



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL REVISION APPLICATION NO. E004 OF 2021

PASCAL WANJOHI NDUNGU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Brief Facts

1. This application dated 24th February 2021 is brought under **Articles 49(1)(h), 159(2)(d) and 165(6) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code** seeking for orders of revision of the ruling delivered on 18th February 2021 in Criminal Case No. Nyeri CMSO No. 53 of 2020 Republic vs Pascal Wanjohi Ndungu the applicant herein. It also seeks for orders for reinstatement of the applicant's bond pending trial.

2. In opposition to the application, the respondent filed Grounds of Opposition dated 6th June 2021 in which it urged the court to dismiss the application for lack of merit.

The Applicant's Case

3. The applicant states that he was arrested on 7th September 2020 and charged on 8th September 2020 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. He was released on bond of Kshs. 200,000/- with a surety of a similar amount. However, on 27th November 2020 the respondent obtained ex parte orders cancelling the applicant's bond pending the hearing and determination of the application to cancel his bond. The application was determined on 18th February 2021 when the trial court held that due to the applicant's interference with the witnesses his bond was cancelled.

4. The applicant argues that the reasons advanced by the respondent for cancellation of bail do not meet the constitutional threshold because no charges have been preferred against the applicant under **sections 223 and 117 of the Penal Code**. Further **section 10 and 11 of the Victim Protection Act** relates to giving the victim protection and does not in any way abrogate on the applicant's constitutional rights particularly the right of presumption of innocence, the right to liberty and the right to bail.

5. The applicant further contends that he is been punished instead of been presumed innocent until proven guilty because he was not warned of the alleged interference with the witnesses and the fact that he was remanded at King'ong'o G.K Maximum Prison instead of Mweiga Prison despite the existence of a valid court order. As such, the applicant prays that pursuant to **Articles 49, 159 and 165 of the Constitution and sections 362 and 365 of the Criminal Procedure Code**, this Honourable Court revise the ruling of the trial court and reinstate the applicant's bail pending trial.

The Respondent's Case

6. The respondent opposed this application on grounds that there existed compelling reasons to warrant cancellation of the applicant's bail. And it was further argued that the applicant is facing a very serious charge which may lead to him serving life imprisonment if he is convicted. The respondent prays that the application be dismissed in its entirety.

7. Parties disposed of the application by written submissions. A summary of the respective submissions is as follows.

The Applicant's Submissions

8. The applicant reiterated his averments in the supporting affidavit and added that the respondent ought to provide the court with sufficient evidence to prove the requirement of compelling reasons to warrant a court to cancel an accused's bail. The applicant submits that the

respondent failed to provide such evidence as the allegations against him were threadbare as he has not been charged with any offences. Further, the applicant submits that the state has all the facilities and resources to provide protection to victims. He relies on the case of **John Waraga Njuki vs Republic [2019] eKLR** to buttress his point.

9. The respondent further submits that this court has jurisdiction donated by **Article 165(6) and (7) of the Constitution** to call for the record of any proceedings before the trial court and give any orders it considers appropriate for the fair administration of justice. Further **sections 362 and 364 of the Criminal Procedure Code** empowers this Honourable court to supervise the subordinate court with an aim of correcting their errors or wrongs. As such, the applicant prays that the court revises the error of the trial court in cancelling his bail on the basis that no cogent evidence was tendered to demonstrate that there were compelling reasons to cancel his bail.

The Respondent's Submissions

10. According to the respondent, it provided sufficient material to prove compelling reasons that warranted the cancellation of the applicant's bail. The applicant on two separate occasions threatened EG and CN (the minor complainant). He threatened to kill EGN and the baby ANN who was born out of an unlawful sexual act and on a separate occasion had threatened EGN and CN by persuading them not to attend court for any mention or hearing of the case. These threats were reported to Mweiga Police Station on 24th November 2020 vide OB No. 40/24/11/2020. The two also recorded statements capturing the nature of threats and intimidation. The Investigating Officer testified and confirmed this to the court.

11. The respondent further submits that the investigating officer chose not to charge the applicant with any offence but chose to bring it to the court's attention through case CMSO 53 of 2020 because the witnesses who had been threatened had not yet testified and the said threats would compromise the trial altogether. The respondent submits that delay in not charging the applicant does not absolve him of threatening the witnesses.

