



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

CRIMINAL DIVISION OF THE HIGH COURT

CRIMINAL REVISION NO. 223 OF 2019

REPUBLIC.....APPLICANT

VERSUS

DAVID SOME BARNO.....1ST RESPONDENT

PETER GATHII.....2ND RESPONDENT

CATHERINE NJERI NG'ANG'A.....3RD RESPONDENT

ESTHER FURA SOME.....4TH RESPONDENT

SADHANI LIMITED.....5TH RESPONDENT

KEIBUKWO INVESTEMENT.....6TH RESPONDENT

SAYANI INVESTMENT LIMITED.....7TH RESPONDENT

RULING

1. The applicant herein has filed a notice of motion application dated 6th January 2020, premised on the provisions of; Articles 22(1), 23(1), 50(1), and 165 (6) and (7) of the constitution of Republic of Kenya and Sections 8(1)(a), 362 and 364 of Criminal Procedure Code, Chapter 75 Laws of Kenya.

2. The applicant is seeking for orders as follows;

a) The Honourable court be pleased to call for and examine the record of 11th December, 2019 relating to examination and approval of sureties in; Chief Magistrate's Court at Milimani, in criminal case number 819 of 2019, Republic vs David Some Barno, Peter Gathihi, Catherine Njeri Nganga, Ester Fura Some, Sadhani Limited and Keibukwo Investment Limited for the purpose of satisfying itself as to the correctness, legality or propriety of proceedings therein and be pleased to revise and set aside those proceedings and the resultant release order and edict that that a fresh examination and approval of sureties be done after proper verification of bond related documents/instrument.

b) That the Honourable Court be pleased to call for and examine the record of 11th December, 2019 relating to examination and approval of sureties in Chief Magistrates Court at Milimani , in criminal case number 819 of 2019, Republic vs David Some Barno, Peter Gathihi, Catherine Njeri Nganga, Ester Fura Some, Sadhani Limited and Keibukwo Investment Limited, for the purpose of satisfying itself as to the correctness, legality or propriety of proceedings therein and be pleased to revise and set aside those proceedings and the resultant order and edict that the 5th and 6th Respondent do avail sureties for examination and possible approval.

c) That the Honourable court be pleased to edict that the Chief Magistrate's Court, at Milimani in criminal case number 819 of 2019, Republic vs David Some Barno, Peter Gathihi, Catherine Njeri Nganga, Ester Fura Some, Sadhani Limited and Keibukwo Investment Limited, be transferred for hearing and determination by a different court other than one presided by Honourable Kennedy Cheruiyot, Senior Principal Magistrate.

d) That the Honourable court be pleased to issue such other orders as may be fair and just to secure fair and just hearing and

