



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC. CRIMINAL APPLICATION NO. 10 OF 2020

(CORAM: F.M. GIKONYO J.)

IN THE MATTER OF ARTICLE 49(1) OF THE CONSTITUTION OF KENYA

AND

SECTION 362 AND 364 OF THE CRIMINAL PROCEDURE CODE

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

-VERSUS-

WILLIAM MUGO GATHONGO.....1ST RESPONDENT

DENNIS BETT.....2ND RESPONDENT

KENNEDY ROTIKEN.....3RD RESPONDENT

PATIENCE MUALA.....4TH RESPONDENT

MARY MBITHE MUTUKU.....5TH RESPONDENT

PETER MUTUKU KIIO.....6TH RESPONDENT

PHILEMEON CHERUIYOT CHEPKWONY.....7TH RESPONDENT

TIMOTHY KAMOMOE KAGURU.....8TH RESPONDENT

JOHN KIMANI.....9TH RESPONDENT

BERNARD WAINAINA.....10TH RESPONDENT

DAVID JAMBAJI.....11TH RESPONDENT

RULING

[1]. The state has applied for review of the order issued in chief magistrate's criminal case no. 956 of 2018 dated 17th February 2020 granting the 6th, 7th and 11th respondents bond after their bond application had been reviewed and dismissed by the Hon. Justice Bwonwonga in **Misc. Criminal Appl. No. 86 Of 2018**.

Brief history

[2]. The respondents were jointly charged in **Narok chief magistrate's criminal case no. 956 of 2018** before court no. 1. The accused persons then sought to be released on bond pending the hearing of their case. The application for bond was considered by the trial court and

was dismissed on the basis that the respondents were a flight risk after attempting to break out of Narok police station cells.

[3]. The respondents then being dissatisfied with the trial court decision filed High court misc. criminal appl. no. 86,87,88, 89 ,90 and 91 of 2018. These applications were all consolidated and determined as no. 86 of 2018. in a ruling delivered on 8th October 2018 the Hon Bwonwonga J. dismissed their applications and concurred with the trial magistrate.

[4]. No appeal was preferred by the respondents against the said ruling. Instead, the 5th, 6th, 8th and 11th respondents sought review of the High court ruling dated 8th October 2018 and also sought to introduce new evidence. This application was also dismissed by the High court.

[5]. The 11th respondent filed High court misc. crim. appl. no. 26 of 2019 while the 9th respondent filed a similar application in no. 25 of 2019 both applications were consolidated.

[6]. The applications sought review of the ruling delivered on 8th October 2018. The judge granted the 9th respondent bond based on the change in circumstances (medical grounds).

[7]. The high court however declined to review its ruling on bond based as pertaining to 11th respondent herein.

[8]. The three respondents were then granted bond by the trial court on 17th February 2020 and 6th and 7th respondents are out on bond while the 11th respondent has been unable to meet the bond terms.

[9]. The prosecution now seeks this court to determine whether a magistrate court can review a ruling of the High court.

[10]. The applicant submitted that the ruling delivered by the High court on 8th October 2018 could only be overturned by the Court of Appeal exercising its appellate jurisdiction. The High court having made a ruling on bond application by the respondents, the magistrate court had no authority or power to review and issue contrary finding to that of the high court. This will amount to the magistrate court usurping the powers of the court of appeal in overturning the ruling of the high court. This clearly offends Article 165(6) of the Constitution.

[11]. The applicant submitted that the trial court erred in considering the fact that a witness testifying in court was a change in circumstance that would override the ruling of the high court that the respondents were flight risks if they were released on bond. No material evidence was placed before the trail magistrate to make him reach a contrary decision and thus grant the three respondents bond.

[12]. The prosecution urged this court to review the ruling issued on 17th February 2020 by the chief magistrate court on its correctness, legality and property.

[13]. The applicant relied on the following authorities

i. Joseph Kabuchwa Muya V Republic [2004] eKLR

ii. Republic V Feisal Mohammed Ali Alias Feisal Shabal Misc Criminal Revision No. 166 of 2015

iii. Peter Mutuku Kiio & 2 Others V Republic [2019] eKLR

iv. John Kimani & Another V Republic (2020) eKLR

v. Feisal Mohammed Ali Alias Feisal Shabal V Republic [2015] Eklr Misc Criminal Application No. 75 Of 2015.

[14]. The respondents have not filed submissions despite court's orders on 18/10/2021 directing Mr. Wandugi to file and serve submissions.

ANALYSIS AND DETERMINATION

[15]. Article 165 (6) of the Constitution confers supervisory powers of the High Court to the subordinates Courts in the following manner: -

“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 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 an order or give any direction if it considers appropriate to ensure the fair administration of Justice”.

[16]. Whilst ensuring fair administration of justice remains to be the overall objective of the supervisory jurisdiction, the court should seek to be satisfied 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

[17]. The question that has been put to court by the appellant is: Whether a trial magistrate can review orders of the High Court?

[18]. A straight answer is No. A subordinate court has no supervisory power over the High Court. It cannot therefore review orders of the High Court.

[19]. This should not however be confused with the power of the trial court to review its orders and grant the accused bail.

[20]. In this case, the High Court had agreed with the trial court and denied the accused bail. Subsequent applications for review of the High Court were also denied except one by the 9th accused person was allowed on the ground of ill health. In such scenario, it is desirable that the accused should apply for review in the High Court for review its own decisions. In this manner, claims of usurpation or contempt of judicial authority of the High Court by subordinate court will never arise.

[21]. Hitherto, the constitutional command is respect for and adherence to the hierarchy of courts; a tool in and the enabler of administration of justice. The hierarchy of courts establishes courts and demarcates their respective jurisdiction, and ordains order in adjudication of cases. Its constitutional importance and value cannot be over-emphasized. Any attempt to blur or obfuscate the hierarchy of courts in whatever manner – juridical or jurisdictional- will lead to constitutional as well as overt anarchy in the administration of justice.

[22]. I note the other question posed as to whether the fact of being a “*flight risk*”, as a compelling reason may change should be determined within the substantive context it is claimed to have changed rather than in the abstract.

[23]. Of significance is that this Court denied the 6th, 7th and 11th Accused persons for being a flight risk. A contrary finding could be arrived at by the High Court in exercise of its power of review or by the Court of Appeal. It bears repeating that, as bail is a matter of constitutional right to liberty and freedom, in case of changed circumstances, review of an order denying bail may be allowed. The respondents could still apply for review of the order before this court for theirs is a matter of fundamental freedom and liberty.

[24]. The upshot of it is that, the application for revision is allowed. The bond granted to the 6th, 7th and 11th Accused persons is cancelled. Those already out shall be taken into custody. All shall remain in remand as earlier ordered by this Court in its ruling dated 8th October 2018 unless otherwise ordered. There is however need for the trial to be expedited. It is so ordered.

Dated, signed and delivered at Narok through Teams Application, this 24th day of November, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Accused - absent
2. Ms. Torosi for Respondent
3. M/s Wandugi holding brief for accused No. 6, 7 & 11
4. Kasaso - CA