12. The respondent submits that the nature and gravity of the offence in CMSO Case No.53 of 2020, may lead to the applicant serving a 15-year sentence and this increases his temptations to abscond. Further, pursuant to the trial court order for extraction of DNA from the applicant and the baby, the results, which both parties acknowledge, the prosecution has overwhelming evidence against the applicant which increases his temptation to abscond.

13. The respondent further submits that the right to liberty is not an absolute right, which is depended on the circumstances of each case. In the instant case, the right was curtailed after the respondent was made aware that the applicant was threatening and interfering with witnesses.

14. The respondent states that there are no exceptional or unusual circumstances to warrant review of the decision to cancel bond pending the hearing at the trial court.

15. The respondent further urges the court to keep in mind **section 10 of the Victim Act**, which protects victims from intimidation and harassment and to have their safety and that of their families considered in determining the conditions of bail. Further, **section 11** of the said act provides that when dealing with a victim, one ought to ensure that the victim is immediately secured from further harm before any other action is taken in relation to the victim and the respondent urges the court to uphold the provision.

16. The respondent submits that the trial court exercised its discretion upon been presented with compelling reasons by the respondent that warranted the applicant's bond be cancelled. Pursuant to **Article 49(1)(h) of the Constitution**, the respondent submits that he was within his purview to institute the application to have the applicant's bond cancelled during the pendency of the trial. Further, **Article 49(1)(h) of the Constitution and sections 10 and 11 of the Victim Protection Act** are intertwined as sections 10 and 11 direct that the victim's security should be considered whenever the issue of bail/bond is canvassed. As such, the respondent prays that the application be dismissed.

Issues for determination

17. The issue for determination is whether the applicant is entitled to the orders sought in his application based on the provisions of section 362 of the Criminal Procedure Code.

The Law

18. The High Court's power of revision is set out in **Article 165 (6) and (7)** which provides:-

(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 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 of justice.

19. **Section 362 of the Criminal Procedure Code** provides:-

The High Court may call 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.

20. Section 364(1) of the Criminal Procedure Code provides:-

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 his 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 sentence;

b. In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

21. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of **Joseph Nduvi Mbuvi vs 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.”

22. Similarly Nyakundi J in **Prosecutor vs Stephen Lesinko [2018] eKLR** outlined the principles which will guide a court when examining the issues pertaining to **section 362 of the Criminal Procedure Code** as follows:-

a. Where the decision is grossly erroneous;

b. Where there is no compliance with the provisions of the law;

c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

d. Where the material evidence on the parties is not considered; and

e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

23. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.

24. **Article 49 (1)(h) of the Constitution** guarantees the right to bail unless there are compelling reasons to warrant the refusal or cancellation of bail as in the present case. Whereas the right to bail is not absolute, it is constitutionally circumscribed by the presence of compelling reasons. The Court of Appeal in **Michael Juma Oyamo & Another vs Republic [2019] eKLR** pronounced itself as follows in respect to compelling reasons that can justify denial of bail/bond:-

“Article 49(1)(h) of the Constitution states 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.’ It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in R vs Joktan Malende & 3 Others Criminal Case No. 55 of 2009 as follows:

‘.....the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.’

Analysis and Determination

25. It is indeed true that compelling reasons depends on the circumstances of each case and must be one that satisfies the court 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 guaranteed by the Constitution and in regard of which courts have a duty to safeguard.

26. In the instant case, the prosecutor made an application dated 27th November 2020 before the trial magistrate based on an affidavit by the investigating officer, PC W. Sussy Saidi. Viva voce evidence was adduced by the investigating officer and she was cross-examined by the applicant’s advocate. The bone of contention was that the applicant who was out on bond, threatened the minor complainant and one other

crucial witness. It was also alleged that the applicant threatened to kill the baby born out of the alleged sexual relation between him and the complainant. The respondent produced evidence in form of the affidavit by the investigating officer, an OB extract No. 40/24/11/2020 and witness statements detailing the threats and intimidation executed by the applicant. As such, the prosecution urged the court to cancel the applicant's bond citing compelling reasons particularly that the applicant was interfering with the witnesses by threatening to kill them. The trial court found the reasons compelling and in the ruling delivered on 18th February 2021, ordered cancellation of the applicant's bond. It is the said ruling that the applicant urges this court to review and give orders for reinstatement of bail.