3. The application is supported by the grounds thereto and an affidavit of the even date sworn by Festus Njeru Njue, an advocate of the High Court attached to the Office of the Director of Public Prosecution(ODPP).
4. The background facts of the matter are that, the Respondents were arraigned in the Chief Magistrate's Court, at Milimani, vide Criminal Case No. 819 of 2019; on 17th May 2019, charged with the various offences as stated in the charge sheet therein. They pleaded not guilty to the charges and were released on bond, each of; Kshs 500,000 with one surety of similar amount, with an alternative of; cash bail of Kshs 200, 000, for each.
5. However, the Applicant being aggrieved by the order of the bond terms, by a notice of motion application dated 29th July 2019, applied to the High Court for revision, on the ground that, they were too lenient. By a ruling dated; 26th November, 2019, the High Court set aside the bond terms orders and substituted it with an order that each Respondent be released on bond of; Kshs 10,000,000 with one surety of a similar amount with an alternative of; cash bail of; Kshs 5,000,000. The Court granted Respondents time up to; 3rd December 2019, to comply. That period was extended by the Chief Magistrate to 11th December, 2019.
6. Subsequently, the 1st to 4th Respondents availed their sureties for approval. However, the Applicant avers that, the Learned Trial Magistrate, approved the surety bonds for the Respondents without the prosecution participation.
7. That, the prosecution was denied an opportunity to peruse the documents presented by the sureties before approval; which resulted in irregularity of the bond approval process. Further, the trial court allowed the defence to "examine proposed sureties" at the commencement of the bond approval process and rendered the prosecution counsel a "passive spectator" in the entire process.
8. That, despite the request by the Prosecution Counsel seeking for time to get the documents for verification, the request was declined and the court commenced the approval of the first surety approved, before the documents presented had been verified, though stream way, the court realized documents were not complete, adjourned for five minutes, and resumed.
9. That, officers; No. 61496 Inspector Njuki and No. 80936 Corporal Osusi confirmed that, they were not involved in verification of the documents presented by the proposed sureties. Further, not all documents were availed, as the Defence Counsel indicated that, the officer who had gone to Lands office, was still on the way, but to date, it is not clear whether the documents were presented to Court.
10. The applicant further avers that, on the material date of surety approval, the matter was stated for hearing at; 11.30am, however, the sureties were not examined until 3.30 to 4.00pm as the 1st, 2nd and 4th accused were not in court, allegedly escaping arrest based on the warrants of arrest, issued by the High Court, which were in force.
11. It is thus argued that, the trial court approved sureties and signed release orders despite the protestation by the prosecution; and without the 5th and 6th accused providing any bond approval documents. The prosecution argues that, on the 31st May 2019, when plea was taken, the trial court granted each accused; bond of Ksh 500,000 one surety or cash bail of Kshs200,000, including the 5th and 6th accused. Therefore, the 5th and 6th accused ought to have been examined independent of the directors thereof.
12. That, in the cause of the process, the Honourable Trial Magistrate uttered words to the effect that, the Respondents were to enjoy their Jamuhuri Holiday without residences. Further due the haste and/or the hurried manner in which the sureties were approved, the prosecution is apprehensive that, "justice will be jeopardized" if the case is not transferred from the Learned Trial Magistrate.
13. Finally, applicant further avers that, when the applicant raised its concerns, the trial court directed them, to seek for clarification in the revision application, if need be.
14. However, the Respondents have opposed the application, vide a replying affidavit dated 20th February 2020, sworn by David Some Barno. It is averred that, the trial court extended the compliance period to 11th December 2019; in order to comply with the ruling dated 26th November 2019, and because the valuation and verification of surety documents was taking too long. Further the application for extension was heard and determined inter parties.
15. Further, the sureties subjected themselves to verification process including, taking of finger prints and verification of their national identity cards. Subsequently they availed to court the necessary documents for approval. That examination only commenced when the verifying office had examined the documents.
16. That despite the approval, the prosecution applied to the High Court and obtained warrants of arrest and apprehended the Respondents maliciously with the intention of having them detained over Jamhuri holiday, in violation of Article 47 of the Constitution and section 4 of the Fair Administrative Action Act 2015.
17. That as the Respondents Learned Counsel Mr. Bwire was introducing the sureties to the court, the Prosecutor interrupted him arguing that it was the court to lead the process. However, when the court invited the Prosecutor to take over, he declined and the court proceeded to approve the sureties. Even then there was no need of the two officers, Osuri and Njuki mentioned to verify the documents as the verification department at Milimani Law Courts had already done so.
18. The Respondent argued that, approval of surety is the discretion of the court. Even then, the Applicant has not produced any evidence to show that, the prosecution was locked out of the bond approval process to warrant setting aside of the process.

