REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION CASE NO. E001 OF 2021

REPUBLIC.....APPLICANT

VERSUS

EMILY MUSINDA BANDA .....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms. Susan Lewa for the state

Respondent in person

RULING

Through a letter dated 22.1.2021, the Director of Public Prosecutions through **Ms. Susan Lewa** has approached this Court pursuant to Section 362 of the Criminal Procedure Code seeking orders on revision in **Traffic Case Number E002 of 2021**. In that case the respondent was charged with various traffic offences under Section 49 (1) and 73(1) of the Traffic Act Cap 403 of the Traffic Act. He pleaded not guilty to each count and thereafter he was released on bond of Kshs.50,000/= with a surety of identical amount or in the alternative a cash bail of Kshs.30,000/= pending hearing and determination of the case.

Being aggrieved with the order **Ms. Susan Lewa**, the prosecution counsel urged this Courts' to invoke revisionary powers to review the orders by varying or substituting and setting them aside altogether for being lenient, given the nature and gravity of the offences facing the respondent.

Determination

In this case the thrust of the matters falls within the scope of Article 49 (1) (h) of the Constitution

> ***"That an accused person has the right to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released."***

The trial Magistrate in the instant case upon the respondent entering a plea of not guilty exercised discretion to release him on bail terms of Kshs.50,000/= with a surety or a cash bail of Kshs.30,000/=. As a general principle of the High Court is clothed with revisionary jurisdiction donated under Article 165 (6) and (7) of the Constitution. In this Article

> ***"the Court has supervisory jurisdiction over the subordinate Courts and over any person, or authority exercising a judicial or quasi-judicial function but not over a superior Court. Here, the High Court is mandated to call for the record of any proceedings before any subordinate Court or person or authority referred to in clause (6) and may make any order or give any directions it considers appropriate to ensure the fair administration."***

Further, it is also well settled under Section 362 of the Criminal Procedure Code that when the Court calls for the record its to satisfy itself as to the regularity, propriety, correctness and justness of the proceedings or orders of the subordinate Court. The question as to the regularity or propriety of the proceedings is to be judged objectively in the sense of the record that is actually being questioned by an applicant seeking revision.

The reality based inquiry was considered in the comparative case of **Public Prosecution v Muhari Bin Mohd {1996} 41 LRC 728 at 734** in which the Court held thus:-

"In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the Lower Court should be interfered with in the interest of justice. If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to better that discretion. This discretion cure all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case."

Though not a closed list in my view a legal duty to act by the High Court under Section 362 of the Criminal Procedure Code may arise where the accompanying conditions exist in the matter which is a subject of revision:

(a). The questioned proceedings or order must emanate from the inferior Court or tribunal or person.

(b). The inferior Court or tribunal to the High Court must seem to have exercised its jurisdiction ultravires the Law or failed to exercise a jurisdiction vested in it by the statute or in exercising that jurisdiction took into account wrong principles or illegal or irregular material.

The test and the guiding principles on revisionary jurisdiction arose in the case of **Amir Hassan v Sheo Baksh Singh (11LA 237)** where the Court interalia held:

"That the inquiry at that point is, did the judges of the Lower Courts in this case, in the exercise of their jurisdiction, demonstrate illegally or with material irregularity. It gives the idea that they had consummate jurisdiction to choose it, regardless of whether they chose it rightly or wrongly, they had jurisdiction to choose the case and regardless of whether they chose it wrongly they did exercise their jurisdiction illegally or with material irregularity."

I now proceed to consider the main arguments advanced by the prosecution in their letter dated 22.1.2021. The main thrust of their request for a revision is grounded on the leniency of bond terms granted by the trial Court to the respondent. It has been argued by the prosecution that the respondent may face a serious offence dependent upon the condition of the victim of the traffic offence currently admitted at the hospital.

The prosecution claimed that the authorized bond terms imposed were lenient and not proportionate with the indictment against the respondent in the case. The answer to this plea for a revision under Section 362 of the Criminal Procedure Code is short and simple. The characteristic attributes of impugned decision has been scrutinized in the *stricto sensu* under Article 165 (6) of the Constitution and Section 362 of the Criminal Procedure Code. The findings made by the trial Court are governed by the provisions of Article 49 (1) (h) of the Constitution, Section 123, 123A and 124 of the Criminal Procedure Code as they relate to bail of an accused person.

