Ambuku v Republic (Criminal Revision E297 of 2023)
[2023] KEHC 21728 (KLR) (Crim) (14 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21728 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E297 OF 2023

LN MUTENDE, J

AUGUST 14, 2023

BETWEEN

DAVID KAHI AMBUKU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. David Kahi Ambuku, the applicant, approached this court through a Notice of Motion dated 1st May, 2023, seeking orders as follows:

    1. Spent...
    2. Spent...
    3. That this Honourable Court be pleased to issue interim orders that the accused be placed under house arrest at his home in a clean environment for speedy recovery and access to medical treatment.
    4. That this Honourable Court be pleased to issue stay orders to all criminal cases the accused person is facing till he fully recovers from the surgery that will be conducted on the 5th day of May 2023.
    5. That this Honourable court be pleased to set aside the bond terms set by the trial court and admit the Applicant to bail or bond on reasonable terms.

2. The application is premised on grounds that the appellant was charged with the offence of obtaining money by false pretence in Criminal Case No. E331/2021 and granted bond terms of Ksh. 20,000,000/- with a surety of a similar sum without an option of cash bail which was later reduced

to Ksh. 15,000,000/- with an even surety; bond terms he considers excessive and unreasonable. That he could not comply with hence detained in remand where he has been for one (1) year and four (4) months.

3. That prior to the detention the applicant had serious health conditions that have worsened due to conditions in remand custody and lack of specialized medical attention.

4. That Doctors have recommended that he seeks specialized medical attention to salvage his health but due to the exorbitant and excessive bond terms, he continues to suffer in custody.

5. Further, he urges that excessive bond terms amount to denial and a defacted detention of an accused person pending hearing which defeats the constitutional intentions as prescribed under article 49(1)(h) of *the Constitution*.

6. That in the absence of compelling reasons as it were at the trial court, it is only reasonable that the conditions for bail and bond must be such that an accused can meet. That denial of bail to the applicant would mean that he continues to languish in custody as the same will jeopardize his already fragile health condition.

7. The application is supported by an affidavit deposed by the applicant who avers interalia that he has a colon malfunction that is endangering his internal organs. That despite a report from Industrial Prison Medical Facility the court declined to review the bond terms to what was affordable to enable him seek proper medical attention.

8. That he developed chronic constipation that led to the collapse of his colon prompting manual stool evacuation that was to be conducted every two (2) days but the same was not done hence worsening his condition which prompted him to conduct the action of manual evacuation himself in the presence of other remandees.

9. That instructions by Doctors at Kenyatta National Hospital have not been adhered to by the Prisons Department that has resulted into him skipping colonoscopy and edema procedures that were scheduled for October 21, 2022 thus complicating his health conditions.

10. That he is apprehensive that if he undergoes surgery he will be subjected to deplorable environmental conditions in remand custody which calls for reasonable bail terms.

11. The application was disposed through written submissions. It is urged by the applicant through Kisuya & Weyombo Advocates that the applicant who is innocent until proven guilty is entitled to reasonable bail terms as provided by article 49(1)(h); 50(2) (a) of *the Constitution* and the Judiciary Bail and Bond Guidelines. Reliance was placed on the case of *Kirit Bhangwanda Kanabar Vs. DPP & Another*, Misc. Criminal Application No. 29 of 2018, where the court stated that:

> " The seriousness of the offence should not be seen from an eye of the quantum or liquidated amount stated to be defrauded or stolen but the nature and gravity of the offence should be in line with prescribed penal provisions and probable sentence on conviction. It was important to distinguish between the nature of the offence as a category and the seriousness of it as attached by the legislature in its various cluster of punishment in default.
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> Given the framework, the automatic trigger on the cash bail being based on a particular percentage or ratio of the alleged amount in the offence charged to was a fallacy not attributable to any rationale or legal craft. In other words, exercise of discretion in determining bail terms should apply the fundamental rights to ensure fairness, access, justice, consistency, predictability, speedy trials and due process of the law. That was because

the framers of *the Constitution* forged a new path under article 49 (h) which mirrored the rule against the use of excessive bail. Setting bail amounts at ratios that were unaffordable contravened equal protection and due process rights of an accused person

There was no inquiry carried out to satisfy the Court that the accused person had the ability to deposit the cash bail or recognizance of a surety of ten (10) million in lieu of cash"

12. And *Andrew Young Otieno V. Republic* (2017) eKLR, where Kimaru J. (As he then was) stated that:

> " ...This court agrees with the Applicant that the purpose of imposing bond terms is to secure the attendance of the accused before the court during trial. The terms imposed by the trial court should not be such that it amounts to denial of the constitutional right of the accused to be released on bail pending trial. The trial court must consider the circumstances of each accused when determining the bond terms to be imposed. In the present application, it was clear to this court that the Applicant was unable to raise the bond terms imposed by the trial magistrate. He has been in remand custody for a period of over two years ..."

