



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**CRIMINAL REVISION NO. E002 OF 2021**

**ODPP.....APPLICANT**

**-VS-**

**FELIX MWEBIA NYAGA.....RESPONDENT**

**SM (VICTIM MINOR).....INTERESTED PARTY**

**RULING**

**Introduction**

1. This Revision arises from the ruling of the trial Magistrate Hon. S. M. Nyaga (SRM) sitting at the Principal Magistrates Court at Marimanti in Criminal Case No. SOE 09 of 2021.
2. The Applicant, by a Notice of Motion dated 21/04/2021, seeks for the following orders:

**i. Spent.**

**ii. THAT** this Honourable Court be pleased to stay the proceedings in Marimanti Principal Magistrates Court Criminal Case No. SOE 09 of 2021 pending hearing and determination of this Application.

**iii. THAT** this Honourable Court be pleased to suspend the Bond and Bail terms granted to the Accused/Respondent in Marimanti Principal Magistrates Court Criminal Case No. SOE 09 of 2021 pending hearing and determination of this Application.

**iv. Spent.**

**v. THAT** this Honourable Court be pleased to set aside and revise the orders issued by Hon. S. M. Nyaga (SRM) on 11<sup>th</sup> March, 2021.

**vi. THAT** this Honourable Court be pleased to order that the Bail/Bond terms granted to the Respondent/Accused be suspended/cancelled pending hearing and determination of Marimanti Principal Magistrates Court Criminal Case No. SOE 09 of 2021.

**Brief Facts of the Case**

3. The Respondent was charged with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006** and in the alternative, he was charged with a count of committing indecent act with a minor contrary to **Section 11(1)** of the same act.
4. The Respondent pleaded not guilty and was released on a bond of Kshs. 200,000/= or alternatively a cash bail of Kshs. 100,000/=.
5. The Applicant alleges that during the pendency of the aforesaid case, the Respondent has continuously involved himself with several acts of witness interference and destruction of evidence prompting the prosecution to seek for the cancellation of the Respondent's bond in the said trial court. The trial court dismissed the applications for reasons which are not clear on the face of the ruling.
6. It is this ruling refusing the cancellation of the Respondent's bail/bond terms that prompted the Office of the Director of Public Prosecutions (O.D.P.P), through counsel Jane K. Maari to file the present application for revision. The Applicant seeks for this court's

intervention in order to safeguard the safety of the key prosecution witnesses and the integrity of the trial process.

7. In response to this application, the Respondent has denied violating the bail/bond terms and stated that the allegations by the Applicant are mere allegations and should therefore be dismissed.

8. The Respondent further states that the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal.

#### **Issues for determination**

9. Upon considering the applicant's case and the response to this application, the issues which rises for determination are as follows:

- i. Whether this application falls within this court's revisionary jurisdiction.
- ii. Whether this court should interfere with the order of the trial magistrate and alter and or reverse it.

#### **Analysis of Issues**

##### **Revisionary Jurisdiction of the High Court**

10. The first issue for determination is whether this application falls within this court's revisionary jurisdiction as it is trite law that jurisdiction is everything and without jurisdiction, a court must down its tools.

11. The Applicant has brought this application under the provisions of **Article 165(6) & (7) of the Constitution of Kenya** as well as **Sections 362 and 364 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** in support of his application.

12. **Articles 165 (6) and (7) of the Constitution** provide that,

**“(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.”**

13. By virtue of the above Constitutional provision, the scope of this court's revisionary jurisdiction is specifically prescribed under **Section 362** of the *Criminal Procedure Code* which provides that:

*“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.”*

14. **Section 364** of the *Criminal Procedure Code* provides that:

*“(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 sections 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.”*

15. In a persuasive decision on the revisionary jurisdiction of the High Court, Odunga, J opined as follows in the High Court case of **Joseph Nduvi Mbuvi v Republic [2019] eKLR**:

**“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”**

I am in agreement with this view.

