REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. APPLICATION E013 OF 2020

(From original conviction sentence in SOA case No. 47 of 2020 of the Chief Magistrate's Court at Chuka)

ELISEUS MUTEGI MUGWIKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The Applicant has filed the application dated 7th October 2020 under **Articles 50(2) (a), 49(1) (h), 25(a)** and **(c)** and **165(6)** and **7** of the **Constitution and Section 362(b).** It seeks revision of the orders of the Chief Magistrate issued on 17th September 2020 in ***Chuka Chief Magistrate's Court Sexual Offence Case No. 47/2020*** denying the applicant bail/bond pending trial. The applicant prays that this court issues an order releasing him on reasonable cash bail or bond terms pending the hearing and determination of the trial.

2. The facts giving rise to this application are that the applicant was charged before the **Chief Magistrate's Court Chuka** as follows:

COUNT 1:

DEFILEMENT CONTRARY TO SECTION 9(1) AS READ WITH SECTION 88(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

ELISEUS MUTEGI MUGWIKA: On the 12th day of August 2020 at [Particulars withheld] village in Maara Sub-County within Tharaka Nithi County, intentionally and unlawfully caused your penis to penetrate the vagina of **PK** , a child aged 9 years.

COUNT 11

DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF SEXUAL OFFENCES ACT NO. 3 OF 2006

ELISEUS MUTEGI MUGWIKA: On the 12th day of August 2020 at [Particulars withheld] village in Maara Sub-County within Tharaka Nithi County, intentionally and unlawfully caused your penis to penetrate the vagina of **CK.** A child aged 9 years.

ALTERNATIVE COUNT

INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCE ACT NO. 3 OF 2006:

ELISEUS MUTEGI MUGWIKA: On the 12th day of August 2029 at [Particulars withheld] village in Maara Sub-County within Tharaka Nithi County intentionally and unlawfully touched the buttocks and vagina of CK a girl aged 9 years old with your genital male organ namely penis.

COUNT III:

DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF SEXUAL OFFENCES ACT NO. 3 OF 2006.

ELIEUS MUTEGI MUGWIKA: On the 12th day of August 2020 at [Particulars withheld] village in Maara Sub-County within Tharaka Nithi County, intentional and unlawfully cause your penis to penetrate the vagina **GM** a child aged 9 years.

ALTERNATIVE COUNT:

INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCE ACT NO. 3 OF 2006:

On the 12th day of August 2029 at [particulars withheld] village in Maara Sub-County within Tharaka Nithi County intentionally and unlawfully touched the buttocks and vagina of **GM** a girl aged 7 years old with your genital male organ namely penis.

The appellant pleaded not guilty to all the charges when he was arraigned in court on 3rd September 2020. His legal counsel on record applied for his release on bail/bond before the trial magistrate but the application was denied as the prosecutor had indicated that he intended to amend the charge sheet. The applicant was remanded in custody upto 17th September 2020. When the applicant was produced in court, the prosecution did not prefer new charges but they made an application to be given more time.

3. The trial magistrate proceeded to give a ruling on 17th September 2020 and held that there are compelling reasons to deny the applicant bond/bail and ordered that he shall remain in custody pending the determination of the trial or until further orders of the court.

4. The applicant has urged this court to find that he has a right to fair trial as provided under **Article 50(2) (a**) of the **Constitution** which included the right to presume innocent until the contrary is proved. He has further urged the court to find that bail pending trial is a **Constitutional** right under **Article 49(1) (h)** and that right to fair trial shall not be limited as provided under **Article 25(a) of the Constitution.**

5. It is contended that the trial magistrate failed to consider that he is ailing, his advanced age and general bodily and physical manifestation/appearance of the applicant who appears frail and barely able to support himself. That holding him in custody especially during this time of the novel covid- 19 pandemic is highly detrimental to his survival. He urges the court to find that holding him in custody is tantamount to unreasonable, cruel, torturous inhuman and degrading treatment. He submits that he has home within the jurisdiction of this court and has no capacity to abscond.

That he appreciates and understands the ramification of interfering with witnesses either directly or indirectly. The applicant has supported the application with an affidavit sworn on 7th October 2020 where he has reiterated the grounds and that the offence is bailable. He has urged the court to consider that he does not live in the same compound with the complainants, they have protective guardians who are capable of taking good care of them and that the court has effective, functional mechanisms for witness protection to deter any possible interference with witnesses either directly or indirectly. He urges this court to order that he be released on reasonable bail terms.