13. In that regard this court was asked to set aside the orders of the trial court and admit the applicant to a cash bail of Ksh. 500,000/- or bond of Ksh. 1,000,000/- with a surety in a like sum.

14. The state/respondent through Mr. Mutuma Mwereru, learned Prosecution Counsel submitted that bail or bond terms ought to guarantee that the accused person turns up for trial. That the letter from the Prisons Service clearly indicates that the applicant is critically ill and is due for surgery of his organ; circumstances that may guide the court in reviewing bail. It is hence urged that Ksh. 15,000,000/- bond is excessive.

15. The revisional jurisdiction of the High court over subordinate courts is provided for by *the Constitution* and Statute. Article 165(6)(7) of *the Constitution* provide thus:

> (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

16. Section 362 and 364 of the *Criminal Procedure Code* (CPC) provide thus:

Section 362.

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.

Section 364

> (1) In the case of a proceeding in a subordinate
> court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

17. From the alluded to provision of the law the High Court has power to supervise orders and/or findings of the lower court save that the power is limited to the court satisfying itself as to the correctness, legality or propriety of the order/finding.

18. This is a matter where the contention is in respect of bail terms granted and subsequently reviewed by the lower court that the applicant finds unreasonable. This calls for examination of the terms of bond granted by the trial court in relation to the offence committed. The applicant was charged with eight counts. All the counts hinge on fraudulent conduct. It is alleged that he conspired to defraud some two (2) individuals Ksh. 47,360,000; that he obtained Ksh. 290,000/;Ksh 6,000,000/-; Ksh. 20,000,000/-; by false pretence; and, laundered Ksh. 17,952,500/-; contrary to respective provisions of law as captured in the charge sheet.

19. An accused person has a constitutional right of being released on bail/bond unless there are compelling reasons (See Article 49(1)(h) of *the Constitution* as correctly pointed out by Counsel for the applicant. Further, as correctly submitted, according to article 50(2) (a) of *the Constitution* every person has the right to a fair trial which includes being presumed innocent until the contrary is proved. This, however, is a matter where the applicant has been granted bail.

20. The applicant has invoked the provisions of section 123 (2)(3) of the *Criminal Procedure Code* which provide that:

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced. [Act No. 22 of 1959, s. 13, Act No. 6 of 1976, Sch., Act No. 13 of 1978, Sch.,

Act No. 19 of 1984, Sch., Act No. 19 of 1985, Sch., Act No. 7 of 1990, Sch., Act No. 14 of 1991, Sch., Act No. 5 of 2003, s. 71.]

21. For that reason, this court is seized of the power to interfere with orders of the lower court where bail, if unreasonable can be reduced.

22. The applicant herein is charged with similar offences in other cases. He faces charges in criminal cases; No. 694 of 2018; 494 of 2018; 9520 of 2020; 1534 of 2018;1297 of 2020; 444 of 2023 and 331 of 2022 the instant one.

23. When the applicant sought to be released on bail he argued that compelling reasons did not exist that required him to be granted bail. However, the Prosecution through an affidavit deposed by the Investigation Officer opposed the application on grounds that the applicant had jumped bail in criminal case No. 133 of 2023 where under similar circumstances he sought bail allegedly to travel to India to seek treatment. That he had been granted bail in MCCC. No. 494 of 2018; 694 of 2018 and E444 of 2022 and he absconded by failing to turn up for trial.

24. Despite all those allegations, the antecedents of the applicant and previous records, the trial court was persuaded to grant him bail because of the health challenges.

25. Review is sought because the applicant has not posted bail. Paragraph 3. I. (d) of the Bail and Bond Policy Guidelines provides that:

> "(d) Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they 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....."