16. The High Court can exercise and indeed exercise revisionary jurisdiction in “any criminal proceedings” in question. The statutory demarcation of this jurisdiction under **Section 362** of the **Criminal Procedure Code** is limited to determining the correctness, regularity or legality of any orders issued by a subordinate court except for an order of acquittal.

17. However, it must be appreciated that revision is not a substitute for an appeal but is exercised to confirm the correctness or otherwise of orders issued by the sub-ordinate courts and proceed to issue directions on how the proceedings in questions shall take in line with Article 165(b) of the Constitution (Supra). *Justice Ondunga in Joseph Nduri Mbuvi -v-R* (supra) stated:-

**“In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

**“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. 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 fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.**

18. In this case, what falls for determination is whether that the orders issued by Hon. S.M. Nyaga (SRM) on 11/03/2021 in Marimanti PMCC Case No. SOE 09 of 2021 should be set aside and/or revised by orders suspending/cancelling the bond/bail terms granted to the Respondent.

19. **Article 165(6) of the Constitution** provides that the High Court has supervisory jurisdiction over Subordinate Courts to make any order or give any direction it considers appropriate to ensure the fair administration of justice.

20. The revisionary jurisdiction exists in all orders, interlocutory or final, from the subordinate court save that an order of acquittal may not be revised. To that extent, it is my view therefore that the said order by the trial court falls within orders that this court may interfere with by way of a revision.

#### **Compelling Reasons for Denial of Bail/Bond**

21. The right of an accused person to be released on bond pending trial is a right that is guaranteed by the Kenyan Constitution under **Article 49(1)(h)** which provides that an arrested 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.”** This provision clearly dictates that the right to pre-trial bail is not an absolute right as it may be denied should the prosecution prove the existence of any compelling reason.

22. The trial court released the Respondent/accused on a bond of Kshs. 200,000/=. The Applicant’s position appears to be that if the Respondent’s bond/bail terms are not suspended/cancelled, then the safety of the key prosecution witnesses will be compromised, and the integrity of the trial process will not be guaranteed.

23. Clause 4.26 of the Kenya Judiciary’s *Bail and Bond Policy Guidelines, March 2015* identify the likelihood of the accused interfering with witnesses or evidence as a compelling reason for denial of bail by providing as follows:

**“The prosecution shall satisfy the court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:**

- a. **That the accused person is likely to fail to attend court proceedings; or**
- b. **That the accused person is likely to commit, or abet the commission of, a serious offence; or**
- c. **That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or**
- d. **That the accused person is likely to endanger the safety of victims, individuals or the public; or**
- e. **That the accused person is likely to interfere with witnesses or evidence;**
- f. **That the accused person is likely to endanger national security; or**
- g. **That it is in the public interest to detain the accused person in custody.” (Emphasis mine)**

24. The said trial court dismissed the applicant’s plea for denial of bond on ground that the claim that the Respondent has already contacted

witnesses and interfered with them so as to bring down the prosecution case prematurely remains an allegation by the investigator based on the information given by the victim's mother. The trial court reasoned that a statement from the victim's mother would have been compelling enough in the given circumstances.

25. In a persuasive decision in **Republic v Francis Kimathi [2017] Eklr**, the High Court sitting at Meru held as follows: -

**“...There may not be a scientific measure of what exactly amounts to compelling reasons as that would depend on the circumstances of each case. Except, however, compelling reason should be a reason or reasons which is rousing, strong, interests attention, and brings conviction upon the court that the accused person should be denied bail. Flimsy reasons will not therefore do. Therefore, the standard is high for it draws from the constitutional philosophy that any restriction of rights and freedoms of persons must be sufficiently justified given the robust Bill of rights enshrined in the Constitution. I need not aver-emphasize these matters except to cite the case of R vs. JOKTAN MAYENDE & 3 OTHERS [2013] eKLR.”**

It is indeed true that compelling reasons depends on the circumstances of each case and must be one that satisfies the judge that bail ought to be denied. The prosecution bears the burden to satisfy the court that there exists compelling reasons. This is due to the fact that what is at stake is the right of the accused person to liberty which is guaranteed by the Constitution and protected by the courts. This right is however not absolute as it may be denied where compelling reasons exist. The right to liberty of an individual and the public interest must balance some of the compelling reasons which have been settled by the court include-

- the nature of the charges
- the weight of the evidence.
- the punishment which is provided under the law in the event of a conviction.
- character and antecedents of the accused based on previous criminal record.
- the possibility that the accused may fail to turn up for his trial.
- the likelihood that the accused may interfere with witnesses or may surpress any evidence that may incriminate him.
- the likelihood that the accused may be charged with other offence and/or more serious offences.
- to protect the accused from the wrath of the public or from some other quarters.

