REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO. 441 OF 2019

KALALA PAULIN MUSANKISHAY.....1ST APPLICANT

PERIS ONYANGO OMONDI alias RAHA EVERLINE KAMBERE.....2ND APPLICANT

=VERSUS=

REPUBLIC.....RESPONDENT

RULING

1. On 10th December, 2019, this court delivered a ruling in which it partially reviewed the bail terms issued by the trial magistrate in Criminal Case No. 121 of 2019 at the JKIA Chief Magistrate's Court where the Applicants are facing charges of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act.** The 2nd Applicant is also facing a further charge of being in possession of a forged passport contrary to **Section 54(1) (c)** of the **Kenya Citizenship and Immigration Act No. 12 of 2011.**

2. In the application dated 20th December, 2019, the Applicants seek a review of the orders issued by this court on 10th December, 2019 with a view to admitting the 1st Applicant to bail/bond and reducing the 2nd Applicant's bail terms. They also ask that the court issues any other orders that it may deem fit to grant. The Application is brought under **Article 165(6) and (7), Article 157(6) (c), (9), (11)** and **Article 50(1)** of the **Constitution of Kenya, 2010, Section 364** of the **Criminal Procedure Code** and all other enabling provisions of law.

3. The main ground upon which the application is anchored is that this court did not have the opportunity to look at some crucial documents which were erroneously omitted when filing the Applicants' respective applications for revision of the bail terms issued by the trial court. These were the 1st Applicant's pre-bail report as well as medical and mortuary documents for the 2nd Applicant's deceased son.

4. In his self-sworn Affidavit in support of this application, the 1st Applicant avers that a probation report was filed on his behalf revealing, *inter alia*, that he has a contact person in Kenya and is a law abiding individual who should be given a chance to defend himself against the charge he is facing while out on bail. He attached a copy of the pre-bail report to his Affidavit and marked it ***"KPM1".*** On her part, the 2nd Applicant in her self-sworn Affidavit deposes that the body of her deceased son continues to lie in the mortuary at Kenyatta National Hospital awaiting farewell by her. She avers that the same has caused her untold anguish and psychological torture and therefore seeks the intervention of this court to reduce her bond/bail terms to a reasonable amount to enable her bury her son. She attached copies of the deceased's medical reports and mortuary documents which were marked ***"POO2".***

5. Counsel for the Applicants, Mr. Swaka reiterated that the application was brought purely on humanitarian grounds in view of the Applicants' physical and financial conditions as well as the Covid-19 pandemic situation.

6. On behalf of the 1st Applicant, Mr. Swaka submitted that he is sickly and cannot be treated in the prison facility. Counsel submitted that the 1st Applicant is ready to supply evidence that he has a fixed abode since he was already living in Kenya at the time he was arrested. Counsel stated that the 1st Applicant is willing to deposit his travel documents in court and further, that the court can issue an order limiting his exit from the country, though it is obvious that no one can travel out of the country at the moment. Counsel argued that being a foreigner does not disqualify an Applicant from benefiting from the provisions of **Article 49 (1) (h)** of the **Constitution**. He relied on the cases of **R v Richard David Alden [2016] eKLR** and **Francis Edward Strange v Republic [2015] eKLR** where foreigners were granted bail pending trial.

7. On the part of the 2nd Applicant, Mr. Swaka submitted that her bond stands at Kshs. 1,000,000/= but to date she has not managed to raise the said amount. He argued that the pandemic has worsened the situation due to financial depression and beseeched the court to reduce the said amount to Kshs. 200,000/= with an alternative cash bail of between Kshs. 50,000/= to 100,000/= which the 2nd Applicant can afford to

raise. Counsel informed the court that in view of the Covid-19 pandemic, the body of the 2nd Applicant's deceased son was ordered to be buried which has traumatized her.

