



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL MISC. APPLICATION NO. 3 OF 2017

RICHARD OUMA ARONDO..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. This is a ruling on an application dated 26/01/2017 seeking for orders that this honourable court do order that the participation of the victim's advocate in the trial of Criminal Case No. 728 of 2012 (now Sexual Offences Case No. 45 of 2016) be limited within the confines of the law. It also seeks that this court be pleased to review or set aside the orders of Hon. R. O. Oigara made on 9/01/2017.
2. The application was supported by the affidavit of the applicant Richard Ouma Arondo sworn on 26/01/2017. He states that on 9/01/2017 the trial court cancelled his bond based on an application by the victim's advocate and that he is convinced that the said advocate had no right of audience in the circumstances since the prosecutor was present and ought to have addressed the court.
3. It is further stated that it was wrong to cancel the bond since it was not objected to by the prosecution and claims that he had attended court religiously since his bond was reinstated. He further states that the trial magistrate failed to appreciate that the applicant had satisfactorily explained the reasons for his absence from court. It is his contention that by cancelling his bond he is being presumed guilty before the trial.
4. The application was opposed by the respondent relying on the affidavit of Brenda Nandwa sworn on 10/04/2017. It is stated that the applicant is facing a very serious offence of gang rape and that he had absconded court immediately after the plea was taken in the year 2012. Apart from that, the applicant had threatened the victim forcing her to be put under Witness Protection Program. This caused the delay of the trial because the applicant was arrested after a period of 3 years. The applicant failed to explain his whereabouts for the said period except verbally stating that he had been attending training.
5. The respondent further stated that the applicant if granted bond is likely to abscond again. It should be noted that the complainant and her mother are now under Witness Protection Program pending the hearing and disposal of the case. It was further stated that the victim's advocate is empowered by Section 9 of the Victim Protection Act to represent the victim and air her views before the court for she has a right to be heard which includes matters related to bail.
6. The applicant was represented by Mr. Victor Andande advocate, the respondent by Brenda Nandwa and the victim by Mr. Njoroge who all argued the application orally before the court.
7. Mr. Andande submitted that the Director of Public Prosecutions (DPP) had abdicated his role as a

prosecutor contrary to Article 157 of the Constitution authorizing only his office to exercise the said powers which are of absolute nature.

8. It was further argued that Article 50(2)(a) of the Constitution gives an accused person the right to be presumed innocent until proven guilty. The contents of the replying affidavit and the manner in which the application was heard and conducted contravenes the applicants right of innocence.

9. The counsel submitted that Article 49(1)(h) confers the right to bail to the accused unless compelling reasons are given. No such reasons were presented to the court when the orders for bail were cancelled. The applicant had explained the reasons for his absence when he was presented to court after arrest and the prosecution did not object.

10. The applicant argued that the victim's counsel should have appealed against the magistrate's ruling that reinstated bond instead of applying for cancellation.

11. It is further argued that the court did not give any reasons why it chose to believe the victim's advocate. Section 9(2) of the Victims Act limits the participation of the victim in the proceedings.

12. Ms. Nandwa relied on Section 9 of the Victims Act in her argument that the participation of the victim's lawyer in the proceedings was within the law and it is not correct to say that the prosecution took a back sit. It was further argued that when the accused was arraigned in court after absconding for a period of 3 years, he failed to explain his absence and that had he not been arrested, he would not have availed himself in court. Although he claimed to have been undergoing training, he did not produce any documents to support his claim.

13. The respondent submitted that the presumption of innocence under Article 49(1)(h) has not been violated since the applicant is yet to be tried. At the time of arrest, the victim had not been traced and did not participate in the proceedings of reinstating bond. She had earlier been threatened by the applicant before she was considered for witness protection.

14. Mr. Njoroge opposed the application on behalf of the victim arguing that the Victims Protection Act has ushered a new dispensation in criminal justice. Article 50(7) of the Constitution allows an intermediary to assist a complainant or an accused to communicate with the court. Article 50(9) empowered parliament to enact legislation providing for the protection, rights and welfare of victims of offences. By virtue of this power, the Victims Protection Act was enacted.

15. It was further argued that Article 2(5) provides for application of general rules of international law by courts. Article 68(3) of the Rome Statute allows victims to have legal representation to the extent that the victims counsel may put questions to the accused.

16. Section 4(2)(b) and Section 9(2) of the Victim Protection Act gives the right of audience to the victim which may be ventilated by the counsel. Section 13(a) allows a victim to adduce evidence which may have been left out by the prosecution. This means that the victim has a right to be heard which is not restricted.