6. The respondent has opposed the application and filed a replying affidavit sworn by Erick Momanyi. He depones that the application is not suitable for revision as it seeks to challenge the merits of the decision of the learned trial magistrate. He contends that the applicant ought to have moved this court by way of an appeal. That the applicant has not demonstrated and or established any incorrectness, illegality or impropriety of any proceedings before the trial court to warrant this court to exercise its powers on revision.

7. The respondent further depones that the decision by the trial magistrate was correct, legal and proper. That the respondent demonstrated before the trial magistrate that there were compelling reasons to deny the applicant bail. He contends that the victims of the sexual offences preferred against the applicant are minors who are aged nine (9) and seven (7) years as demonstrated by their birth certificates. They are children of tender years who are vulnerable witnesses. That they live in the same compound with the applicants who wields immense influence on them and there are high chances that he will interfere with the witnesses. It is further deponed that the applicant failed to produce any evidence before the trial court or even before this court to prove that he is elderly and ailing. That bail is not an express right and can be limited if there are compelling reasons. He prays that the application be dismissed.

8. I have considered the application. The issue for determination is whether the application for revision from a decision of the trial magistrate denying an accused person bail amounts to a complaint which this court can consider under its powers on revision.

Secondly, whether denial of bail/bond amounts to an illegality, impropriety or incorrect warranting this court to intervene by way of revision.

" The power of revision.

"362 Criminal Procedure Code. The High Court may call for 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.

"363 Criminal Procedure Code. (1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings. (2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court.

"364. (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 –

(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;

(b) 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 Penal 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 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:

Rev. 2015] Criminal Procedure Code CAP. 75 108 (1) [Issue 2]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."

From the foregoing, it is clear that although the High Court has wide powers on revision, when the court is called to by an applicant or on its own motion, It has to satisfy itself as to do so the correctness, legality or propriety of any finding sentence or order recorded or passed and as to the regularity of any proceedings of a subordinate court. The High Court will only exercise its jurisdiction if satisfied that any finding sentence or order recorded or passed or the regularity of any proceedings before a sub-ordinate court did not meet the required standards as to correctness legality and propriety.

9. This powers are not to be exercised in matters where an appeal lies from the finding, sentence or order of a sub-ordinate court and no appeal has been brought. It is provided in mandatory terms that no proceedings by way of revision shall be entertained at the insistence of a party who could have appealed, see **Section 364(5) Criminal Procedure Code**, above. However, the jurisdiction of this court is wide and exists in all orders, interlocutory or final except that the court will not on revision alter an order of acquittal to an order of conviction. With regard to the question of revision where the right of appeal exists, in the case of ***R.V Ajit Singh S/O Vs Singh (1957) E.A 822.*** Quoted with approval in the case of ***Charles Gitau -V- Republic***, where the Judge stated that;

"In the case the court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was in which an appeal lay"

It was stated in the case ;

" The construction of this sub-section is not free from difficulty. The opening words appear to indicate that it is concerned with cases where a right of appeal presently exists; but the last three words seem to imply that if the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed, then proceedings by way of revision shall not be entertained at his instance.

We do not propose to say which construction is correct; nor do we propose to say whether, in the instant case, an appeal by way of case stated did not in fact lie."

" We are of the opinion sub-section 5 is not intended to prelude the Supreme Court from considering the correctness of a finding, sentence of order merely because the facts of matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by Section 361 and Section 363 (1). To hold that sub-section 5 has that effect would mean that this court is powerless to disturb a finding, sentence of order which is manifestly incorrect- for instance in the case of a conviction where no offence known to the law has been proved- merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal. In our view Chhagan Raja -v- Gordhan Gopal (1963) 17(KLR 69 merely decided that, on the facts of that particularly case, the court should not make an order in revision. It emphasizes that the exercise of jurisdiction in revision is discretionary.

In this case the decision was brought to the notice of the court by crown, and the court, in exercise of its discretion, decided to call for and examine the record under the power of conferred by Section 361,"

'The decision supports the submission by the applicants that the High Court's jurisdiction for revision is not ousted by possibility of an appeal. As emphasized in the Ajit Singh and the Muhari bin Mohamed Jani decisions, the court has a wife discretion to revise orders of the trial court and the discretion is to be exercised on a case by case basis having regard to the different circumstances of each case."

What the court was saying is that the court has jurisdiction to exercise its powers of revision where the issue has been presented as a revision instead of an appeal, the discretion is to be exercised based on the circumstances of each case. The supervisory jurisdiction of the High Court over sub-ordinate Court is entrenched in the **Constitution at Article 165(6)and (7)** .

