



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 348 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

SWALEH ALI MWINYI.....RESPONDENT

RULING ON REVISION

1. This court was through a letter dated 15th May, 2018 moved by Mr. Muteti, Senior Assistant Director of Public Prosecutions, for orders on revision under the provisions of Sections 362 to 365 of the Criminal Procedure Code.
2. The said letter outlines the reason for seeking revision as being that the respondent was charged with the offence of defilement of children of tender years way back in the year 2013 but he had avoided trial, thereby denying justice to the victims. The said letter further states that the respondent's bail was canceled by the lower court after he absconded trial. It further states that when he was arrested, fresh orders were issued releasing the respondent to bond pending trial.
3. The Senior Assistant DPP expressed his concern that releasing the respondent on bond would seriously undermine public trust in the Kenyan justice system. Counsel relied on the affidavit of Abubakar Mohamed Omar sworn on 15th May, 2018 to support his request for orders on revision.
4. One Mwidani Khamis Mwidani, swore an affidavit on 28th August, 2018 to oppose the application. Counsel for the applicant filed submissions on 15th October, 2018, whereas Counsel for the respondent filed his on 1st November, 2018. Both Counsel left it to this court to peruse the documents in support of their arguments and to deliver a ruling.
5. In his affidavit, Mr. Abubakar Mohamed Omar deposes to the fact that he is the father of one of the victims of a sexual offence and the guardian to another victim of a similar offence, that the respondent herein was charged with. He deposed that the respondent was arrested and arraigned in court on 18th October, 2012 and that thereafter 5 witnesses testified.
6. In paragraph 5 of the said affidavit, he deposes that on the 7th November, 2013, when the Doctor was to give evidence, the respondent absconded court and warrants of arrest were issued against him. The said deponent in his affidavit further avers that he took over the task of looking for the respondent after the Police failed to effect the said warrants.
7. He further states that he resorted to walking around with the warrants of arrest and that on 12th May, 2018, he spotted the respondent attending a wedding at Seifee Hall. He rushed to Makupa Police Station with the said warrants and sought Police assistance. He was given 3 plainclothes Police Officers who accompanied him to Seifee Hall where they arrested the respondent. They booked him at Makupa Police Station vide OB 18/12/05/18 at 1425 hours.
8. In his affidavit, the deponent avers that he personally talked to the Prosecutor of the court where the respondent was taken after he was re-arrested and gave her documents to enable her to explain to the Hon. Magistrate that the respondent had absconded court since 7th (sic) November, 2013. He further states that the foregoing was supposed to guide the prosecutor in opposing an application for the release of the respondent on bond or reinstatement of his bond. The deponent deposes that he was however shocked when charges were read out to the respondent afresh and he was granted a bond of KShs. 1 Million with a surety of the same amount. He states that he also learnt that a new file, Sexual Offence No. 25 of 2018 was opened with regard to the same matter yet there was an earlier Criminal Case No. 2993 of 2012 still in court.
9. The replying affidavit filed on behalf of the respondent was sworn by Mwidani Khamis Mwidani who states that he is a brother to the respondent. The competence of the said deponent to swear the affidavit on behalf of the respondent was challenged by the applicant who urged this court to strike out the same for having been sworn without authority from the respondent. The applicant submitted that the

respondent who was well versed with the facts of the lower court case, was the best placed to swear the affidavit and to give facts that were within his knowledge. Mr. Magolo P., for the respondent urged this court to invoke the provisions of Article 159(2)(d) of the Constitution to cure the lapse.

10. This court notes that no explanation has been put forth in the affidavit filed by the deponent to indicate why the respondent could not swear it himself to oppose the revision. The said deponent has in his affidavit not averred that he was authorized by the respondent to swear an affidavit on his behalf. It is my finding that the affidavit filed on behalf of the respondent is incompetent. I decline to invoke the provisions of Article 159(2)(d) of the Constitution in favour of the respondent and as a consequence thereof, I hereby strike out the affidavit sworn by Mwidani Khamis Mwidani on behalf of the respondent.