19. The alleged off the cuff remarks attributed to the Learned Trial Magistrate were refuted. That the court has acted judiciously, and with utmost professionalism and exercised great restraint from the Applicant.
20. That, Mr Festus Njue Njeru having sworn an affidavit herein is precluded by the provisions of the Advocates Practice Rules to continue acting in the matter as an Advocate. Further, the Respondents have appealed against the ruling of the High Court as it was prejudicial to them, due to presumption of innocence under Article 50 of the Constitution.
21. The case was disposed of through filing of submissions. The Applicant submitted that, by the trial court extending the time limit which the High Court set for approval of sureties or bond process, the court was revising the orders of the High Court.
22. Further, the law is settled vide various cases that, the prosecution must be involved in the bond/surety approval process, as the court has no machinery to undertake verification of documents or sureties process. That, without the participation of the prosecution, the whole process is irregular, illegal and improper.
23. The Respondents referred to the case of; Phillip K Tunoi & Another Vs Judicial Service Commission & Another (2016) Eklr which laid down the test of; bias to argue that, the actions of the Learned Trial Magistrate indicate bias against the Applicant.
24. Further, the applicant relied on Section 23 of Penal Code, to submit that, when a corporation is charged, the directors are bound to provide security since the Corporation does not act in abstract. That, the orders of the High Court were that, each accused provides security or surety of Ksh 10,000,000 or Cash bail Ksh 5,000,000.
25. Finally, section 8(1) of the Criminal Procedure Code empowers the court to transfer a criminal case from a subordinate court.
26. However, the Respondent filed response submissions and argued that; there are two applications dated 6th January 2020 and 24th December 2019, filed by the Prosecution and the Complainant's Counsel respectively, seeking for similar orders. That, Section 2 of the Victim Protection Act No. 17 of 2014, defines a victim "as a natural person who suffers injury, loss or damage as a consequence of an offence. Further, the essential of a victim are provided for under; Section 7 of the Act
27. It was submitted that, the Complainant herein is a limited liability Company, defined under the Companies Act of Kenya, N0, 17 of 2015, as a legal person. Therefore, does not qualify as a victim to possess the *locus standi* to file the subject application. To support that submission, the case of; Kimuri Housing Company Limited and Margaret Wambui Ngugi vs Director of Public Prosecution (2017) eKLR was relied on.
28. The Respondent further submitted that, by failing to procure "a statement or affidavit from Kennedy Panyako, who participated in the application for extension of time, the Applicant is relying on hearsay evidence, to argue that, it was not aware of the application for extension of time, within which the bond process was to take place and/or lay the basis for the allegation that, they did not. The Respondent relied on the provisions of; Section 62 of the Evidence Act, (Cap 80) Laws of Kenya, and the case of; Subra Mahiumi vs DPP (1956) WLR
29. The Respondent maintained that, when the Court conducted the process of surety approval, both the prosecution and the defence were present. Reference was made to the cases of; Baktadsh Aksha Abdalla & 3 Others, Criminal Revision No. 75of 2015 and Republic vs Polly Ketty Wanja (2019) eKLR where the court stated the importance of having the Prosecution and Defence counsel, during the bond approval process.
30. Further the Criminal Procedure Code, does outline the manner in which the surety should be approved, however, the Judiciary of Kenya Bail and Bond Policy Guidelines of March 2015, gives guidelines that, their surety approval was done as per these guidelines.
31. The alleged bias on the part of the Learned Trial Magistrate was denied and/or rebutted by Respondents who submitted that; the Applicant has not availed any evidence of off the cuff remarks by the Learned Trial Magistrate, which have the connotation of favourism or bias towards it. The Respondent referred to several legal authorities, inter alia, the case of; Republic vs Gough (1993) AC 646, Taylors vs Lawrence (2003) OB 528, which deals with the test to establish bias.
32. Finally, the Respondent submitted that, based on section 23 of the Criminal Procedure Code, the 5th and 6th Respondents cannot be held personally liable, save for the directors thereof to be answerable for any actions done by them. That, in this case the 1st and 4th Respondents' have been charged as directors of the 6th Respondent and 2nd and 3rd Respondents as directors of the 5th Respondents, Further, when warrants were issued by the High Court, none were issued for the 5th and 6th Respondents. That, it is unreasonable for the Applicant to ask that, the 5th and 6th Respondents avail sureties.
33. The victim also filed submissions and joined issues with the prosecution's argument that, the application for extension of time and surety approval process, was conducted without the Prosecutor; Kennedy Panyako's participation. That the Learned Counsel Mr. Bwire commenced examination of the first surety, even as the prosecution questioned the procedure being used. Thereafter, the trial court took up the cross-examination and concluded the exercise, without the involvement of the Prosecution Counsel. Reliance was placed on the case of: Republic vs Polly Ketty Nyaga [2019] Eklr. (supra) and the Policy guidelines, 2015, referred to herein. Further, the 5th and 6th Respondents have not provided sureties.
34. That the Learned Trial Magistrate displayed bias through utterance of remarks alluded to by the prosecution and to the effect that, "an application made therein is suspicious and that it's like a rattle in the bush which will fizzle away and that they have seen many like that."
35. That lack of adherence to the procedure in surety process raise suspicion and violates; Articles 22 (1) and 50 (1) of the Constitution of

Kenya that allows a party that feels aggrieved to institute court proceedings to allow them to seek a fair hearing. Therefore, the case should be transferred as sought, as the court has stated in; Barnaba Kipsongok Tenai vs Republic [2014] eKLR, that the threshold of getting a matter transferred was to prove reasonable apprehension.