27. Notably, the applicant was given an opportunity to defend himself against the application to cancel his bond and his counsel cross-examined the investigating officer. The respondent produced the O.B extract before the court to the effect that the said threats had already been reported to Mweiga Police Station. The respondent detailed the allegations as presented in the affidavit of the investigating officer. I have looked at the record of the court and noted that the counsel for the applicant made very exhaustive and lengthy cross-examination in respect of the investigating officer. The court gave the parties a chance to file submissions which they both did.

28. It is not in doubt that the trial court gave both parties a fair hearing before delivering the ruling on the application. I have also perused the said ruling and noted that the magistrate addressed all the issues raised by the prosecution. The prosecution heavily relied on the fact that the respondent had not preferred any charges against the applicant despite receiving the report. In this regard, I would state that the Director of Public Prosecutions under Article 157 of the Constitution has absolute powers to charge or not to charge anyone suspected of having committed an offence. He cannot be directed to exercise those powers by anyone or how and when to charge a suspect. It is therefore not the duty of the applicant to push the Director of Public Prosecution to charge him with the offence of threats to kill or threat to harm witnesses. The Director of Public Prosecutions could charge the accused at any time during or after the pendency of this case.

29. The other issue raised was that the reasons given by the prosecution do not amount to compelling reasons. The investigating officer said that she saw the accused outside the court in early November 2020 communicating with the elder sister of the complainant, EG but did not know what the communication was or about. On 24/11/2020 the witnesses visited Mweiga Police Station and reported the threats of intimidation if they dared attend court to testify. The O.B. reports state that the applicant threatened to kill EG and the complainant on 2/11/2020 and this made E not attend court on 9/11/2021 when she was required to testify. She later made the report to the OCS Mweiga. The 2nd witness was approached by the applicant with similar threats on 2/11/2020 and on 23/11/2020. E was also tasked by the applicant to persuade her sister to drop the case.

30. In her ruling, the trial magistrate found the threats to harm and to kill as compelling reasons and cancelled the applicant's bond. I would agree with the trial court that the threats to kill a witness and the infant of the complainant born out of the very sexual interaction that forms the basis of the charges before the court are compelling reasons to cancel bond. The magistrate also cited Section 11 of the Victims Protection Act that gives the court power to accord protection to the victims of an offence against intimidation, harassment and tampering with evidence. The applicant argued that the court ought not to have relied on the said provision. In my view, the law is relevant and was enacted to ensure protection and rights of victims of offences and to safeguard their rights.

31. As for the principle of presumption of innocence which the applicant says was not given due consideration, I am of the view that denial of bond does not violate the principle. The witnesses and victims have their rights which ought to be safeguarded. The court has a duty to balance the rights of the accused and the victims. In my view, the trial magistrate did her duty and relied on the material placed before her.

32. On the issue of the applicant been held at King'ong'o Maximum Prison instead of Mweiga Police Station despite a court order stating so, the trial court in its ruling stated clearly that it would summon the OCS Mweiga Police Station to provide an explanation as to why that occurred. The trial court is therefore seized of the matter of enforcing its own orders. This is therefore not relevant to this application.

33. Section 362 of the Criminal Procedure Code addresses cases for revision where the magistrate has made a mistake, irregularity or illegality. The High Court has power to correct such misdoings by giving the appropriate orders in an application for revision.

34. In this application, it is my finding that the ruling of the trial court delivered justice to the witnesses who are yet to testify. The freedom of the applicant was appropriately curtailed by cancelling bond. The applicant is the author of his fate and cannot blame the trial court for it fulfilled its legal mandate.

35. I find that the applicant has failed to demonstrate that the trial court committed any illegality, mistake or irregularity to warrant any interference by this court in the course of its supervisory jurisdiction. As such, this application must fail.

36. I find no merit in this application and I hereby dismiss it with no orders as to costs.

37. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF AUGUST, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 25TH DAY OF AUGUST, 2021.