8. Learned state counsel, Ms. Akunja opposed the application. She submitted that the issues raised had already been determined in this court's ruling of 10th December, 2019. She stated that the 1st Applicant was denied bond because he had no fixed abode unlike the foreigners in the cases cited. As for the 2nd Applicant, counsel submitted that the conditions stated are not an incentive for her to attend trial. She submitted that if the court is inclined to review the bond terms, the terms imposed must be stringent enough to ensure the Applicants attend court for their trial.

9. In rebuttal, Mr. Swaka submitted that this is a proper time for the court to review the bond terms in the spirit of decongesting prisons s due to the Covid-19 pandemic.

Determination

10. The Applicants have invoked various constitutional and statutory provisions in support of their application. To begin with, **Articles 165(6)** and **(7)** of the **Constitution** provides for the supervisory jurisdiction of the High Court over subordinate courts in the following terms:

> ***"(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 of justice."***

11. As regards the circumstances under which this court can exercise its constitutional supervisory jurisdiction, I find useful guidance in the case of **Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR,** where Mwongo J. posited as follows:

> ***"….I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:***
>
> ***a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;***
>
> ***b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;***
>
> ***c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.***
>
> ***d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice;***
>
> ***This list showing rationale for intervention is of course not exhaustive."***

12. The learned judge went on to state that:

> ***"Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:***
>
> ***i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court's independence in the conduct and management of its proceedings;***
>
> ***ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question;***
>
> ***iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;***
>
> ***iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;*** [emphasis mine]
>
> ***v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;"***

13. The Applicants have also invoked **Articles 157(6)(c), (9) and (11)** of the **Constitution** which provides for the functions of the office of the Director of Public Prosecutions as well as **Article 50(1)** of the **Constitution** which mandates courts to accord persons appearing before them a fair hearing. I must state that nothing on these constitutional provisions confers on this court the jurisdiction to revise its own orders.

14. The Applicants have also placed reliance on **Section 364** of the **Criminal Procedure Code** which provides for the powers of the High Court on revision as follows:

> ***"(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—***
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> ***(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; in the case of any other order other than an order of acquittal, alter or reverse the order.***
>
> ***(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the***
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> ***Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.***
>
> ***(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: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***
>
> ***(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.***
>
> ***(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.***
>
> ***(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."***

15. I have not seen anything in the said provision which gives this court the power to review its own decision. It is however my considered view that, in appropriate circumstances, this court may review or vary its earlier order by invoking its inherent jurisdiction under **Article 165(3)(a)** of the Constitution which confers on the High Court unlimited original jurisdiction in civil and criminal matters. This is possible in circumstances where it is deemed necessary so as to serve the ends of justice like for instance where new matters are brought to its attention that were not within the knowledge of an Applicant when the order sought to be varied was granted. (See **Director of Public Prosecutions v Betty Njoki Mureithi [2016] eKLR).**

16. In the instant case, the documents that the Applicants allege that this court did not have sight of when making its earlier decision, were available during the determination of their initial respective applications for revision. Indeed, this court had an opportunity to examine the trial court's record upon calling for the same as required of it when exercising its revisionary jurisdiction. The 1st Applicant's pre-bail report was part of the said record and its contents were accordingly taken into consideration. Further, in the application for revision of bail filed herein on 27th September, 2019, the 2nd Applicant attached the medical reports which are now being alleged to constitute new evidence as proof of her son's demise.

17. It is therefore clear that the Applicants are in essence asking this court to sit on appeal of its earlier decision which cannot happen as this court has no jurisdiction to do so. Whereas this court empathizes with the 2nd Appellant's situation regarding her deceased son, it can only intervene within the precincts of the law. The remedy lies in appealing the earlier decision to the Court of Appeal which is constitutionally and statutorily mandated to hear appeals from this court.

18. The upshot of the foregoing is that the Application must fail and is accordingly dismissed. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH JUNE,2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Swaka for the Applicants.

2. Miss Akunja for the Respondents.

3. Both Applicants present.