



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL REVISION NO. E001 OF 2020

GEORGE NDERITU NDEGWA.....1ST RESPONDENT

ISAAC GITARI WAINAINA.....2ND RESPONDENT

– VS –

REPUBLIC.....APPLICANT

RULING

1. The State is the Applicant in this Revision application dated 24/9/2020 seeking Orders that

a) Spent.

b) That pending the hearing of the application the court do stay release orders issued on 23/9/2020 in respect of the 1st Respondent in Gichugu SRM No. 285 of 2020.

c) The Honourable court be pleased to call for and examine the record of the proceedings in Gichugu SRM No. 285 of 2020 for purpose of satisfying itself and pronouncing on the correctness, legality or propriety of the order issued by Hon. L. W. Kabaria SRM on 3/8/2020 and on 4/9/2020.

d) That the court be pleased to review, vary, reverse and or alter the ruling of the trial Magistrate ordering the accused to be released on alternative cash bail of Kshs 400,000/-.

2. The application is premised on the grounds that;

a) The Applicant's charge in the Criminal Case Gichugu SRM No. 285 of 2020 was on Wildlife Conservation Act Section 92, as he was found in possession of five elephant ivory tusks. That he is a poacher and operates a syndicate thus the cash bail granted would likely come from the proceeds of the crime.

b) That the applicant seeks a revision of the terms of bail from cash bail to bond with 2 sureties.

3. To urge the application the Learned Assistant Director of Public Prosecution Mr. Ashimosi submitted orally while the Respondent filed written submissions which they also highlighted by their Advocate Mr. Okinyo.

Applicant's Submissions

4. For the Applicant, it is submitted that the offence under **Section 92(4) of the Wildlife Conservation and Management Act, 2013** is serious, and that the applicants are involved in a syndicate of poachers of elephants.

However, it is further submitted that the State does not oppose the bail granted by the trial court save for the terms imposed by the trial Magistrate.

5. The accused were admitted to bond of Kshs 900,000/- or an alternative cash bail of Kshs 400,000/-.

Both accused persons complied with the terms of the bail and were released but the 1st accused had to spend about 50 days in remand as he could not raise the cash bail immediately.

Respondents Submissions

6. In opposing the application the Respondents by their Replying Affidavit sworn on the 2/11/2020 by the 1st Respondent stating their bad economic status. It is averred that the 1st Respondent had to be assisted financially by a relative to, after about 50 days, to raise the cash bail, and even after he had raised the cash bail, the Applicant refused to release him, upto until upon application, the court threatened to commit the Applicant to jail for contempt. To that it is submitted that the application smirks malice and bad faith and abuse of court process and order.

7. The Respondents submit that the Applicant ought to have filed an appeal to the High Court and not approach the court by a Revision application, citing the case **Republic –vs- Mark Lloyd Stevenson – Criminal Revision No. 1 of 2016**, wherein it was stated:-

“In my view the correct reading of the sections is that a party who has a right of appeal cannot insist on invoking the High Court’s power of Review, in other words, such party does not have a right to have the court review the decision he/she is aggrieved of. The only sure way to have such grievances heard and considered as a matter of right is through an appeal.”

8. It is further submitted that it is only in matters that pause great injustice that the court may revise, citing **Section 364 (5) Criminal Procedure Code** that when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained.

9. The Respondents further submit that there was no evidence that they were involved in a cartel of poachers, nor that they were a flight risk, citing **Article 49(1)(h) of the Constitution**.

10. Two issues that summaries all others are flagged for determination by the court

a) Whether the application for Revision is competently before the court

b) Whether the application is merited.

Analysis and Determination.

11. The basis of the application is that the bail/bond terms ought to be varied so that the proceeds of the crime do not aid the accused persons. The court is under a duty to consider whether the reason stated is sufficient to warrant a revision.

12. The High court’s power of Revision is set out under **Section 362 and 364 of the Criminal Procedure Code**.

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 Section 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.