11. Article 49(1)(h) of the Constitution of Kenya, provides for the release of an arrested person on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be release the said person. The lower court record is very clear that the respondent absconded court in the course of the proceedings in Mombasa Chief Magistrate's Court Criminal Case No. 2993 of 2012. The lower court record indicates that on 6th November, 2013, the Prosecution was ready to call its 6th witness and the court gave a time indication of 11.00 a.m., for the hearing of the case. Come the said time, the respondent was nowhere to be seen, he had disappeared. A warrant of arrest was issued and the case was mentioned several times in the lower court before it was withdrawn by the Prosecution on 22nd August, 2016.

12. The respondent was re-arrested and charged in Mombasa Chief Magistrate's Court Sexual Offence No. 25 of 2018. The charge sheet reveals that the particulars of the two counts of defilement he has been charged with are similar to the previous ones and the victims are the same. The new case can therefore not be treated as being totally isolated from what transpired in the previous case with regard to the conduct of the respondent when he was released on bond.

13. The respondent was arraigned in court on 15th May, 2018 for Mombasa Sexual Offences No. 25 of 2018, the record does not show if Ms Fundi, the Prosecution Counsel, informed the Hon. Magistrate that the respondent had jumped bail in a previous case that he had been charged with, namely, Mombasa Chief Magistrate's Court Criminal Case No. 2993 of 2013. Going by the court lower record, this court cannot make the presumption that the Hon. Magistrate was aware of the earlier case which had stalled due to the absence of the respondent. If the said information was given to the Hon. Magistrate, then it was not recorded.

14. In **Republic-vs Danson Mgunya & Another** [2010] eKLR, M.K. Ibrahim J (as he then was) held thus on the issue of bail pending trial:-

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. According directly from the omnibus criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above provision is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”

15. In Nairobi High Court Miscellaneous Criminal Application No. 372 of 2017, **Napoleon Wakukha Murende vs Republic**, Kimaru J in making reference to the **Danson Mgunya** case above, stated thus:-

“It is clear from the above cited decision that the most important consideration that the court should take into account is whether the accused should attend court to stand trial. In the present application, it is clear that the applicant's past conduct militates against the court exercising discretion in his favour.” (emphasis added).

16. The respondent in this case is facing 2 counts of defilement of children aged 7 and 9 years. His past conduct which I have captured in this ruling works counter to him being released on bond pending hearing in the new trial. In his submissions Mr. Magolo P, cited the case of **Joses Kimathi Murumua and 3 Others vs Republic** [2013] eKLR where Lesiit J highlighted the factors that would work against an accused person being granted bond or bail pending trial. One of the factors is the failure by an accused person to turn up at his trial or to surrender to custody. In the present case the respondent by his conduct has proved that there is a likelihood of him not turning up in court for the new trial.

17. The provisions that empower this court to deal with matters that call for revision are the provisions of Article 165(6) and (7) of the Constitution. Similarly Sections 362 and 364 of the Criminal Procedure Code, give supervisory jurisdiction over subordinate courts. The latter provisions state as follows:-

“362. 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 propriety of any finding, sentence or order recorded or passed and as the regularity of any proceedings of any such subordinate court.”

364 (1). In the case of proceedings 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)

(b) *In the case of any other order other than an order of acquittal alter or reverse the order.*

(c)

(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.”

18. In the circumstances of this case, the complaint raised by the applicant is valid. I therefore invoke the provisions of Section 364(1) (b) of the Criminal Procedure Code and hereby revise the order made by Hon. Kagoni releasing the respondent on bond pending trial in Mombasa Chief Magistrate’s Court Sexual Offence No. 25 of 2018. I hereby order that the respondent will be remanded in prison until his case is heard and determined.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ngina Mutua- Prosecution Counsel, for the applicant

Mr. Magolo P., for the respondent

Mr. Oliver Musundi - Court Assistant