REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 6 OF 2019

PROSECUTOR.....REPUBLIC

VERSUS

JULIUS KIPYEGO MENGICH.....1ST ACCUSED

PIUS KIPKORIR MOSONIK *Alias* KIRONGOS ....2ND ACCUSED

RULING

The application before me was brought by the prosecution, seeking a stay of the orders which the Court made on 14th February 2019.

1. The Respondents, **JULIUS KIPYEGO MENGICH** and **PIUS KIPKORIR MOSONIK** have been charged with the offence of **MURDER**.

2. On 14th February 2019, the accused persons pleaded "*Not Guilty*".

3. Immediately after the Court recorded their plea of "*Not Guilty*" the accused persons asked the Court to admit them to Bail and Bond respectively.

4. In response to that application, the prosecuting counsel, Miss Gathu informed the Court that the prosecution did not oppose the issuance of Bond.

5. In the circumstances, the Court granted Bond to each of the accused persons. The said Bonds were for Kshs 500,000/= each, together with two sureties of similar sum.

6. On the afternoon of the same date (14th February 2019) the prosecution filed the current application Under a Certificate of Urgency.

7. The State said that it was seeking a review of the orders for the grant of Bond, because there was an error on the face of the record.

8. The said error was;

> ***"……. that the honourable court was not aware that the matter is related to the one in Criminal Case No.27 of 2018 i.e. R Vs Isaac Kiptoo Rono alias Malakwen; wherein the court received a probation report and affidavit objecting to the release of accused person on bond."***

9. The state also said that the orders granting bond in the case would have far reaching ramifications in the criminal justice system.

10. When responding to the application, Mr. Maua, the learned advocate for the 1st accused noted that this Court was already functus officio, as it had already rendered its decision on the question of bond.

11. In any event, if there were factors affecting the accused in the case of **REPUBLIC Vs ISAAC KIPTOO RONO CRIMINAL CASE NO. 27 OF 2018**, the 1st accused should not be assessed on the standard of measure applicable to that other case.

12. The 1st accused views the present application as a belated attempt to frustrate him, based upon some ulterior motives.

13. On his part, Mr. Onsongo, the learned advocate for the 2nd accused, submitted that the matters which the State was raising in this application were already within its knowledge when the prosecution told this Court that it had no objection to the grant of Bond.

14. Furthermore, it was pointed out that the circumstances of each accused person were different, and that therefore the circumstances existing in one case should not form the basis of an order affecting another accused, in a different case.

15. In this case, it is common ground that the Court already granted bond to both accused persons.

16. The Court was reminded that the accused persons had not violated the terms and conditions which the Court had imposed when it granted bond.

17. In determining this application I first note that the prosecution has not asserted that there were any new developments in the case, which could warrant a review of the orders already granted.

18. Therefore, whilst it is open to the Court to review its orders in appropriate circumstances, the party seeking revision or review would need to satisfy the Court that there was sufficient legal or factual basis for any such revision or review.

19. The prosecution has said that there was an error on the face of the record.

20. However, the prosecution has failed to point out the nature of the said mistake.

21. On my part, I have not found any mistake on the face of the record. I so find because there is nothing which is on the record of the proceedings which constitutes a mistake either of commission or of omission.

22. If a Court record contains something which was not said by the parties, or if the record does not contain something which was stated by one or another party, that would be an error.

23. And if the error was acknowledged by the parties, or by the Court, or if the error was so obvious that it could not be denied, it could be described as an error apparent on the face of the record.

24. An example of such an error would be when the Court attributed to a plaintiff, a statement which was made by the defendant.

25. A second example would be when the Court made a finding that a witness had denied something, whereas the record of the proceedings clearly shows that the said witness had actually admitted that something.

26. In this case, not a single error was pointed out from the record of the proceedings.

27. If anything, the Applicant is saying that the error on the face of the record was the fact that the Court was not aware that this case was related to **Criminal Case No. 27 of 2018**.

28. Whilst it is a fact that the Court was not aware whether or not this case was related to **Criminal Case No. 27 of 2018** (or to any other Criminal Case) that cannot be said to have been an error.

29. If the prosecution or the accused had made known to the Court, the relationship between this case and another case, and if the Court had then rendered a decision which was inconsistent with the obvious uncontroverted information, it could be said that there was an error on the face of the record.

30. In this case, the prosecution expressly told the Court that they did not oppose the grant of bond. Therefore, I find that there was no error on the face of the record.

31. The decision to grant bond was informed by the information provided by the prosecution, that they did not oppose the application for bond pending trial.

32. The prosecution may not have been fully instructed by the Investigating Officers or by whoever was responsible for telling the prosecution about whether or not the State had compelling reasons for objecting to bond.

33. But, as the prosecution told the court that they had no objection to the grant of bond, the Court's decision to grant bond cannot have been an error.

34. If anything, the Court would have erred if it had denied the accused bond, when the prosecution had not put forward compelling reasons to warrant such denial.

35. When the prosecution asks the Court to stay the orders made on 14th February 2019, they are asking me to negate the said orders.

36. I have found no basis in law or in fact to warrant the stay of the orders in question. Accordingly, the application dated 14th February 2019 is rejected.

37. However, each party will bear his own costs of the said application. I so order because I find that the prosecution believed that the action they were taking was in the nature of safeguarding public interest.

38. Finally, I wish to make it clear that all through the trial of the accused persons, matters of bond or bail can always be re-visited, if circumstances arise that would warrant such re-visit.

39. Mr. Onsongo advocate mentioned an example of a situation which could prompt an application to re-visit orders already made, when he alluded to the fact that the accused had not violated any terms or conditions which had been imposed by the Court.

40. The converse is also true; that if the accused had been denied bail, he could always file another application before the same Court if he was of the view that the circumstances which had been deemed as compelling reasons were no longer prevailing.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **28th** day of **March** 2019

FRED A. OCHIENG

JUDGE