13. The court ought to consider the statutory limitations of exercise of its supervisory jurisdiction in revision cases. **Section 364** sets some of these such as a court cannot convert an acquittal or revise where an appeal ought to have been filed. In the case **John Wambua Munyao 3 Others –v- R (2018) eKLR**, the High Court held that revisionary jurisdiction should only be invoked where there are glaring omissions but should not be substituted for an appeal.

14. The revisionary powers are exercisable to determine the regularity of any proceeding of such subordinate court. This includes interlocutory proceedings, but not in an order of acquittal, and in circumstances where grave injustice may be occasioned by the subordinate court’s orders – see the matter of **Oscar Sudi Kipchumba – Criminal Revision No. 208 of 2020 (2020) eKLR**.

15. Though the applicant stated that the respondents were a flight risk, no evidence to support such averment was tendered before the court. In the case **R –vs- Mohamed Hangar Abdirahiman & Another (2012)eKLR** it was held that a compelling reason that would compel the court to deny bail for an accused person must be forcefully urged before the court, to persuade it to believe that something is true. Mere statements with no evidence remain as such, are without any probative value.

No material evidence was adduced to the court by the Applicant to convince the court that the Respondents are flight risk and thus the cash

bail was not good enough.

16. It is trite that a party who alleges the existence of certain facts has the burden of proving that such facts exist. This duty rests with the prosecution. It failed to discharge that burden – **Job Kenyanya Musoni –vs- R (2012) eKLR**.

17. The court notes that the application for revision is supported by the affidavit of one Chief Inspector 219337 Charles Lumatete. The list of witnesses lined up to testify does not state the above Police Officer as either a witness or the Investigating Officer.

For a person to swear an affidavit alleging knowledge of material facts, that party must by implication appear to the court to testify or to have investigated the alleged crime. A stranger cannot swear to alleged material facts, relevant to the matter under controversy and fail to tender evidence on the same or state the source of his information.

That being the case, the affidavit is therefore not of any assistance to the Prosecution/Applicant. It does not prove any of the allegations upon which the applicant bases its application and case.

18. It is trite that the High Court will only exercise its revisionary powers to review, or on an appeal, on an interlocutory matter pending before a subordinate court, or tribunal, only in exceptional circumstances –where grave injustice might otherwise result or where justice might not by other means be attained – **Walhouse & others –v- Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113 A at 120D**.

19. The application before me does not fall under the above parameters. I find nothing exceptional that might cause injustice if the orders sought are denied. None has been placed before the court. Stating simply, without any evidence, that the Respondent is a poacher and operates a syndicate thus the cash bail granted would likely come from the proceeds of the crime is far from proven to likely cause grave injustice to the applicant.

20. Bail is a Constitutional right under **Article 49(1)(h)**. The presumption of innocence of the accused, and seriousness of the offence are factors to consider – **Philip Anyanya –vs- R (2020)eKLR**. The trial court has discretion to consider the terms to impose upon an accused person.

Persuasive reasons must be tendered to the court to persuade it to disturb the trial court's exercise of its discretion in imposing the terms attached to the bail.

None exists in this application. No grave injustice has been shown that maybe occasioned if the subordinate courts orders are not revised – **Oscar Sudi Kipchumba Case (Supra)**

21. The Prosecution cannot dictate the terms of bail/bond upon which a suspect may be released. The court in exercise of its discretion in granting bond/bail determines what is reasonable and appropriate in the circumstances of each case. If the Prosecution is not satisfied, unless in very exceptional circumstances ought to file an appeal, and not to approach the court for revisionary orders – **Oscar Sudi Kipchumba – vs- R (2020) eKLR**. Such exceptional circumstances ought to be evident on the face of the record, so should the eminent and grave injustice to be occasioned by a denial of an order or revision.

22. For the foregoing I find and hold that the Prosecution's application dated 24/9/2020 lacks merit. It is dismissed.

Delivered, Dated and Signed at Kerugoya this 25th Day of January, 2021.

J. N. MULWA

JUDGE