



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 4 OF 2020

REPUBLIC.....RESPONDENT

VERSUS

NASSIR MUSA MOHAMED.....APPLICANT

RULING ON REVISION

1. On 17th January, 2020 the Counsel for the applicant filed an application for revision under the provisions of Section 362 of the Criminal Procedure Code and Article 50(q) of the Constitution, against the orders of Hon. F.W. Macharia, SPM, and proceedings of 16th January, 2020. This court was requested to examine the said record to satisfy itself of the correctness, legality, regularity and propriety of the proceedings and orders made on the said date. These were in respect to cancellation of the applicant's bail and directions given earlier respecting loss of the lower court file.
2. The applicant's Counsel in the application for revision referred to the applicant as the 2nd accused. The Trial Court when making its order of 8th November, 2019 referred to him as the 1st accused. The lower court proceedings when read as whole however leave no doubt that the applicant herein is the 2nd accused in the lower court case. That is easily discernible as he is the one who was granted a bond in the sum of Kshs. 10,000,000/=.
3. Subsequent to the filing of the present application, the lower court case file was called for. A perusal of the same reveals that the applicant and his co-accused were charged separately. The applicant took a plea on 25th May, 2017. He pleaded not guilty and was released on a surety bond of Kshs. 10,000,000/= . His surety was approved by the court on 31st May, 2017
4. On 20th June, 2017, the applicant's case was consolidated with Shanzu Senior Principal Magistrate's Court Criminal Case No. 753 of 2017. A consolidated charge was read out to him and his co-accused. They pleaded not guilty. Hon. Mochache, SPM, ordered for the bond terms to remain as before. The hearing of the case commenced on 21st February, 2018 before the said Magistrate.
5. The case was taken over by Hon. F.W. Macharia, SPM, on 4th of July, 2019. On 6th November, 2019 when the case came up for further hearing, the Hon. Magistrate realized that the original case file had gone missing. On the said date, the accused persons and their Advocate did not attend court. The said Magistrate recorded the proceedings on a skeleton file. She noted that on that date neither the accused persons nor their Advocate were present in court yet there was a witness, the Investigating Officer, who had traveled all the way from Gatundu. She ordered for the case to proceed for hearing in their absence since they were aware of the hearing date.
6. The Hon. Magistrate made an order for the Executive Assistant, Shanzu Law Courts to retrieve the original file within 7 days. Warrants of arrest were issued against the applicant and his co-accused. The case was slated for mention on 13th November, 2019 to confirm availability of the original file.
7. On 7th November, 2019 the applicant and his co-accused appeared in court together with Mr. Makasembo Advocate who prayed for the warrants of arrest against his clients to be lifted. He explained that their bonds were extended to 7th November, 2019 by a police officer.
8. The Hon. Magistrate observed that the police officer had no business in extending bonds as that is the work of the Court Assistants. She also noted that the bond was a photocopy and the only words on it were written on 7th November, 2019.
9. Hon. F.W. Macharia, SPM, ordered the applicant and his co-accused to be put temporarily in custody to assist in identifying the police officer who extended their bonds, as such kind of behaviour was unacceptable. She further ordered that they be presented before the DCIO Kisauni to commence investigations to find out if the date written on their bail/bond documents was not inserted to defeat the cause of justice. The Hon. Magistrate slated the matter for mention on 8th November, 2019. The case was thereafter mentioned several times.