17. The following cases explaining the rights of the victim and the extent of participation were relied on:-

(a) Constitution Petition No. 151 of 2015 Nairobi GIDEON MWITI IREA VS DPP & 6 OTHERS

(b) High Court Criminal Appeal No. 23 of 2016 Mombasa I.P. VERONICA GITAHU & PC ISSA MZEE VS REPUBLIC

(c) High Court Criminal Case No. 34 of 2014 REPUBLIC VS JOSEPH LENTRIX WASWA

18. In the said cases, it was generally observed that a victim is an affected party and requires to be heard

and accorded protection and that the victim's counsel is the mouthpiece. It was held that the Director of Public Prosecution prosecutes the case whereas a victim ventilates his grievance.

19. On the role of the DPP, Mr. Njoroge argued that his powers were not being challenged. However, compelling reasons were given to the court mainly that the applicant had absconded for 3 years and did not explain his absence.

20. The issues arising from this application are as follows:-

(a) Whether the victim's advocate had the right to be heard on the application for cancellation of the applicant's bond.

(b) Whether there were any compelling reasons for the cancellation.

(c) Whether it was proper for the victim's counsel to apply for review of the orders reinstating bond or whether he ought to have appealed against the said orders.

(d) Whether the constitutional rights of the applicant were violated by the act of cancelling the bail orders.

21. The facts leading to this application are that the applicant jointly with one Ahmed Ali Mayo were charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act in Criminal Case No.728 of 2012. A sexual offences case No. 45 of 2016 was later substituted with a criminal case. The applicant absconded immediately after the plea for a period of 3 years. It took a long time for the prosecution to arrest the applicant and as a result the case against his co-accused proceeded to conclusion.

22. The applicant was subsequently arrested and arraigned before the court on 25/07/2016. The court released him on a surety bond of Kshs.100,000/= on the same day. The court record shows that at the time that the applicant appeared before the court, the victim and her mother were not available. On 20/12/2016, a witness protection officer appeared before the court and informed it that the victim and the mother had been put under the Witness Protection Program due to threat against them.

23. Mr. Njoroge appeared in court on the same day as the victim's counsel having been instructed by FIDA Kenya. He informed the court that he had learnt of the reinstatement of the bond of the applicant despite having absconded for a long time. He applied for the cancellation of the bond giving reasons which was opposed by the advocate of the applicant. In the ruling of Hon. R.O. Oigara delivered on 9/01/2017, the application was allowed.

24. The applicant's counsel faulted the DPP for failing to participate in the said application arguing that it abdicated its role as under Article 157 of the Constitution. It was also contended that the victim's counsel had wrongly assumed the role of the DPP. It is therefore important to examine the role of the DPP vis a vis that of the victim's counsel in criminal proceedings.

25. Article 157 of the Constitution establishes the office of the DPP and spells out its functions thus:-

157(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any

criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

157(10) *The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

26. The powers of the DPP are replicated in Section 6 of the Office of Director of Public Prosecutions Act which includes instituting and undertaking criminal proceedings against any person in respect of any offence alleged to have been committed, discontinuing any proceedings and prosecuting the same.

27. It is not in dispute that the powers of the DPP are not being challenged in this application. For this reason the court will not belabor in the argument of the applicant which implied that there was a conflict.

28. Article 2(5) of the Constitution is clear that the general rules of international rules are applicable in Kenya. The victim's counsel cited Article 63 of the Rome Statute which allows legal representation of the victim and extends it to putting questions to the accused. The enactment of the Victims Protection Act, No. 17 of 2014 gives effect to Article 50(7) of the Constitution.

29. Section 4(2) provides that every victim shall be given an opportunity to be heard and respond before any decision affecting him or her is taken.

30. The rights of the victim are explained in Section 9:-

9(2) *Where the personal interest of a victim have been affected, the court shall;*

(a) permit the victims views and concerns be presented and considered at stages of the proceedings determined to be appropriate by the court; and

(b) ensure that the victims views and concerns are presented in a manner which is not –

(i) prejudicial too the rights of the accused; or

(ii) inconsistent with a fair and impartial hearing.