I find in my view, no grounds canvassed in the letter by the prosecution that the power invested with the inferior Court was exercised in err or not within the limits of its jurisdiction. Without proceeding very far on this issue already the superior Courts have spoken in a plethora of cases that bail is a means of permitting an accused person to be released on such terms as they may be set by the trial Court in consideration of a recognizance or guarantee or to pay a liquidated sum to allow him remain at liberty pending the hearing of his or her trial. On the face of it, bail is underpinned within the ambit of Article 50 (2) (a) of the Constitution that an accused person is presumed to be innocent until the contrary is proved by the prosecution. Therefore, he should not be deprived of his or her liberty until, there is Judgment or conviction, unless there exist compelling reasons advanced by the state.

The problem of course, as I see it in our jurisdiction is for the prosecution to purpose bail as a form of penal sanctions to punish the accused upon suspected of a crime or to act as a deterrence for future offenders. That is far from the truth. It is not sufficient for the prosecutor to make sweeping statements that the victim is still in ICU and in a critical condition and as such the bond terms of Kshs.50,000/= recognizance surety and cash bail of Kshs.30,000/= made pursuant to an order of the Court ought to be set aside, for being lenient. However, is this valid or helpful? It appears not our Courts have repeatedly emphasized that the essential condition of bail is for the accused to be released from custody with an undertaking that he or she would attend trial at the appointed time and forum until the final determination of the case.

Thus bail must be set by a Court at a guarantee by a surety or cash deposit that is designed to ensure the very objective and tenets of the Constitution and to achieve the goal of future attendance to participate at the trial and no more. Despite insistence by prosecutors to vigorously pursue excessive bail terms for suspects before our Courts, the same Constitution in Article 49 (1) (h) abhors excessive bail terms that are set at a higher threshold that deprives a suspect of crime his or her right to liberty and freedom protected under the Constitution.

In considering the reasonableness of the bail conditions, it would be sufficient for Courts to bear in mind the problem of pauperism in our country. It must also be remembered that the Constitution forbids the Courts from setting excessive bail terms that would be counter productive to deny an accused the ability to meet the conditions in line to enjoy his fundamental right to human dignity in Article 28 and right to freedom in Article 29 of the Constitution. In comparative precedent in the case of **Mendenhau v Sweat 117 Fla 158, 280 and 6 C. J. Ball 222 {1916}** it was observed:

"Bail must not be in a prohibitory amount, more than the accused can reasonably be expected under the circumstances to give, for if so it is substantially a denial of bail within the constitutional provision. However, a mere inability to procure bail in a certain amount does not of itself make such amount excessive."

Nothing can be more discriminative than a system of justice that does not recognize that many citizens earn less than 1 dollar and own no tangible assest to meet higher bond terms. Therefore, a purposeful approach to Article 49 (1) (h) of the Constitution should not be interpreted in such a class of citizens to stay out of remand custody until the hearing and determination of their trial to either secure a conviction or an acquittal.

In **Stack v Boyle 342 US 1 {1951}:**

> ***"The Court found that a defendant's bail cannot be set higher than an amount that is reasonably likely to ensure the defendants presence at the trial."***

Not surprisingly, the broad and general language of Article 49 (1) (h) of the Constitution gave rise to differences of opinion as to the criteria to be applied and their intent to develop a common approach which would supply some guidance to the Courts on what accounts to reasonable bond terms.

Whilst, in principle, the Courts discretion as to bail should enable an order to be made which is fair in all the circumstances, I believe that in some cases there has been an overreach of judicial discretion to substantially order for excessive bail/bond terms; that prevent accused persons from being released to the community.

In light of the evidence in the letter and exercising the revisionary powers under Section 362 of the Criminal Procedure Code, there is no issue of Law or fact raised by the prosecution to warrant interference with the order on bail terms. The revision is dismissed for invoking the Court to review and reset grossly excessive bail and thereby going against the letter and spirit of Article 49 (1) (h) of the Constitution which provides that the bail must be reasonable. As such the revision is dismissed.

That is the order of the Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state