26. The court would therefore be expected to consider personal circumstances of the accused person, and his financial ability. But, the presumption of innocence, the fundamental right of an accused must correspond with the fact of bond granted which should not be so lenient so as to encourage the accused to abscond. Further, I emphasize that fact because it has been demonstrated that the applicant herein is a flight risk.

27. The trial court's finding herein was informed by facts before it, the possibility of the accused jumping bail and the multiple cases that he faced. This was a discretionary order that cannot be impugned on revision.

28. The court is allowed to issue stringent bail terms aimed at reducing chances of absconding.

29. I am alive to the case of *Kirit Bahangwanda Kanabar Vs. DPP and Another*, Misc Criminal Application No. 29 of 2018, referred to where the court observed that:

> " ...the seriousness of the offence should not be seen from an eye of the quantum or liquidated amount stated to be defrauded or stolen but the nature and gravity of the offence should be in line with prescribed penal provisions and probable sentence on conviction.
>
> It is important to distinguish between the nature of the offence as a category and the seriousness of it as attached by the legislature in its various cluster of punishment in default.
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> Given this framework the automatic trigger on the cash bail being based on a particular percentage or ratio of the alleged amount in the offence charged to me is a fallacy not attributable to any rationale or legal craft. In other words, exercise of discretion in determining bail terms should apply the fundamental rights to ensure fairness, access, justice, consistency, predictability, speedy trials and due process of the law. I say so because the framers of *the constitution* forged a new path under Article 49(h) which mirrors the rule against the use of excessive bail. Setting bail amounts at ratios that are unaffordable contravenes equal protection and due process rights of an accused person.
>
> ... there was no inquiry carried out to satisfy the court that the accused person had the ability to deposit the cash bail or recognisance of a surety of ten (10) million in lieu of cash. "

30. I must point out that the applicant herein seems to be diverting criminal proceedings to focus on his medical condition. Ostensibly, the applicant's condition is being managed at the Prisons Medical Facility and Kenyatta National Hospital. There would be nothing wrong with an application being made before the trial court for an appropriate order to have the applicant escorted to a desired private hospital. In this regard I am persuaded by the case of *Joseph Nduvi Mbuvi Vs. Republic* (2019) eKLR, where the court held that:

> " In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to detrmine the regularity of any proceedings of any such subordinate court as well."

31. The applicant has also sought an order of stay of all criminal cases he is facing, that means all the eight (8) cases where various victims have a right of seeing justice done before the court.

32. He also seeks an order placing him under house arrest in a clean environment to facilitate speedy recovery.

33. The power to grant stay of proceedings in criminal cases is only exercised in exceptional or extreme circumstances. The court would be determining whether the prosecution should have been initiated in the first instance. The administration of justice should not be brought to disrepute because of some orders. This position was also appreciated in the case of *Goddy Mwokio & Another V. Republic* (2011)

eKLR where the court stated that an order for stay of proceedings, particular criminal proceedings is made sparingly and only in exceptional circumstances.

34. It has not been insinuated that the proceedings before the lower court have no foundation hence oppressive. Therefore, the interest of the victims should also be considered.

35. As regards the prayer to be placed under house arrest, this kind of relief is never utilized for economic crimes like those included in the charges faced by the applicant. I have not seen any document from the Prisons Service Authority suggesting that there is overcrowding at the facility requiring some prisoners being accorded clean environment elsewhere to facilitate supervision by the court. That notwithstanding, the relief was not sought before the lower court, therefore , there would be nothing to revise. What is demonstrated is the applicant's intention to be absolved from court proceedings, an intent that should not be achieved unlawfully.

36. To sum it all, revisionary powers of the court should not be used to delay court proceedings and ultimately defeat the purpose of expeditious determination of the case. It is hence my conclusion that the focal point of the applicant should be to post bond as ordered by the lower court or seek an order to be treated at a hospital of his choice while under supervision of the Prison Services Authority.

37. In the result, I find terms of bond set not excessive in relation to the circumstances in issue. There having been no illegality or procedural breach that would warrant revision, the application is unmeritorious. Accordingly, it is dismissed.

38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 14TH DAY OF AUGUST, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Weyombo for the Applicant

Mr. Mutuma for Odpp

Court Assistant – Mutai