



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHS

CRIMINAL REVISION NO. E018 OF 2022

(From the Ruling delivered on 24th February 2022 by Hon. D.N. Sure (S.R.M) in Engineer Misc. Cr. S.O.A Case No. E076 Of 2022)

(CORAM: F.M. GIKONYO J.)

PATRICK MUTHURI MWENDA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Reinstatement of bond

[1] The Applicant, is facing sexual offence charges in **Engineer Misc. Cr. S.O. A Case No. E076 of 2022: Republic v Patrick Muthuri Mwenda** at the Senior principal Magistrate's Court at Engineer. The particular charges are; alleged defilement of, and committing an indecent act with a girl aged sixteen (16) years and abuse of a position of authority. Upon taking plea in the said case, the Applicant was released on bond pending trial. However, on 24th February 2022, Hon. D. N. Sure (SRM) cancelled the bond granted to the Applicant. It appears the cancellation of bond was based on two grounds, namely; (i) that there were possibilities that the accused would abscond after the ruling on the case to answer; and (ii) the accused had communicated to the investigation officer of his request to have the matter withdrawn since the accused had reconciled with the victim.

[2] It is this cancellation of bond that the chamber summons dated 1st March 2022 seeks review by this court under **Section 362 and 364** of the **Criminal Procedure Code** and reinstate his bond terms.

[3] The specific grounds for the application are set out in application as well as the Affidavit in support sworn by the Applicant on 28th February 2022. They were also expounded in the oral submissions which I shall examine later.

[4] In response, the respondent filed grounds of opposition dated 15th march 2022. The prosecution argued that the applicant is facing extremely serious charges and is liable upon conviction to imprisonment for a term of not less than fifteen years.

[5] According to the prosecution, the evidence gathered so far places the accused person as having committed the crime for which he is facing charges and the evidence so far presented in court is cogent and sufficient to secure a conviction and hence the temptation of the applicant to abscond.

[6] The respondent further argued that there existed and still exists compelling reasons that warrant the detention of the applicant pending hearing and determination of the trial as stated in the affidavit sworn by the investigating officer on 19th January 2022. The respondent urged this court to dismiss the application as it does not meet the required threshold.

Applicant's arguments

[7] The parties canvassed the application via oral submissions.

[8] Ms. Kinyanjui advocate for the applicant submitted that the trial court rushed in cancelling bond without due regard to the rights of the applicant. She argued that the restriction of liberty must be to required high constitutional threshold. He relied in the case of **Francis Kimathi V R [2017] eKLR.**

[9] The applicant submitted that the trial court based its decision on allegation that the applicant was sending emissaries to have the case withdrawn without any evidence. Not even an OB was adduced. She therefore argued that unsupported allegation cannot be a basis for cancellation of bond. she relied on the case of *Naivasha Samwel V R (Unreported) Criminal Rev. 10 Of 2021.*

[10] Counsel for the applicant took a swipe at grounds filed especially clause 2 thereof; and clarified that the accused has not been placed on his defence, and still enjoys presumption of innocence. The applicant therefore contends that this ground is malicious.

[11] The applicant submitted that the accused has always attended court religiously and will continue as such.

[12] The applicant submitted that the affidavit filed by the investigating officer in the lower court makes allegations that the accused had been sending emissaries to have the case withdrawn. The affidavit was not properly filed as it does not bear stamp from the engineer court.

[13] It was also submitted that the applicant is not a flight risk as he lives at Njabini with his family. His wife is a secondary school teacher in that area. He urged this court to review that court's decision and restore his bond.

DPP'S submissions

[14] Mr. Ondimu OGW, counsel for the respondent was in agreement with the authorities cited and policy guidelines 16-18. He submitted that the ruling by the trial court referred to the investigating officer's affidavit. The court deferred hearing to some other date to allow defence to file replying affidavit. The matter was then heard inter parties. Therefore, right to be heard was not infringed.

[15] The prosecution counsel submitted that the accused averred he had been placed on his defence. Nonetheless, record shows that trial court considered strength of the prosecution's case.

[16] The prosecution counsel urged this court to look at consideration of interference with witnesses by the trial court and its finding. Court did not interfere with the presumption of innocence. Evidence of interference with witnesses was brought forth in court. Evidence of emissaries to witnesses by the accused was proved. The accused was alleging that he has settled the matter with victim's family.

[17] The prosecution submitted that there is need to protect victims and this protection does not end because the victim has testified.

[18] The prosecution submitted that this court can only give timelines for the matter to be concluded rather than reinstate bond.

[19] The prosecution submitted that the affidavit was not expunged; it is in the court file. He argued that this is e- filing error. Lack of court stamp cannot invalidate the affidavit.

Applicant's rejoinder

[20] In a rejoinder the defence sought to clarify that the case is at defence stage but defence is yet to be heard. The defence argued that the affidavit was not properly filed as per rules of court. The complainant and all prosecution witnesses have testified and thus accused will do so little to interfere with the case. There is no evidence of emissaries sent was availed to court.

ANALYSIS AND DETERMINATION

[21] I have considered the application, the grounds of opposition and the rival oral submissions. This application being one of review, the questions which arise are;

a) Whether the trial court acted arbitrarily or on wrong principles in cancelling the bond herein in the ruling dated 24th February 2022

b) Whether the bond should be restored, and on what terms?

