



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. E160 OF 2021

JAMES KIBET CHIRCHIR.....APPLICANT

-V/S-

REPUBLIC.....RESPONDENT

RULING

Application

1. The application dated 16th September 2021 was brought under Article 48, 49, 50 of the Constitution of Kenya and all other enabling provisions of law.
2. The Applicant seeks for orders that the proceedings before Court in Chief Magistrate's Court at Shanzu Criminal Case No. E969 of 202 be removed and brought to the High Court for purposes of ascertaining the legality, correctness and or propriety of the proceedings and ruling of the lower court. That the Honourable Court do exercise its discretion in revision of the ruling on bail and bond by the lower court wherein the magistrate granted unreasonable bail and bond terms. That the Honourable Court be pleased to set aside the bail and bond orders made and admit the Applicant to bail or bond on reasonable terms. That costs of the application be provided for.
3. The application was premised on the grounds that in rendering her determination, the learned magistrate failed to consider submissions by counsel that the Applicant has a Constitutional right to be released on bail or bond on reasonable grounds. That the bail and bond terms that were set by the court are not reasonable as bail was set at Kshs. 5,000,000 or an alternative bond of Kshs. 7,000,000. That in setting the said bail and bond terms, the court failed to take into cognizance the presumption of innocence and that bail ought not to be used as a punishment. That the constitutional rights of the applicant would be curtailed unnecessarily if indeed he continues to languish in custody having been condemned to bail terms that are unreasonable and for the reason that the trial court has deemed as compelling. That the reasons advanced by the prosecution were not sufficient to warrant the accused to be subjected to such bail terms. That the Respondent will not be prejudiced if the orders prayed for herein are granted.
4. The application is supported by an affidavit sworn the applicant, James Kibet Chirchir on 16th September 2021 and with such other grounds.

Applicant's Submissions

5. The Applicant submits on proportionality of bail and bond terms that the liberty of an individual is precious and is to be jealously protected by the Constitution and the Honourable Courts. It is for this reason that an accused person can be admitted on bail and

bond. However, the same has to be commensurate to the prevailing circumstances and not exorbitant or send a message of it being punitive as it would offend the constitutional principle of presumption of innocence. The Applicant submitted by citing the case of *Republic v Robert Zippor Nzilu*, Criminal Case No. 4 of 2018. The Applicant submits that it is trite law that granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent on the one hand and the public interest on the other. The cornerstone of the justice system is that no one should be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The terms as set are indeed high by any measure or standard and indeed the same can easily be misconstrued as a punishment. The Applicant further submits that it is the accused person's averment that upon requesting for financial assistance from friends and family, the family has raised an amount of Kshs. 300,000. The family can alternatively avail a parcel of land that is estimated to be worth Kshs. 500,000 as bond.

6. The Applicant submits that bond terms should not be seen to defeat the sacred doctrine of presumption of innocence. The Applicant submits that in setting the said bail and bond terms as such, the Honourable Court failed to take into cognizance the presumption of innocence and that bail ought not to be used as a punishment but rather as a means to secure the accused person's attendance in court. The Applicant submits that it is trite law that an accused person is simply an accused person and the presumption only shifts upon being adjudged guilty by the court or at the earliest and arguably upon being found to have a case to answer. The Applicant submits that he is a man of meagre means and the amounts set as bail have occasioned him hardship as he is not able to afford to raise them. To such an extent, the Applicant submits that the bail justice or terms set are discriminatory in nature based on the financial status as the same will imply that bail and/or bond is a remedy only available to the rich. The Applicant submits that he is quite elderly and sickly and his continued incarceration is detrimental to his health. The same could even lead to fatality and in essence defeat the very hope of the accused person having his day in court and a chance to prove his innocence.

7. The Applicant further submits to the above that he has shown, undertaken and committed that if granted bail on such reasonable terms as indicated, he will diligently and religiously attend court without failure at all material times, he will not interfere with the investigation or any of the witnesses, he has and will maintain his known place of abode and he is not a flight risk, and he has no known history of absconding bail at all. The Applicant submits that he is willing to abide by any other terms that this Honourable Court may place as it deems just in the circumstances. That his continued stay in custody not only unfairly subjects him to further severe hardship and anxiety not only to him as an individual but to his young family by extension together with his elderly parents, being the sole breadwinner in his family and his extended family as well. The Applicant submits that the State has not alleged or adduced any evidence that the accused person is at risk in subjecting himself to the jurisdiction of this court or he poses as a risk of interfering with witnesses or faces risk as to his own safety to life and security or that his detention is for the preservation of public order and security of the state. The Applicant submits that with respect to a decision on bail, the court is required to observe the statutory injunction in Section 123 (2) of the Criminal Procedure Code whose rationale is elaborated in the Criminal Procedure Benchbook, 2018 para. 109 at p.52 while dealing with minor offences. In addition, the Bail and Bond Policy Guidelines at p.9 paragraph 3.1 (d) underpins the right to reasonable bail and bond terms.