36. The victim also relied on a series of other authorities as follows; Kinyatti vs Republic (1984) e KLR, Criminal Appeal No. 60 of 1983, Republic vs Hashimu (1961) E A 656, Francis Henry Karanja vs Republic, HCCR Application No. 107 of 1976 (unreported) and Travelyan Jin John Brown Shileuje vs Republic; HC CR Application No 180 of 1980 (unreported).

37. At the conclusion of the arguments by the respective parties, I have considered the entire matter in the light of the submissions and the said arguments and I find that, when the parties appeared before the court on 17th March 2021, the Applicant addressed the court on the notice of motion application dated 6th January 2020. Thereafter, the Learned Counsel Mr Mongeri, for the victim, informed the court that, the victim was supporting the Applicant's application and also canvassing their application dated 24th December 2019. As such it is not clear whether, the victim was pursuing its application.

38. However, having considered the arguments and/or submissions by the Respondent, on the validity and/or *locus standi* of the victim, in relation to the application dated 24th December 2019, I find that, both the Applicants in the two applications dated 6th January 2020 and 24th December 2019, seeks for similar orders.

39. Therefore, the victim, will not be prejudiced if its application is not considered, as the prayers therein will be canvassed in the application dated 6th January 2020. Further, I concur with the Respondent's submissions that, the interests of the victim are ventilated by the prosecution in the trial court. This is a public prosecution case and not a private prosecution.

40. Finally, dealing with both applications will be a waste of otherwise scarce judicial time. In conclusion, I uphold the Respondents submission and decline to determine the application dated 24th December 2019.

41. To revert back to the main issues, herein, it is settled law that the process of approval of a surety cannot be done without the presence of the Public Prosecutor. In the case of, Republic vs Polly Ketty Wanjia Nyaga (supra), the Court stated as follows:

"That any examination of a surety in court cannot be done in the absence of a Prosecution Counsel, otherwise such a process would be lacking in transparency. A Prosecution Counsel is a necessary party and is obligated to be present during the examination of sureties with a view of verifying, through its investigative agencies, authenticity of the documents submitted to the court. The process of approval of a surety is a judicial process which should form part of the court proceedings and the presence of a Prosecution Counsel is mandatory."

42. In the same vein the court in the case of; Republic vs James Kiarie Mutungi (supra) stated as follows: -

"A Magistrate when exercising power donated by the Constitution and statute in performance of his/her judicial function must adhere to the procedure and practice to give legality to the session. A court properly constituted in a criminal trial must be viewed as a tripartite entity comprising the Judicial Officer, the accused/defendant and the Prosecution Counsel or Private Prosecution Counsel, the defence Counsel where appropriate and the Court Assistant to deal with logistics and interpretation." In the event that an accused person absconds from the jurisdiction of the court, it is the same prosecutor who must apply for warrant of arrest, process execution through the police to apprehend both the accused and the surety for defaulting in their obligations, in that event the prosecutor must be supplied with particulars of the accused and the surety. The need therefore to participate in verification of the materials which precede the approval is obligatory and not discretionary on the part of the trial court."

43. Similarly, in the case of; Republic vs Baktash Akasha Abdalla and 3 others (supra), the Court observed that,

"being such a judicial function, it is mandatory that, it be exercised in the presence of both the prosecution and Defence Counsel."

44. I have perused the lower court file in relation to the first issue of approval of sureties and I note that; on 11th December, 2019, the issue of warrants of arrest of the Respondent was canvassed before the trial Court in addition to the issue of approval of sureties.

45. The record indicates that, the Prosecutor; Mr Njue addressed the court and stated that, none of the documents presented by the sureties had been presented to him. He further stated as follows; -

"The proceedings before the court would pre-empt compliance with the directions of the high court. I have seen the sureties I do not know the documents."

46. However, the record shows that, the trial Court did not address itself to the issue of warrants, nor the concern by the Prosecution and stated that; -

"We will proceed with the examination of sureties and a decision be made whether they are suitable or not."

