



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 152 OF 2018

(Original Embu CM Criminal Misc. Case No. 38 of 2018)

SWALLEH ABDALLAH NJIRU.....1ST APPLICANT

NEWTON MUGENDI KARIMI.....2ND APPLICANT

DENNIS MWANIKI KINYUA.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicants seek for revision of orders of Honourable Ndengeri RM in Misc. Criminal Application No. 38 of 2018 as considered alongside CM Sexual Offence (SO) No. 16 of 2018 that was consolidated with CM Criminal Case No. 479 of 2018 withdrawing and cancelling the bond of the applicants and immediately reinstate the bond terms.
2. The grounds on the application may be summarized as follows:-
 - (a) *That the Resident Magistrate's court had no jurisdiction to entertain the application dated 18/06/2018 and lacked powers or to grant the orders sought therein.*
 - (b) *That the applicant PC Marion Barus had no locus standi to institute the said application.*
 - (c) *That the procedure followed by the magistrate in entertaining the application was flawed.*
 - (d) *That the orders issued contravene Articles 19(2), 20(1), 20(3)(B), Article 20(4)(A) and (B), 22(3)(C) of the Constitution.*
3. The application was opposed by the respondent through two replying affidavits. The first one is that sworn by PC Marion Barus on 26/06/2018. She deposes that she is the investigating officer in Criminal Case No. 479 of 2018. She states that she received information from an informer that the applicants were planning to kill the victim in order to destroy evidence.
4. It was further stated that the applicants took plea in the case on 31/05/2018 and were released on bond and that from that time, the complainant has been apprehensive of her security and fears for her life. This forced the victim to relocate from her home and sought safe refuge elsewhere with the assistance of the deponent and the children's officer.
5. The matter was reported at Itabua police station. The OCS Itabua in liaison with the children's officer have now put the victim in a safe-house where she resides awaiting the process of being put under witness protection programme.
6. The second affidavit was sworn on 9/07/2018 by the respondent's counsel Leah Mati. She states that she has been reliably informed that the applicants are facing a charge of abduction before the subordinate court. The 1st applicant faces a further charge of defilement under the Sexual Offences Act. She further stated that the applicants were plotting to kill the complainant.
7. The counsel further deposed that the decision of the learned magistrate was informed by information on the threats to kill as reported by the complainant. The rights of the complainant to give evidence in a free atmosphere must be protected. It stated further that bail is not an absolute right in view of the threats to kill and that the orders to cancel the bonds of the applicants were justified.
8. The application was argued orally in court by Mr. Guantai for the applicants and Ms. Mati for the respondent.

9. This application for revision is premised on Section 362 of the Criminal Procedure Code which empowers this court to correct errors, irregularity or any impropriety in any proceedings, sentence or order as to satisfy itself as to the correctness, legality or impropriety.

10. Section 362 provides:-

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.

11. Article 165(6) empowers the High Court to supervise the subordinate courts. This may be done by calling the record of any such court or tribunal and examining it with a view of correcting any errors or mistakes.

12. This being a revision application, the applicant must satisfy the court that the subordinate court made some mistake or error in the proceedings or order.

13. The first issue of whether the application was properly before the court that issued the orders. I am guided by Article 157(6) of the Constitution which creates the Office of the Director of Public Prosecutions and gives it powers to “*institute and undertake criminal proceedings against any person or before any court*”. The ODPP has power “*to take over and continue any criminal proceedings commended in any court by any other person other than that by a court martial...*”

14. The criminal proceedings in CM Criminal Case No. 479 of 2018 and Sexual Offences No. 16 of 2016 as consolidated were instituted by the independent office of the ODPP. The investigating officer PC Barus is working under the Office of the Inspector General which is charged with functions of investigations among others.

15. The officer was the applicant in the application instituted before the honourable magistrate and which resulted in the suspension of the applicants bail orders. The Director of Public Prosecutions is the only person who can institute criminal proceedings in any court and against any person. The current proceedings in the consolidated criminal cases Nos. CM Criminal Case No. 479 of 2018 and Sexual Offences No. 16 of 2018 were lawfully instituted and it is only in those case files that an application to alter or cancel orders made in the main files may be instituted.

16. The Miscellaneous Criminal Application No. 38 of 2018 was misplaced and not properly before the court. PC Barus had no authority whatsoever to bring the said application before a court of law. In the event that she had issues for the court to deal with, the right procedure was to bring them to the attention of the ODPP for action or for advise.

17. It follows that any orders issued by the honourable court in that application are null and void *ab initio* and I hereby so declare.

18. Once the court reaches the finding that the application was incompetent and that the orders made were of no legal consequence, the court need not deal with the other issues raised by the applicant.

19. I find that this is a case that falls under Section 362 of the Criminal Procedure Code for revision for which the powers of this court should be invoked.

20. I find this application is merited and it is hereby allowed as prayed.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mate for the Respondent

Applicant present