



**Bule v Director of Public Prosecutions (Criminal Appeal 197 of 2015)
[2017] KEHC 8339 (KLR) (28 February 2017) (Judgment)**

Neutral citation: [2017] KEHC 8339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 197 OF 2015
DO CHEPKWONY, J
FEBRUARY 28, 2017**

BETWEEN

ALI ABDI BULE APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Appeal from the Ruling of D Mochache, SPM delivered on November 2, 2015 in the Chief Magistrate's Court at Mombasa in Criminal Case No 2143 of 2015)

JUDGMENT

1. The Appellant, Ali Abdi Bule, was charged with the offence of Ethnic Contempt contrary to Section 62(1) of the *National Cohesion and Integration Act*, 2008 in Count 1.

The particulars were that;

“On July 15, 2015, at Hurara Centre, Garsen Sub-county in Tana River County within the Republic of Kenya he uttered words to wit ‘nitahakikisha Wagiriama Wote Watarudi Mahali Wametoka’, which words were intended to incite feelings of hostility and violence against the Giriama community on the bases of their ethnicity”

2. In Count II, the Appellant was charged with incitement to violence and disobedience of the law contrary to Section 96(a) of the *Penal Code*.

The particulars were that;

“On July 15, 2015, at Hurara Centre, Garsen Sub-County in Tana River County, within the Republic of Kenya without lawful excuse he uttered words to wit ‘Ninaona Nyinyo Hamna Hakiri Was Hivyo Mimi Nitanunua Panga Ishirini Niwape Watu Wangu Ama



Nyinyi Wagiriama Mwanze Vita Mkatwe Vichwa kabisa’, which words indicated it desirable to bring death and physical injury to persons in Kenya”.

3. The charges against the Appellant were presented to court on October 28, 2015 and the Director of Public Prosecutions applied for Summons to issue upon the Appellant to appear before court for plea-taking. The court proceeded to issue Warrant of Arrest against the Appellant.
4. On October 30, 2015, the Appellant presented himself before court upon hearing of the Warrant of Arrest against him. Because of this, the court lifted the said Warrant of Arrest and directed that the Appellant appears before it on November 2, 2015 for plea.
5. And on November 2, 2015, the Appellant attended court for plea-taking. The court proceeded to read the charges to the Appellant and he pleaded not guilty to both counts.
6. The Appellant, through his learned counsel, Mr Angima, applied to be released on bond on reasonable terms, since he is law abiding and would attend court whenever he would be required, he is innocent until proven guilty and is a Senator.
7. Though they did not object to the Appellant being released on bond, the prosecution applied that he be released on the strongest/strictest terms in view of the nature of the case and what was happening at the time. The prosecution went on to pray that the court orders the following condition upon releasing the Appellant in bond:-
 1. The Appellant/Senator avoids visits to Kanagoni Area of Kilifi County where we have Internally Displaced People courtesy of this matter.
 2. That the Appellant, in his public appearances should stay clear of discussing this matter because he has the interests of the communities.They urged the court to consider granting the Appellant a bond of Kshs.5 Million.
8. The Appellant’s counsel agreed to conditions being imposed upon the Appellant at and above the bond. He however objected to the bond of Kshs 5 Million.
9. In the Ruling, the Trial Magistrate on releasing the Appellant on bond, ordered that he;
 - a. be released on a bond of Kshs 1,000,000/= with one surety or cash bail of Kshs 500,000/=.
 - b. shall not set foot at Karagoni Area of Kilifi County pending the hearing and determination of the case. That he shall not even attend the burial of his close friends in that area without a court Order.
 - c. be prohibited from making any utterances with respect to this case pending its hearing. That should he forget or so utter, this bond shall automatically be cancelled and he shall remain in custody until this matte is heard and determined.
 - d. shall not even discuss the case on Social Media or grant an interview to the Press.Should he disobey, his bond shall be cancelled.
10. The Appellant was aggrieved with some of the terms/conditions of bail/bond that were imposed upon and he filed a Petition of Appeal dated November 16, 2015 whereby he cited nine (9) grounds. I will not repeat all of them here but they can be categorized as follows:-
 - a. Grounds 1, 2, 5, 7 and 8 are against the terms of bail/bond imposed upon the Appellant.