47. The record further shows that, the court proceeded to examine the four sureties, and stated as follows at the end of the process: -

"I have looked at the documents and I find them in order and the properties valuation made, the surety proposed are suitable. In my

assessment the verification be completed. I find no reason to delay this matter of surety examination and now order that release order issue accordingly upon which the accused be released and attend court when required unless they are otherwise lawfully held.”

48. As such it is clear that, the Applicant did not participate in the bond approval process and/or the surety approval. Similarly, the Bail and Bond Policy guidelines at Clause 4.20, recognize the challenge that, the courts do not have the resources or capacity to verify the authenticity of security documents; such as title deeds and motor vehicle logbooks. That this has led to many courts holding onto worthless security documents, as such many courts have now entrusted the verification of such documents to Investigating Officers, although they have not established the time-lines within which such verification is supposed to occur.

49. On the issue of the 5th and 6th Respondent being required to provide securities I find that, first and foremost, the legal status of a company has been well discussed and established in the celebrated case of; ***Salomon vs. Salomon [1897] Ac 78, that***

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.

50. Be that as it were, in the terms of bond given by the High Court, it was stated as follows:

*“In the result I set aside cash bails granted to the respective respondents of Kshs. 200,000 by Hon M. Mutuku CM in Milimani Criminal Case 819 of 2019 and substitute the same with an order that **each** of the respondents is admitted to bond Kshs 10 million shillings with one surety of a similar amount or that each deposits a cash bail of Kshs. 5 million. I hereby cancel the previous bond terms until each of the respondents meets the current bail/bond terms grated. They shall be remanded in custody pending compliance with posting of the bail/bond terms granted with a grace period of up to 3rd December 2019 to do so. It is so ordered”*

51. It is clear therefore from this order that, all the six (6) respondents were to provide sureties and/or cash bail. I also note from the trial court file that, when they were presented to court for plea, all are recorded to have answered to the charges and subsequently the court ordered as follows;

“I will grant each bond of Kshs. 500,000 and one surety, alternative cash bail of Kshs 200,000 each.”

52. That order was repeated on 31st May 2019, when substituted charges were read to the respondents. It therefore follows that both courts recognized the fact that, the 5th and 6th Respondents though being artificial legal entities, their agents took a plea on their behalf and therefore, have the responsibility to comply with the bond terms by the High Court.

53. The only way to go around it is for the 5th and 6th respondents to apply for review of those high court orders. I therefore uphold the applicant’s submissions that they need to comply with the high court orders.

54. On the issue of recusal, I find that, the applicants allege the Learned Trial Magistrate uttered words off record which creates the perceived bias. However, The Learned Trial Magistrate is not a party to this application and has not been given an opportunity to respond to the alleged utterances.

55. Be that as it were, there is no evidence to support the alleged utterances. Even then, it is clear to the court that, the main issue herein is the manner in which the sureties were approved. That per se, cannot be deemed to be bias, the process if found to be wanting, can be corrected by the same being done afresh or verified where necessary.

56. However, from the entire court record, it does appear that, a lot has gone on in this matter, with the prosecution applying successfully to vary the initial bond terms given by the trial court, to an application by the Respondent for the Learned Judge handling the matter at the High Court to recuse herself. Therefore, the issue of recusal by the Trial Court will be left to the conscience of the Learned Trial Magistrate.

57. The upshot of all the aforesaid is that, I order as follows:

a) Approval of the sureties be done afresh wherein the Applicant should be accorded an opportunity to verify the documents presented by the Respondent’s sureties;

b) The process referred to in (a) above, should be done within 14 days with effect from 5th of May 2021.

c) The 5th and 6th respondents should comply with the orders of the High Court;

d) The prayer for transfer of the matter is declined unless the trial court feels inclined to recuse itself from the matter on personal volition; and

e) The lower court file to be returned for hearing of the matter.

58. I think in view of the provisions of; Article 159 of the Constitution of Kenya and for expeditious disposal of matters in court, it’s

necessary that, the parties now focus on the trial in the lower court. It is so ordered

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 29TH DAY OF APRIL 2021.

GRACE L. NZIOKA

JUDGE

In the Presence of:

Ms Chege for the Applicant

Mr Mongeri for the victim

Mr Bwire for the Respondents

Edwin Ombuna – Court Assistant