



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. E 014 OF 2021

STEPHEN MUSYOKA MWENDA.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

(Being Review from an order of the Record, Proceedings and Ruling of the

Honourable R. Aganyo (Ms) – PM on 11th January 2021)

RULING

1. Stephen Musyoka Mwenda, the Applicant, was arraigned for the offence of assault causing bodily harm. Having denied the charge, he was released on a cash bail of ksh. 10,000/- Following a complaint raised by the prosecution that the Applicant was interfering with the complainant, his bail was cancelled.
2. As a result, the Applicant approached this court through a Notice of Motion seeking revision of the order cancelling bail and remanding him so that he could be released from custody.
3. The application is premised on grounds that: the prosecutor alleged that the Applicant had interfered with the complainant without offering any particulars; when asked to show cause why bail could not be cancelled, he denied the allegations, but, the trial court acting on allegations cancelled bail and remanded him in custody.
4. At the hearing Mr. Momanyi for the Applicant urged that the Applicant did not abscond, allegations made were not substantiated hence the prayer for reinstatement of bail.
5. The State through Ms. Chege did not oppose the application. She urged that it was not demonstrated how the Applicant interfered with the complainant. That the investigation officer should have been put in the dock to explain. She concluded by stating that should there be an interference, the Applicant should be warned to adhere to bail terms.
6. The trial court record shows that at the outset the Applicant was released on bail after it was indicated that the prosecution had no objection. This meant that the State had no compelling reasons to justify denial of bail to the Applicant. Therefore, at the point of seeking cancellation of bail, it behoved the prosecution to establish that reasons did emerge requiring cancellation of bail.
7. According to the Bail and Bond Policy Guidelines, 2015, reasons that would have called upon the court to deny the Applicant (Accused person) bail would have included if he was a flight risk, likely to endanger the safety of victims, and /or interfere with witnesses' evidence.
8. The Court prosecutor made an application that the Accused (Applicant herein) was really interfering with the complainant, her relative, and as a result, she was not having peace. Consequently, the Court ordered the Applicant to show cause as to why his bail could not be cancelled and accordingly was remanded in custody.
9. On the date of his appearance, he had retained an advocate, Mr. Momanyi who explained that the allegation of threats to the complainant was baseless because the Applicant lived in Nairobi while the complainant resided in Makeni. That the issue between the complainant and the Applicant was properties that belonged to the Applicant that the complainant wanted to sell. Further, he urged that the matter should have been in the family court and that the court having remanded the Applicant in court culminated into some other developments.

10. In response thereto, the prosecuting counsel argued that issues raised by the Applicant's counsel were irrelevant as witness intimidation was not allowed. That it was possible for the Applicant to travel to Makueni and access the property and even take rent and witnesses had to be protected.

11. The trial court in considering issues raised was satisfied that the Applicant had interfered with the complainant who had complained that she was not living in peace. That the defence counsel did not give a satisfactory explanation as to why the Applicant failed to act responsibly. The court added that the behavior of the complainant while the case was going on was appalling as it proved that he was unable to act responsibly, which was an indication that the complainant was unable to live peacefully without the supervision of the court.

12. Having considered what transpired at the trial court the question begging is what constituted the threat that made the prosecuting counsel make an application seeking cancellation of bail? If there was a threat, it would amount to pervasion of the course of justice which could even amount to some offence.

13. He who alleges must prove existence of that particular fact. This was well put in the latin maxim of "*semper necessitas probandi incumbit ei qui agit*" The legal burden was not on the Accused person (Applicant herein) to disapprove the allegation. There was need to adduce evidence to enable the court decide whether or not what was done amounted to interference with the complainant. When one talks of an interference with witness(es), it may mean attempting to prevent witnesses from giving evidence or influencing the evidence to be adduced.

14. Therefore, there was need for the prosecution to present evidence by way of affidavit where the deponent would have been subjected to cross-examination to establish the truthfulness of the allegation. It was not sufficient for the prosecuting counsel to make unsubstantiated allegations as he did.

15. This being the case, the trial court fell into error when it cancelled the Applicant's bail. Therefore, I quash the order of the trial court issued on the 11th day of January, 2021 cancelling bail granted to the Applicant that culminated into his incarceration and, accordingly reinstate it.

16. It is so ordered.

Dated, signed, and delivered virtually on the 25th day of March, 2021.

L N MUTENDE

JUDGE.