- b. Grounds 3, 4 and 9 are directed against exercise of judicial discretion by the learned Trial Magistrate.
 - c. Ground 6 accuses the Honourable Learned Magistrate of denying the Appellant of his constitutional rights of freedom of expression, association and movement.
11. After eight (8) days, on November 24, 2015, the Appellant filed a Notice of Motion application under Certificate of Urgency, anchoring it on Sections 131 and 132 of the Criminal Procedure Code, Articles 49(b) 50(g) and 159(c) of the Constitution of Kenya and all enabling laws.
 12. I wish to point out that at the outset, the application introduced different subject from the certificate that enabled it to be fast-tracked. The reasons on the face of the certificate are as follows:-
 - a. The Criminal Case from which the interlocutory appeal arose was fixed for hearing on December 9, 10 and 11, 2015.
 - b. The terms of suit/bond were oppressive as they would curtail the Applicant from discharging his duties as a Member of Parliament due to the restriction placed on his movement.
 - c. The Applicant is apprehensive that he would not get justice from the Honourable Court presided over by the Honourable D. Mochache.
 13. The Applicant includes that because of the reasons offered above, the appeal be fast tracked.
 14. The Application is seeking the following orders:-
 - i. Spent;
 - ii. Spent;
 - iii. Spent, since he Applicant has complied.
 - iv. That this appeal be fast tracked and heard on priority basis to pave the way for the hearing of the pending Criminal charges the Applicant faces.
The same was premised on the grounds that:-
 - a. The trial of the Applicant was slated from December 9, 10 and 11, 2015 (Spent).
 - b. The Appeal which addressed the said factors necessarily needs to be fast tracked before the trial can proceed.
 - c. The Appeal will be rendered nugatory if it is not fast tracked and heard first and is therefore in the interest of justice that this application is granted.
 - d. The Applicant is exposed to a precarious situation which cannot hold for long before he is in trouble over the impossible conditions.
 15. The Respondents have through their affidavit sworn on December 14, 2015 by Chief Inspector Robert Mabera deponed at paragraph 2 that the Appellant has complied with the financial terms and that he is a free man to date. He reaffirms that the appeal is purely on terms of bond/bail and therefore the plea that the Magistrate recused herself is not properly court.
 16. He however concedes at paragraph 2(h) that the terms can be varied to the extent that he is limited from visiting the areas where the displaced people are camping.



17. We are also informed at paragraph 3 that the areas he is restricted from visiting are in Kilifi County whereas he is a Senator for Tana River County.
18. The Investigating Officer supports the speedy resolution of the appeal to allow the trial to proceed.
19. I have gone through the proceedings before the trial court, the Ruling that has been appealed against the Appellants and Respondents submissions plus a list of authorities filed by both parties and weighed everything against the pleadings as laid out herein.
20. The picture that emerges from the Appellants' pleadings vis-à-vis the appeal and submissions, is that he has shifted ground from objecting to the terms of bond/bail and the recusal of the Trial Magistrate and that he has relied on what he views as likely bias to be the reason for the need to vary terms of bond. This scenario was captured by the Respondent causing to observe that the appeal is about terms of bond/bail and the recusal of the Magistrate is neither here nor there.
21. I agree with that observation. The issue at hand is a very serious matter with far reaching implications on the integration of the Country where communities are encouraged to live together in harmony and for National Security.
22. After the unity of this Country was threatened by the 2007/2008 Post Election Violence, the Country rose from those ashes and enacted an Act which would ensure that there is no repeat of the same and consequently enacted 'National Cohesion and Integration Act, 2008'. Part III of the Act sets out matters to which it applies and has set out six categories of ethnic discrimination.
23. The particular charges that have been brought against the Appellant under the Act are those covered by Section 3(6) under the heading "Harassment on the basis of ethnicity". The relevant part is Section 6(1) which provides as follows:-

"A person subjects another to harassment on the basis of ethnicity for purposes of any provision referred to in Section 4(d) where on ethnic grounds, he engages in unwarranted conduct which has the effect or purpose of:-

- a. violating that other persons' dignity, or
- b. creating an intimidating, hostile, degrading humiliating or offensive environment for him"

This is the environment under which Section 62 and 68 is anchored.

24. The Appellant is charged with an offence under Section 62(1) which states as follows:-

"Any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding One Million Shillings or to imprisonment of a period not exceeding five years or both".

