



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 7 OF 2019

DANIEL KYALO LUA

ESTHER NDUNGE

RUTH NTHENYAAPPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. By letter dated 22nd March, 2019 indicated as being brought under Section 362 and 363 of the Criminal Procedure Code, Article 165 (3) (B) and (7) of the Constitution, the applicants sought to move the court to grant the accused persons bail pending trial, to refer the case to another magistrate and stay of proceedings of the lower court scheduled for 4.4.2019. The applicants request that the Honourable Court call for and examine the **Cr Case No 148 of 2019 Republic v Ruth Nthenya, Daniel Kyalo Lua and Esther Ndunge** and specifically the ruling dated 7.3.2019 for purposes of satisfying itself and granting the accused persons bail pending the hearing and determination of the case as the accused persons were denied bond on the basis that there was acrimony between the accused persons and the complainants and which should not be a compelling reason to deny the accused persons bond pending trial.

2. The State opposed the application vide a replying affidavit that was sworn on 16th April, 2019 by the investigating officer No. 67156 PC David Kiprono. The deponent averred that the accused persons are charged with robbery with violence and that the complainants continue to live in fear as they have received threats concerning the complaint that they made at the police station. The deponent averred that the accused persons are also facing charges of assault in Criminal Case 71 of 2019 and that they are out on bond in respect of the same. He averred that the accused persons are up to no good and have sworn to kill anyone who dares to work on their premises and thus there is likelihood of interference with witnesses and even commission of other offences. He averred that the grant of bail is a matter of discretion that is subject to compelling reasons and there were compelling reasons warranting the denial of bail to the accused persons.

3. The applicants submitted vide written submissions filed on 17th April, 2017 that the reasons advanced by the prosecution were not compelling reasons to warrant denial of bail to the accused persons. They cited the case of **Republic v Robert Zippora Nzilu (2018) eKLR** where Justice Odunga observed that the court shall lean in favour of liberty and grant bail provided that the interests of justice will not be prejudiced by the same. Learned Counsel submitted that the court may grant orders to release the applicants on reasonable bond terms and that the case be heard by a different magistrate.

4. The respondent did not file submissions and sought to rely on the replying affidavit as well as the record of the trial court.

5. The issue for determination is whether the court can grant the orders sought.

6. The application is brought under Section 362 and 363 of the Criminal Procedure Code. However section 363 is not applicable for it relates to the exercise of revisionary powers of a subordinate court over another subordinate court. The jurisdiction of the High Court to review or revise orders of a subordinate court or tribunal is provided for Under **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code**

7. The Sections provide 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 or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate 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 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 than an order of acquittal, alter or reverse the order.

(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 proceedings by way of revision shall be entertained at the instance of the party who could have appealed.”

8. According to the charge sheet, the applicants were charged with two counts of the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The applicants' case is that they are entitled to bail pending trial and therefore it was not fair for them to be denied bail by the trial court which, according to them, relied on non-compelling reasons. Article 49(1)(h) of the Constitution safeguards this right to bond or bail pending trial.

9. It is important to point out that the grant of bail and bond is an exercise of discretion by a trial court. The Bail and Bond Policy guidelines of the Judiciary has proposed that the court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision.

10. The Guidelines recommend that officers of the probation and aftercare service should prepare reports as soon as practicable but not later than two weeks from request. The argument has been that there is need to balance the grant of bail with the needs of the victims.

11. In this regard, this court had due regard to the affidavit on record that raised apprehensiveness of the prosecution towards the grant of bail to the accused persons and as it stands the court is not able to make a decision as to whether or not it is fair to grant or to refuse bail.

12. In the circumstances foregoing, having considered the application, it is the considered opinion of this court that officers of the probation and aftercare service should prepare reports in respect of each accused person so that the court may make an informed decision. Accordingly, this court hereby declines to allow the application of Revision and stays the decision until the said report is availed to the court.

13. In the result the following orders are made:

a. The County Probation officer Machakos is directed to prepare a report and file the same by 2nd May, 2019.

b. The matter shall be mentioned on 2nd May, 2019 for further orders.

It is so ordered.

Dated and Delivered at MACHAKOS this 24th day of April, 2019.

D.K. KEMEI

JUDGE