyo, the 2<sup>nd</sup> applicant bail/bond are hereby revised in the following terms:

- i. Selina Ndinda Ndonyo, the 2<sup>nd</sup> applicant herein is granted a bond of Kshs. 2 million with one surety of a similar amount. In the alternative, she is admitted to a cash bail of Kshs. 1 million.
- ii. The 2<sup>nd</sup> applicant is directed to provide two contact persons one of whom is to be an adult blood relative.
- iii. The 2<sup>nd</sup> applicant is to deposit her passport in court and shall be retained during the period of her trial.
- iv. The 2<sup>nd</sup> applicant shall not be issued with any new passport and or any temporary travelling documents of whatever nature.
- v. This orders shall be served upon the Immigration Department in compliance with order (IV) above.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS DAY 26<sup>TH</sup> DAY OF FEBRUARY 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Ogutu for the Applicants

Mutuma for the Respondent

Omwoyo Court Assistant.

