



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CR. APPLN. NO. 27 OF 2020

TIMOTHY MURITHI MITHIKA.....1ST APPLICANT

ONESMUS KARITHI KABERIA.....2ND APPLICANT

DUNCAN MWIRIGI KIRIMI.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. The applicants were jointly charged in **Tigania S.O. Case. No. 16 of 2020** with **Gang defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006**. There was an alternative charge of **Committing an indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006**.

2. It was alleged that on the 24/3/2020 at Malango market in Tigania Central Sub-County of Meru County in association and in turns, they intentionally caused their penises to penetrate the vagina of **NKK** a child aged 15 years.

3. In the alternative charge, it was alleged that at the same time and place, the applicants in turns touched the vagina of **NKK** a child aged 15 years.

4. On 6/4/2020, the substance of the charges were read out to the applicants which they denied and applied for bond. Owing to the Covid-19 pandemic, they were detained at Mulika Police Station. On 30/4/2020, relying on the pre-bail reports on record, the trial Court denied the applicants bond and directed that they may renew the application for bond after the complainant has testified.

5. It is this decision that the applicants have sought to review vide their Notice of Motion dated 5/5/2020. They also sought bond pending the hearing of the case before the trial Court. They contended that the offence facing them is bail able. That there was no good ground to deny them bail and that in view of the prevailing circumstances of covid-19, pandemic, it is in the interests of justice that they be released on bail so that they can stay home and safe.

6. The application was opposed vide the replying affidavit of **Brenda N. Nandwa** sworn on 22/5/2020. She averred that the pre-bail reports indicated that the complainant was fearing for her life as the applicants had threatened to kill her. That this amounted to witness interference and some of the applicants were adjudged to be flight risk. Learned Counsels relied on their respective affidavits.

7. The jurisdiction of this Court under **section 362 of the Criminal Procedure Code** is limited to calling for the original record of the subordinate court for 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.

8. In **Joseph Nduvi Mbuvi v Republic [2019] Eklr**, the court held that;

“A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court’s revisionary jurisdiction to final adjudication of the proceedings. The section talks of “any criminal proceedings”. “Any criminal proceedings” in my view includes interlocutory proceedings. ... 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 ... 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”.

9. The application is a challenge on the trial Court’s exercise of discretion in granting bail/bond. It questions the procedure the trial Court used to arrive at the decision of denying the applicants bond.

10. On the first issue, the applicants challenge the considerable time taken by the probation officer to avail the pre-bail report and its necessity for the trial Court for its determination of the application before it.

11. The record shows that the applicants took plea on 6/4/2020. The court directed that a pre-bail report be availed before it could consider the bail application. On 20/4/2020, the probation officer sought for more time to interview the applicants. He further sought for more time on 22/4/2020 to interview the victim/complainant and her parents which was granted.

12. On 27/4/2020, the probation officer further requested for more time to interview more people and sent the report to his seniors. This request was also granted. On 30/4/2020, he availed the reports which the Court considered before denying the applicants bond.

13. Pre-bail reports are social inquiry reports that are intended to assist the Court in ascertaining, the social background of an accused, the social condition of the victim, whether an accused has a permanent place of abode or not, the community set up and the economic position of the accused. All these are geared towards assisting the Court in making a determination on the suitability of granting or denying bond. It also enables the Court to weigh the bond terms so as not to give tough conditions that will amount to a denial of bond.

14. **Section 4.12 of the Judiciary Bail and Bond Policy Guidelines (“the said guidelines”)** appreciates that, the potential drawback of the bail reports is that they may contain information that is prejudicial to an accused person.

15. **Section 4.26 of the said guidelines** provides that Officers of the Probation and Aftercare Service should prepare bail reports as soon as practicable but not later than two weeks from the time of request. It also provides that where the court has called for a bail report, it shall give the prosecution and the defense an equal opportunity to contest the findings of the report.

16. In **Idris Aden Mukhtar & another v Office of the Director of Public Prosecutions & 2 others [2018] Eklr**, the trial Court directed the probation officer to avail the pre-bail report within 24 hrs. The court was of the view that the probation officer ought to have been accorded sufficient time to interrogate and investigate information. The Court held: -

“The propriety of relying on the said Pre- Bail Reports is called into question. The information specifically relates to the antecedents, character and residence of the Interested Parties. The failure to accord sufficient time to interrogate it through investigation means that the grant of bail was premised on improper information. The rationale is simple; the veracity of it will determine whether or not the Interested Parties warranted the admission to bail.

My view is that the probation and the investigating officers should be accorded sufficient time to interrogate and investigate the information given by the Applicants after which, I believe, the trial court will be in a position to arrive at an objective ruling...”

17. In the present case, the pre-bail reports took more than 14 days to be presented. The probation officer gave credible reasons why the same could not be procured within the appropriate time. Pre-bail reports are clearly engaging and involve interviews of the victims, the accused, their families and the community.

18. Here applicants were three. In order to prepare the reports, it is expected that, the probation officer required sufficient time in order to provide credible information. This court notes the timelines taken by the probation officers to avail the pre-bail reports. The court also takes judicial notice of the current Covid-19 pandemic and finds that the reports were presented within reasonable time in the circumstances.

19. In relation to trial Court’s decision, the court placed reliance on the said reports and on the ground that the applicants face serious offences. The said guidelines on bail and bond, give the court a wide discretion in relying on pre-bail reports so as to arrive at a just determination.

20. The applicants did not challenge the pre-bail reports. Neither did they cast any doubt as to their correctness. No element of malice or ulterior motive was alluded on the part of the probation officer. In this Court’s view, the pre-bail reports were properly presented and the reliance thereof by the trial Court cannot be faulted.

21. On whether or not the trial Court erred in its exercise of discretion, this Court can only interfere with if it was exercised wantonly and without a basis. A trial Court must always weigh between the rights and needs of some accused vis a vis the rights and needs of the society. The needs of the State in the sense of the administration of justice in maintaining law and order has to be considered.

22. Further, the Court must take into account the wishes and feelings of the victims and the community at large. **Section 123A of the Criminal Procedure Code** is clear on what the Court has to consider.

23. In the present case, the trial Court considered the pre-bail reports and exercised its discretion against the applicants. The reports indicated that the complainant is traumatized and is reported to have been threatened by the applicants. That they had threatened to kill her if she reported them. That the applicants live in close proximity to the victim’s family and they had engaged the family of the victims. There was obviously the likelihood of interference of the witnesses. The reports also state that some of the applicants have no fixed abode.

24. In **Republic v Joktan Mayende & 3 others 2012 eKLR**, the Court held: -

"All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with Witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.

In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010."

25. In this case, the allegation that the applicants may interfere with the witnesses owing to the close proximity of their geographical position was well founded. There was also the issue of prior threats to the complainant. These clearly were compelling reasons for denial of bond. I do find that the trial Court considered the guiding principles to arrive at a just determination. That there was no irregularity in the proceedings to warrant interference by this court.

26. Accordingly, the application is dismissed.

DATED and DELIVERED at Meru this 18th day of June, 2020.

A. MABEYA

JUDGE