It 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 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."

In the exercise of that jurisdiction the guiding principle is that the court will exercise discretion judicially and in the interest of justice. Since the jurisdiction is supervisory, the court has to satisfy itself as to whether the order, finding or sentence is manifestly incorrect, has illegalities or improprieties tothe extent that it has occasioned a miscarriage of justice.

The question which I have to consider is whether the decision by the trial magistrate denying the applicant bail was incorrect, illegal or had improprieties. **Article 49(i) (h)** of the **Constitution** provides-

" An arrested person has the right- to be released on bond or bail or reasonable conditions, pending, a charge or trial unless there are compelling reasons not to be released."

The applicant was refused bail as the trial court found that there were compelling reasons to deny the accused person bail. That is the ruling the applicant is challenging by way of revision and not appeal.

"347 of the Criminal Procedure Code (1) Save as is in this Part provided –

(a) A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) (Repealed by 5 of 2003, s. 93.)

(c) An appeal to the High Court may be on a matter of fact as well as on a matter of law. "

"348A.

(l) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under section (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately."

There is no right of appeal from the decision of the trial magistrate denying the accused person bail since the applicant has not been acquitted or convicted nor are there other circumstances as provided under **Section 348 A of the Criminal Procedure Code** supra, the applicant was in order when he approached this court by way of revision. The ruling of the trial magistrate is basically an order denying the applicant bail for which this court has jurisdiction to call for the record and examine its correctness. The contention by the respondent that the applicant ought have filed an appeal is with respect not correct. Since there is no provision for appeal against an order denying the applicant bail, the revision which is in the nature of judicial review of the order of the trial court to ascertain its legality and correctness, the application is properly before this court.

10. Upon perusal of the proceedings before the trial magistrate, he relied on bail and bond policy guidelines upon noting the relationship between the applicant and the complainants. He relied on the guidelines which states:-

"Here the courts reason if the accused person is either related to the witness or stands in a position of influence vis- a vis the potential witness. There could arise a legitimate, anxiety about the impact the accused person might have on the witnesses if he or she is released pending trial."

11. On the likelihood of interfering with the witnesses he relied on the following guidelines;

> ***"…Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if (i) there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and (ii) the court cannot impose conditions to the bail or bond to prevent such interference. …. The country is not only experiencing an upsurge of defilement cases, but many such cases are compromised as soon as accused persons are released on bail. This happens because the families of the accused person and the victim usually negotiate to settle the cases out of court. Some courts are dealing with this challenge by denying accused persons bail until witnesses, especially the victim, have testified in such cases. The court's have adopted the same approach in murder cases, particularly where the witnesses are closely related to the accused person…"***

He concluded that there were compelling reasons to deny the applicant bail. Under **Section 22(2) of the Sexual Offences Act**, it is provided as follows:-

> ***(4)" In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act (No. 8 of 2001)."***

In this case there is no dispute that the applicant is related to the minors who are the complainants. The Act allows the removal of the accused from the house until the matter is heard and determined. In this case the applicant is a close relative who is living in the same compound with the complainants. It is in the interests of justice that he is removed from the homestead pending the hearing and determination of the case. The right to bail pending trial is not absoluted as it can be denied where compelling reasons to deny him bail are established. The order by the trial magistrate is not in-correct. Criminal justice process is not just about the fair trial of the accused. The court must balance the interests of the victims of crime and the rights of the accused. The law has been put in place to ensure that the victims' interests must be considered. The victims are now more than before given a right to be heard not by just giving evidence but also on decisions which may affect her.

Section 4(2) (b) of the Victim Protection Act 2014 provides-

> ***" Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken."***

In this case, having considered the nature of the charges, the fact that the complainants are minors and the applicant, who is their grandfather lives in the same homestead with them, I find that the trial magistrate was right in holding that there were compelling reasons to deny the applicant bail. The order was based on good grounds and there was no allegations of incorrectness, illegality or impropriety.

I find no reason to interfere with the order of the trial magistrate. The trial has a hearing date and is likely to be disposed off expeditiously.

I find that the application is without merits and is dismissed.

Dated, signed and delivered at Chuka this 19th day of October 2020.

L. W. GITARI

JUDGE

19/10/2020

Ruling signed, dated and delivered in open court in presence of Mr. Kirimi for Applicant and Mr. Momanyi for State.

L.W. GITARI

JUDGE

19/10/2020