See Supreme Court of Nigeria in **Achaji Mujahid Dukubo- Asari -v- Federal Republic of Nigeria S.C. 20A/2006** quoted with approval in **Republic – Danford Kabage Mwangi 2016 eKLR**.

The likelihood of interference with witnesses stands out as one of the compelling reasons for denying an accused person bail.

26. The Respondent has been charged vide case no. MCCRE 244/2021 with two offences, that is procuring abortion contrary to **Section 158** of the **Penal Code** and interference with witnesses contrary to **Section 117(b)** of the **Penal Code**, matters that are still pending before court. Since there is a presumption of innocence that the Constitution bestows upon an accused person.

It is evident that the respondent is alleged to have committed these offences while he was out on bail and is alleged to have interfered with witnesses. Compelling reason is not defined and the prosecution must place some material before court to demonstrate interference. It suffices to prove that the accused did something which amounts to interference with witnesses and the evidence at large.

In this case the witness is a minor and the other is the mother. I must state that the court is not considering the guilt of the accused at this stage. I find that the prosecution has demonstrated that there exists compelling reasons to deny the accused bail. The prosecution demonstrated that there was interference which is all what the were required to show at that stage. The finding by the trial magistrate that the witness did not appear in court to be cross-examined and that the claim by the investigating officer is hearsay was not irregular as the statement was tendered in court and the trial magistrate had discretion under Section 150 of the Criminal Procedure Code to summon the witness. The section provides:-

**“ A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”**

This is a mater which called on the trial magistrate to balance the right to liberty and the rights of the minor. The trial magistrate ignored the statement of the victim's mother which clearly showed that there accused had interfered with the witnesses. I find that the prosecution had laid enough material before the trial magistrate which proved compelling reasons to warrant the cancellation of the bond of the accused.

27. In considering a similar application, the High Court in the case of **K K K v Republic [2017] eKLR** stated as follows:

**“In considering the question of bail in this matter, the court must balance the right of the accused pursuant to presumption of innocence to be released on bail pending his trial against the public interest in prevention of crime and access to justice by the victims of crime by successful prosecution of offences, which would no doubt be adversely affected by interference with witnesses and evidence relied on by the Prosecution to prove its case. The key is in adopting a path that ensures prosecution of the offences in a manner that is least restrictive of enjoyment of the accused’s right to bail. Where an expedited hearing is possible, the same should be ordered; where the witness protection measures guarantees no interference of the complainant or other witnesses by the accused, he may be released on bail as with where the evidence may be secured; and where the witnesses are prone to interference by the accused or other persons for his benefit, the testimony of such witnesses should be taken before the accused is released on bail.”**

28. In the circumstances, it is my view that it is in the interest of justice that the case be fixed for hearing on priority basis so that the testimony of the complainant may be taken.

In the circumstances I find that this court has reason to interfere with the finding of the trial magistrate. I order that the ruling of the trial magistrate dated 11/3/2021 is revised and set aside. It is replaced with an order that the accused person’s bail is cancelled. He will henceforth be remanded in custody until the case is heard and determined. The case be heard on priority basis. The evidence of the complainant and her mother be heard within thirty days from today’s date. The accused will thereafter be at liberty to apply for his bail to be reinstated before the trial magistrate that is after the two witnesses have testified.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF JUNE 2021.**

**L.W. GITARI**

**JUDGE**

**24/6/2021**

The ruling has been read out.

**L.W. GITARI**

**JUDGE**

**24/6/2021.**