REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION CASE NO. 224 OF 2018

(From the order and Ruling in Criminal Case No. 1197/18 & 1241 of 2001 of the Principal Magistrate's Court at Baricho).

NJIRAINI MWANIKI Alias MOSES NJOKA MUNYI.....1ST APPLICANT

RICHARD THIAKA MUNYI.....2ND APPLICANT

PETER MWANGI NJIRAINI..... 3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application pending before court is an application dated 05/09/2018 seeking that the Court revises and/or set asides the order given on 30/08/2018 denying bail to the accused persons in Baricho **Criminal Case No. 1197/18 and 1241/18** and direct that the trial court gives bail on reasonable terms.

It is the applicants case that they were charged with the offence of destroying crop of cultivated produce contrary to **Section 334(a) of the Penal Code.** They were formally charged in court on 16/08/2018 when their plea was taken in Baricho Criminal Case No. 1197/18. The 1st applicant Njiraini Mwaniki was also charged in another file that is Baricho Criminal Case No. 1241/2018 with the offence of destroying cultivated crop **Contrary to Section 334(a) of the Penal Code**. The plea was taken on 22/8/2018.

In a ruling delivered by the trial Magistrate on 30/8/2018, the applicants were denied bail on the basis that there were compelling reasons.

It is the contention by the applicants that the trial Magistrate erred for the following reasons:

- There was no evidence that the applicants threatened to kill the complainant.
- The court stated they threatened to kill their father who the court assumed was the complainant which was not the case.
- The court denied the complainants bond stating that they were likely to commit further offences.

The applicant state that they have committed themselves to attend court for hearing whenever they are required.

For the State it was submitted that the applicants were charged in prior proceedings with the offence of threatening to kill the complainant. In Criminal Case No. 1241/2018 they were charged with destroying cultivated produce against the same complainant. They committed the offence while on bond.

It is submitted that the trial Magistrate was influenced by the provision of **Section 9 of Victim Protection Act** in making his decision. That the trial Magistrate reached the correct position so that the applicants don't continue committing offences.

The ruling of the trial Magistrate states the applicants were charged with the offence of threatening to kill the complainant in **Criminal Case No. 493/2018** and while out on bond they were alleged to have destroyed crops belonging to the complainant and they were charged in Criminal Case No. 1241/18.

From the record bail was opposed on the ground that the applicants security was a threat. The court ordered that an affidavit be filed by the Investigating Officer stating the reason for opposing on bail. The affidavit introduced a fresh allegation that the applicants were likely to interfere with the complainant. The trial Magistrate based his ruling on the affidavit filed by the Investigating Officer to deny the accused

persons bail.

I have considered the application and the submissions.

1. Revision

The power of this court to revise any order issued by a subordinate court in a criminal case is provided for under **Section 362 and 364 of the Criminal Procedure Code**. Once it is brought to the attention of this court that an order issued was incorrect or illegal, this court is mandated to examine the record of the said subordinate court to determine the correctness, legality or propriety of the said order.

> **Section 362 of the Criminal Procedure Code** states;
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> ***"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".***
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> ***Section 364 (1) (b) of the Criminal Procedure Code*** states;
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> ***"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— in the case of any other order other than an order of acquittal, alter or reverse the order".***

Under **Article 49 (1)(h) of the Constitution** bail pending trial is a constitutional right which should not be denied unless there are compelling reasons not to be released.

It provides:

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

The grant of bail is a constitutional right which is based on the trite principle that a person charged is presumed to be innocent until proved guilty. The **Constitution** does not define what compelling reasons are but courts have endevoured to determine compelling reasons based on the circumstances of each case. The purpose for granting bail being to ensure that the rights of the accused to liberty are not violated and to secure the attendance of the accused person at his trial.

The right to bail under the **Constitution** is not an absolute right as it may be denied if there are compelling reasons. When considering an application for review, the court considers the correctness, legality or propriety of the order. The burden is on the applicants to prove that the order was illegally or improperly issued. The applicants are stating that the trial Magistrate erred by assuming the complainant was their father and there was no evidence that they threatened to kill the complainant. However what informed the trial Magistrate in denying the applicants bail was that the applicants had committed subsequent offences while out on bond. They were charged with creating disturbance in Criminal Case No. 496/2018. They were subsequently charged in Cr. Case No. 1197/18 on 16/8/18. The 1st applicant was charged in Criminal Case No. 1241/18 on 22/8/2018. The trial Magistrate was right in holding that there were compelling reasons since the applicants had continued to commit offences while out on bond. This was further reinforced by the affidavit of the Investigating Officer. The trial Magistrate considered the compelling reason based on the decision in **R –v- Mgunya & Another** and the provisions of **Victim Protection Act, Section 4(b) and 9 thereof** which in my view were properly applied based on the matters laid before him. In a decision by my brother Justice Wakiaga in the **Case of George Aladwa Omwera –v- R 2016 eKLR** it was stated:

George Aladwa Omwera v Republic [2016] Eklr. The Court stated;

> **"It** (revision) **is only exercised to correct the manifest error in the order of the subordinate courts but should not be exercised in a manner that turns the Revisonal court into appeal. The jurisdiction cannot be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered……**
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> **If this court was to grant the orders sought by the state without the benefit of further additional evidence then this court will be deemed to have interfered with the exercise of the discretion of the trial court by submitting the discretion of the same with its own and thereby exceeding the revision or supervisory jurisdiction which is limited to interference in all cases of incorrectness, illegality and impropriety of the decision resulting in miscarriage of justice.**
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> **Having looked at the record of the proceedings in this matter I find that the virtual ground taken in this revision by the applicant is that the trial court did not properly appreciate the evidence tendered on behalf of the state and the authorities in support thereof which is not a ground for revision. I therefore find that there is no manifested illegality, error or irregularity committed by the court to enable me interfere with the decision herein on bail, to enable me exercise the jurisdiction herein".**

I am persuaded by the decision as it has stated the correct legal position with regard to revision of order by High Court.

The applicants have not pointed out any illegality or error which the trial Magistrate committed. It was a fact before the trial court that the applicants were facing multiple charges with some being committed while they were out on bond and against the same complainant. The decision cannot be stated to have been made in error. There were sufficient reasons for the trial Magistrate to rule the way he did. Where an accused continues committing the same offence, offence for which the court has released him on bond, in the circumstances of this case it was a compelling reason to deny them bond.

Having considered the circumstances surrounding the case, I find no basis for me to revise the order. The application is without merits. I dismiss it.

Dated at Kerugoya this 25th day of October 2018.

L. W. GITARI

JUDGE