10. On 21st November, 2019, the applicant through his Advocate indicated that his father had died. He explained that since the person who stood surety for him was a friend to his father, it was difficult to trace him.. Hon. F.W Macharia, SPM, granted the applicant 10 days to avail the surety in court or provide another security as the original file and security document had mysteriously disappeared.
11. On 4th December, 2019 the applicant informed the said Magistrate that he had a surety but the security documents were being verified. The Hon. Magistrate ordered for bond approval for the applicant to be on 18th December, 2019 before court No. 2. On the said date, the applicant appeared before Hon. D. Odhiambo, R.M. He addressed the court by stating that he had not gone to court with a surety because his brother went to look for one in Nairobi but he had not found him. He prayed to be given more time. He further said he had raised Kshs. 100,000/= as cash bail, as he had been granted a cash bail of Kshs. 200,000/= as an option. The said Magistrate noted that from the previous proceedings the applicant was given time to avail a surety but he had not done so. The Hon. Magistrate stated that in the circumstances, he was to remain in prison custody until he availed a surety.
12. The case was mentioned on 16th January, 2020 in court 1 for directions. Hon. F.W. Macharia, SPM, noted that the record of 4th December, 2019 and 18th December, 2019 reflected the position stated by Hon. Odhiambo, RM. She however realized that the applicant was out on a cash bail of Kshs. 200,000/= but nowhere in the court proceedings had the applicant been given an alternative of cash bail. She ordered for an explanation to be given as to how the said applicant was out on a cash bail yet the court had not given him such terms.
13. The said Hon. Magistrate further noted that the applicant misled Hon. Odhiambo who handled the matter on 18th December, 2019 that he had been given a cash bail of Ksh. 200,000/= but the said Magistrate rightfully found that the applicant was to avail a surety. She ordered him to be remanded in custody. She further found that there was no release order on record. Hon. F. W Macharia, SPM, directed the Executive Officer of Shanzu Law Courts to explain how the foregoing happened. She ordered for the applicant to be held in custody as the mystery surrounding his release was resolved. The case was then scheduled for mention on 29th January, 2020.
14. This court has deemed it necessary to replicate a part of the lower court proceedings in light of the allegations that have been leveled against the Trial Court and in particular, Hon. F.W. Macharia, SPM.
15. Under the provisions of Article 165(6) and (7) of the Constitution of Kenya, this court has supervisory jurisdiction over subordinate courts. Section 362 of the Criminal Procedure Code empowers the High Court to undertake supervision of subordinate courts in the following terms:-
- “The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.”** (emphasis added).
16. This court called for the lower court file so as to satisfy itself of the correctness, legality and the propriety of the proceedings in the said court. Having perused the said proceedings, this court has established that contrary to the claim that has been made by the applicant, when he appeared before Hon. D. Odhiambo, RM, on 18th December, 2019 the said Magistrate did not make an order granting him a cash bail of Kshs. 200,000/=. Such an order had not been made previously by Hon. F. W. Macharia, SPM. The lower court file does not contain such an order.
17. If anything, Hon. Odhiambo, RM, directed the applicant to avail a surety as in the previous proceedings, he had been given time to do so. The said Magistrate ordered for him to remain in custody until he availed a surety.
18. The application for revision states that on 16th January, 2020, Hon. F.W. Macharia, SPM, without being moved by any party cancelled the applicant’s cash bail as a result of which the said applicant is now remanded at Shimo -la - Tewa prison. The applicant's Counsel's contention is that the said Magistrate sat on appeal against the order of Hon. Odhiambo, RM, of 18th December, 2019. That is far from the factual position.
19. In this court's view, the Hon. Magistrate, F. W. Macharia, SPM, acted lawfully *suo moto* by cancelling the cash bail of Kshs. 200,000/= that had been processed by the applicant. She did not have to be moved by any party to do so. Any prudent Magistrate would be expected to observe the rule of law and to ensure the ends of justice are not defeated. Although accused persons are entitled to being admitted to bail pending trial under the provisions of Article 49(1)(h) of the Constitution of Kenya, a valid order must be granted by a court of law. In the instant case, the valid order that had been made released the applicant on a security bond of Kshs. 10,000,000/=.
20. The applicant herein was granted on different bond terms from his co-accused as they were initially charged separately. The 2 cases were consolidated on 20th June, 2017. Thereafter the original lower court case file disappeared. It bore the security documents which had been executed by the surety for the applicant. In the absence of the said documents, the applicant was ordered to either avail other security documents or avail another surety.
21. In the above circumstances, this court fails to see any action on the part of the Hon. F. W. Macharia, SPM, which can be regarded as unconstitutional, unlawful, improper, illegal, incorrect, or void. There was no order that was issued by said Magistrate or Hon. Odhiambo, RM, admitting the applicant to a cash bail in the sum of Kshs. 200,000/=. As such, this court has no jurisdiction to order reinstatement of a non-existent order.
22. In the application for revision, the applicant applied for an order for the recusal of Hon. F.W. Macharia, SPM, from hearing the lower court case as she had shown bias against him by the manner in which she had handled the matter before her by alleging that the applicant and his co-accused may be responsible for the loss of the original lower court case file. It was also claimed that the said Magistrate could be a potential witness on the issue of the disappearance of the said court file. Needless to say that when a court file mysteriously disappears from its rightful place, several people are bound to be treated as suspects. Registry staff and accused persons are no exceptions.

23. In the Court of Appeal case of **Lubna Ali Sheikh Abdalla Bajaber vs Chief Magistrate's Court Mombasa and 2 Others** [2018] eKLR, the Court of Appeal adopted the decision in **Attorney-General v. Anyang' Nyong'o & Others** [2007]1EA 12, where the test for bias was set as follows:-

“The objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially[”] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...”

24. The course of action taken by the Hon. Magistrate to order investigation of the loss of the original court file and how the applicant was released on a cash bail of Kshs. 200,000/= without a court order is within her powers and the confines of the law. Further, an order for recusal must be made at the first instant before the court seized with a matter and actual bias must be demonstrated. In the present instance, the applicant has fallen short of proving any bias on the part of the said Hon. Magistrate. This court therefore declines to order the recusal of Hon. F.W. Macharia, SPM, from the lower court case against the applicant and his co-accused.

25. The issue of the applicant having been released on a bond in the sum of Kshs. 10,000,000/= whereas his co-accused was released on a cash bail of Kshs. 200,000/= was never addressed before the Trial Court to make a determination on the same. The applicant has no proper footing to move this court for review of the bond terms when he has not raised the said issue before the Trial Court.

26. This court's finding is that it was moved prematurely by the applicant who seems keen to gain his admission to bail/bond from this court by peddling misleading information that his bond terms had been reviewed by Hon. Odhiambo, RM.

27. The long and short of the application for revision before me is that it is totally incompetent, null and void *abinitio*. Had the Counsel for the applicant taken time to peruse the lower court proceedings, he would have established that at no time was an order made admitting the applicant to a cash bail of Kshs. 200,000/=. The said Advocate took the claim by his client as the gospel truth without verifying the facts. As Hon. F.W. Macharia, SPM, very well stated, it was a mystery and this court adds, intriguing how the applicant managed to process a cash bail of Kshs. 200,000/= without a court order and was thereafter set free on the basis of the said cash bail.

28. The processes before the lower court should be exhausted first to their logical conclusion. The upshot of the foregoing is that the application for revision filed on 17th January, 2020 is hereby struck out for being incompetent. The applicant shall be at liberty to move this court if need arises at a future date. He shall remain in remand at Shimo - la- Tewa Prison until he has sorted out the matters that he needs to address before the Trial Court.

29. The lower court case file shall be returned to Shanzu Law Courts. The applicant shall be produced in the said courts on 13th March, 2020 for the mention of his case.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Wangila for the 2nd accused/applicant

Ms Mwangeka for the DPP

Mr. Oliver Musundi - Court Assistant