25. The other offence he is charged with under the Penal Code, Chapter 6 of the Laws of Kenya. Section 96(a) provides for an offence under incitement to violence, and disobedience of the law. The said Section provides as follows:-

"Any person who, without lawful excuse, the burden of proof whereof shall lie upon him. Utters, prints, or publishes any words or does any act or thing indicating or might be desirable to do, or omit to do or omission which is calculated:-



- a. to bring death or physical injury to any person in any class, or community or body of persons..... is guilty of an offence and is liable to imprisonment for a term not exceeding five years”.
26. The National Cohesion Act is therefore an enhancement of this Section to provide more security or to the unity of the Nation. Society therefore views inflammatory remarks, subsequent to Post Election Ethnic Violence seriously.
27. The impugned terms of bond/bail are blamed on the language of the court. However, after saying what I have observed above based on the law, the Honourable Magistrate stated as follows:-
- “The offence herein is serious. We have read that Politicians are likely to send Kenyans to violence in 2017. And therefore the court owes the public a duty to protect it from rogue politicians. While I am not saying that the accused person is guilty of the offence, I would agree with Mr. Muteti that when we elect our leaders we expect them to offer servant-leadership and not to make irresponsible utterances”.
- The Trial Magistrate proceeded to set terms of bond which elicited this appeal.
28. Chapter 4 of the Constitution of Kenya, 2010 did not create a free for all society where the mighty prevails or where there is insubordination to the law.
- Article 19(1) of the Constitution states as follows:
- “The bill of rights is an integral part of Kenya’s democratic state and is a framework for social order, economic and cultural policies”.
- It goes further and provides as follows:-
- “Article 19(3)(b)
- “Do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized on conferred by law, except to the extent that they are inconsistent with this Chapter; and
- (c) are subject only to the institutions contemplated in this constitution”.
29. Paragraph 6 of the Petition alleges that the orders of the Trial Magistrate have the effect of denying the Appellant his rights, as conferred by the Constitution of freedom of expression, association and movement without justifiable reason. The Constitution}} is clear that ones’ rights are balanced with rights of others and the public at large. The rights that are not negotiable are those provided for by Article 25 of the Constitution. This being;
- ‘Freedom from torture, slavery, fair trial and the right to *habeas corpus*-
- There is no complaint that their rights have been infringed with regard to the Appellant.
30. Article 49(h) of the Constitution provides:-
- “ An arrested person has the right-
- ‘..to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons to be released”.



31. The right to bond or bail is qualified by the very Constitution and by virtue of the Criminal Procedure Code. Section 123A of the Criminal Procedure Code provides as follows:-

“Subject to Article 49(h) of the Constitution and notwithstanding Section 123 in making a decision on bail or bond, the court shall have regard to all relevant circumstances and in particular;-

- a. the nature of the offence;
- b. the character, antecedents, associations and community ties of the accused person;
- c.
- d.

32. In my view, the Honourable Magistrate considered all these facts and are the reason she made the observation to which she was entitled as she had the advantage of observing the Appellants’ demeanour.

33. The actions she pointed out have not been denied save that the Appellant is complaining that they were used against him. Had he offered an explanation as to why he was jovial, this court would have had an opportunity to consider the conditions for bond in another light.

34. The reasoning of the court in this regard is not a sufficient reason to cause the Trial Magistrate to recuse herself or for the matter to be moved to another Magistrate and or for the terms of bond to be reviewed or varied.

35. Article 96 of the Constitution sets out the role of the Senate which functions can be carried out without necessarily requiring one to be present in the County. They generally protect the interests of the Counties in the allocation of resources and the making of laws. Hence, these are roles that are more superior and have no direct contact with that County.

36. What commends to me is that the Petition of Appeal must fail. Since the Respondent admits that terms regarding movement be varied, I make the following orders:-

- a. The Petitioner will be limited to Lamu County only and has passage of ward access through Kilifi or any other County on his way to Nairobi.
- b. Conditions (b) and (c) restricting this inflammatory remarks and discussion of this case through the media to remain the same or in force.
- c. The Criminal case being CMCR No 2143 of 2015, (MSA) shall be mentioned before the Chief Magistrate, Mombasa for directions as to hearing before any other subordinate court at Mombasa within competent jurisdiction. And once it is set down for hearing, to be heard on daily basis until it is determined.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2017.

D O CHEPKWONY

JUDGE