8. The Applicant submits that the value or amounts or nature of the charge ought not by itself be the guiding factor on a determination of the bond or bail terms. The Applicant submits that the courts in Kenya have rendered themselves severally on this issue, that Justice Odunga quoted with certainty and great approval the case of *Republic v Danstan Mgunya & Another* [2010] eKLR, while rendering himself in his ruling in the case of *Republic v Danford Kabage Mwangi* HCC No. 8 of 2016 at paragraph 14. The Applicant further cited the case of *Ramadhan Iddi Ramadhan & 5 Others v Republic* [2019] eKLR. The Applicant submits cited 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. 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. The Applicant submits by drawing 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.

9. The Applicant submits to the above that the essence of a trial is to ensure fairness as evidence is produced to demonstrate reasonable suspicion before the accused is accorded the opportunity to give an account thereby protecting the presumption of innocence. The doctrine of presumption of innocence is a fundamental component of a fair trial in any criminal justice process and is indeed a right protected under Article 50(2)(a) of the Constitution.

10. The Applicant submits court's powers of revision that taking into consideration the facts and circumstances of the case, this court has the power to review this case and the standards of review and supervisory jurisdiction in terms of Article 165(6)(7) of the Constitution and Section 362 of the Criminal Procedure Code in the case of *Mwangi v Wambugu* [1984] KLR at 453 where the court

held on the jurisdiction of an appellate court over the decision made by the trial court. Applicant further submits that he is aggrieved due to the grant of excessive bail terms inconsistent with the laid down principles under the constitution and the Criminal Procedure Code. The Applicant submits that the impugned ruling ought to be interfered with on grounds of being punitive, excessive and unconscionable in the circumstances of the case facing the applicant.

11. The Applicant submits in conclusion that the bail conditions as set should not be equated with punishment against the offender for committing an offence yet to be proved by the prosecution. The Applicant further submitted that the amount of Kshs. 300,000 as sought by the accused person will be reasonable and a sufficient amount to secure his attendance.

Analysis and Determination

12. The High Court is vested with Revisionary powers under **Article 165** of the **Constitution** which provides that:-

(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.

13. Further, **Section 362** of the **Criminal Procedure Code Cap 75** provides as follows:-

“Power of the High Court to Call for Records:

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.”

14. From the foregoing, this court has considered the nature of the charges and materials canvassed in respect to the application herein. The cardinal consideration in granting bail/bond is to ensure that the accused person avails himself in court whenever he is required. Additionally, the bail/bond terms must not be pegged on the amount stated in the charge sheet alone but on the consideration that the accused person is presumed innocent until proven guilty, and reasonable bail terms where no compelling reasons have been given.

15. This court agrees with the Applicant’s position on the presumption of his innocence until he is proven guilty in respect to being granted reasonable bail/bond terms. Article 50(2)(a) of the Constitution of Kenya provides that:-

‘Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.’

16. The Applicant submitted on the one hand that he is a man of meagre means and the amounts set as bail have occasioned him hardship as he is not able to afford to raise them, he is quite elderly and sickly and his continued incarceration is detrimental to his health, that his continued stay in custody not only unfairly subjects him to further severe hardship and anxiety to him, his young family and his elderly parents, being the sole breadwinner in his family. On the other hand, the Applicant submitted that the State has not alleged or adduced any evidence that the accused person is at risk in subjecting himself to the jurisdiction of the court, pauses as a risk of interfering with witnesses, faces risk as to his own safety to life and security, or that his detention is for the preservation of public order and security of the state.

17. The **Bail and Bond Policy Guidelines** at **page 9 paragraph 3.1. (d)** underpins the right to reasonable Bail and Bond terms as follows:-

d) “Right to Reasonable Bail and Bond Terms:

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.”

18. In *Andrew Young Otieno v Republic* (2017) eKLR, it was held:-

“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 a 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 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 to be imposed by the trial magistrate. He has been in remand custody for a period of over two years.”

19. The Appellant submitted that upon requesting for financial assistance from friends and family, the family has raised an amount of Kshs. 300,000. The family can alternatively avail a parcel of land that is estimated to be worth Kshs. 500,000 as bond. However, the court must ensure that the bail/bond terms must not be so low an amount that would make it easy for the accused to abscond court. This court finds that the bail and bond terms set by the trial court at Kshs. 5,000,000/= for the former and Kshs.7,000,000/= for the latter were not reasonable and amounted to denial of bail or bond to the accused.

20. In conclusion, this court allows the application herein by setting aside orders of the trial court and substituting the same with the following orders:-

The accused person may be released on bond of Kshs. 1,200,000/= with a surety of a similar amount. In the alternative, cash bail of Kshs. 600,000/= with a guarantor to deposit a copy of ID, 2 passport photos and a written undertaking that they will avail the accused in court as and when required to attend.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 13TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent

Mr. Okatch for the Applicant

HON. LADY JUSTICE A. ONG’INJO

JUDGE



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