Power of revision

[22] **The revisionary power of the High Court draws upon article 167 of the Constitution. The article provides: -**

(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.

[23] In my considered view, **Section 362 and 364 of the Criminal Procedure Code**, being existing law, should be seen and interpreted in light of the overall purpose and objective of revisionary power cast in article 165(6) & (7) of the Constitution, that is **to ensure the fair administration of justice....** Some commentators see this overarching objective to have widened the scope of exercise of revisionary power by the High Court.

[24] Section 364 of the Criminal Procedure Code, provides as follows;

“(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 section 354, 357 and 358, and may enhance sentence: -

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

[25]

Compelling reason to cancel bond

[26] Bond may be cancelled only where there is compelling reason, or the accused has breached the terms and conditions of release.

[27] Was the cancellation upon compelling reason or breach of conditions of release?

Possibility of Absconding

[28] The prosecution argued that the accused may abscond if he is released on bond. The reason for urging this ground is that the accused has been put on his defence after the trial court found him to have a case to answer. This argument provoked a strong objection by counsel for the applicant; that, the accused still enjoys presumption of innocence despite having been put on his defence. She termed the ground malicious.

[29] These arguments force me to dig the ancient wells.

[30] According to **Republic vs. Abdi Ibrahim Owl [2013] eKLR: -**

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

[31] The way I understand the law to be is that, a finding that the accused has a case to answer in a criminal trial is on the basis a *prima facie* case having been established against the accused; which is a rebuttable presumption that the accused committed the offence. Therefore, establishment of a *prima facie case* is not proof beyond reasonable doubt of the guilt, or conviction of the accused for the offence. Accordingly, even after a finding of case to answer, the accused continues to enjoy presumption of innocence until proven guilty. Thus, I would boldly hesitate to lay as a compelling reason the fact that an accused person has been put on his defence lest we should have all bonds issued to accused cancelled once is put to his defence. Other than making the claim that the evidence against the accused was cogent to found a conviction, no evidence whatsoever was adduced by the prosecution to show that the applicant is likely to abscond if released on bond once again. The claim that the applicant has a known fixed abode, and family is convincing he is not likely to abscond. In any case, the record show he attended court when he was on bond. I reject that ground.

Interference with witnesses and victim

[32] The prosecution contends that the applicant interfered with witnesses and the case, for he was sending emissaries to the IO to cause the case to be withdrawn, for he had allegedly settled the matter with the victim.

[33] Before, I examine the potency or otherwise of these allegations, two important legal commentaries. First, by law, a case of defilement or committing indecent act to a child cannot be settled between the parties. Any such attempt is illegal. Second, a victim or victims of crime enjoy right to protection *inter alia* from intimidation, harassment, fear, tampering. This right is not limited to the close of the prosecution’s case or trial; it may subsist beyond trial as the case may be. See section 10 of the Victims Protection Act: -

10. Right to protection

A victim has a right to—

(a) be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

(b) have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

(c) have their property protected.

[34] Be that as it may, the prosecution must prove to the required standards that the accused interfered with the victim by attempting to settle this matter between the parties, and sending emissaries to the IO to cause withdrawal of the charges against him.

[35] The applicant accused the trial court of rushing into cancelling the bond of the accused without any or proper reason. He stated that the prosecution did not substantiate allegations that he; i) interfered with witness; and ii) he sent emissaries to the IO proposing withdrawal of the case.

[36] What does the evidence potent?

[37] The prosecution filed affidavits by the IO making those two allegations that: i) the accused had interfered with the victim; and ii) has been sending emissaries to the IO to have the case withdrawn because he had settled the matter amicably with the victim. However, despite these averments there was no specific piece of evidence provided to the court say, an OB extract on the report of interference with the victim- such would ordinarily be interference with the administration of justice and a criminal offence-, or affidavits by the victim or independent witnesses to prove the alleged amicable settlement of the case or interference with the victim or witness. It bears repeating that cases of defilement cannot be settled between the parties and the prosecution should therefore have taken such interference seriously and commenced formal investigations thereto. Therefore, I find that there was no compelling reason to cancel the bond of the accused.

[38] The court is acutely aware that the overarching objective of bail is to give the accused his liberty while also ensuring he attends his trial. Evidence placed before the court show that the accused faithfully attended court during the time he was on bond. There is no evidence whatsoever that he is likely to abscond when released on bond again.

[39] In light of the foregoing findings of this court, it is evident in the ruling delivered by Hon. D. N. Sure, that the cancellation of bond herein was not founded on any tangible or specific evidence of interference of witnesses or victims. In the upshot I set aside the ruling by the trial magistrate made on 24th February 2022. Nevertheless, the circumstances of this case compels this court to enforce two additional conditions of his release;

i) The applicant shall not interfere, or make any contact by himself or through other people, whether directly or indirectly with any witness or witnesses or victims herein during trial, and

ii) The applicant shall report to the OCS Engineer police station once in every succeeding month until conclusion of the trial.

iii) Any breach of any of these conditions will lead to automatic cancellation of his bond.

[40] For the avoidance of doubt, and subject to the two additional conditions, his bond is reinstated in the terms and conditions earlier issued by the trial court.

[41] File be remitted back to its original court. It is so ordered.

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application

This 21ST Day of APRIL 2022

F.M. GIKONYO

JUDGE