31. From the submissions of the applicant's counsel, it is noted that he was in agreement with the other parties that the victim has a right to be heard by the court. The issue that was raised by the applicant was that the court had a duty to limit the participation of the victim or his counsel. Section 9(2)(a) provides that *the court shall permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court....*

32. It appears that during the hearing of the application, the issue of limitation of participation was not raised by any of the parties. The issue that arises is whether matters of bail are a concern of the victim. The facts arising from the trial are that the victim and the mother had been threatened to an extent that they had to be placed on witness protection. It was not denied that it was the applicant who had threatened the witnesses.

33. The victim's counsel told the court that the applicant had harassed the witnesses and that the mother of the victim cried on seeing the applicant in court. The issue of the threats which led to the protection of the witnesses; the issue of absconding for a long period and that of reinstatement of bond was a matter of grave concern to the victim. Although the court did not expressly indicate the limit of participation, it is correct to assume that it found the matter in issue a concern on part of the victim and allowed participation. No prejudice was caused to the applicant by the failure to set out parameters under Section 9(2) of the Act.

34. It was argued that the prosecutor, though present in court did not participate in the application. The

counsel for the victim had submitted at length on the reasons relied on for seeking orders for the cancellation of the bond. Assuming that the prosecution had nothing to add, it cannot be said that the victim's counsel assumed the role of the prosecutor. Both the victim and the prosecution had distinct roles to play which may overlap depending on the issues of concern affecting the victim.

35. It was held in the case of **JOSEPH LENTRIX** case (*supra*) that:-

The public prosecution conducts the prosecution whereas a victim ventilates his grievance. A public prosecutor conducts the case with a sense of detachment whereas the victim is attached to the case. A decision made in a case does not impart a public prosecutor which is not the case with the victim who is the affected party.

36. It is not in dispute that the victim's whereabouts were not known by the prosecution at the time the applicant was arrested and his bond reinstated. The court ought to have ensured that the victim was availed in court so as to participate in the matters of reinstatement of the bond according to Article 68(3) of the Rome Statute and Section 9(2) of the Victims Protection Act, victims are entitled to being informed of all developments in the case. In this application, the threats and the long period of absconding justified the involvement of the victim before the release on bail of the applicant.

37. The victim's counsel was the mouthpiece to ventilate the views and concerns of the victim in the reinstatement of the bond application. The matter directly affected the victim and the victim's participation was not prejudicial to the rights of the applicant. Neither was it inconsistent with a fair and impartial trial under Article 50(2) of the Constitution.

38. It was held in the **VERONICA GITAH** case (*supra*) that the victim's advocates are permitted to take an active role in criminal proceedings on matters affecting the victim arising at any stage of the proceeding including *plea bargaining, bail hearing and sentencing, as far as possible to be heard before any decision affecting him or her is taken....*

39. It is my considered opinion that the participation of the victim's counsel in the proceedings in issue was within the law and fell within the parameters allowed by Section 9 of the Act.

40. In determining whether there were compelling reasons, the court refers to the proceedings of 25/07/2016. The applicant was present in court under warrant of arrest after absconding for a long period. His counsel told the court:-

The accused person was undergoing training at Embakasi APTC.

41. Having absconded court for three years and arraigned in court under a warrant of arrest demonstrates that the applicant had no intention of availing himself in court. This is a matter of grave concern that called for a serious explanation supported by documentary evidence that he had been attending a three year course at Administration Police Training College (APTC). The magistrate had a duty to demand explanation by the applicant which he failed to do. The court seemed to be in a hurry to reinstate the bond before satisfying itself that the applicant 3 year absence was justified.

42. The applicant was under interdiction after being charged in court and it is unlikely that he was undergoing a course at the said institution. Even assuming that he was on training, it was expected that in his capacity as a member of the disciplined forces, he had an obligation to inform the court of his whereabouts.

43. It is my considered opinion that the victim presented compelling reasons to the magistrate who cancelled the bond. I am convinced that the court exercised its discretion judiciously.

44. It was argued that the victim's counsel ought to have appealed against the decision for reinstatement of the bond instead of approaching the court by way of review. It has been explained in this ruling that the victim was not given a chance to be heard during the reinstatement of the bond which was her right

under the law. It was therefore appropriate for the victim's counsel to apply for review or setting aside of the orders of the court made on 25/07/2016.

45. Having established that there were compelling reasons to cancel the bond granted to the applicant, his rights under Article 49(1)(h) of the Constitution were not violated. The trial is yet to begin and the applicant should be accorded a fair hearing under Article 50(2) of the Constitution. I find no violation of the right to a fair hearing as claimed.

46. I find no merit in this application and it is hereby dismissed.

47. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Andande for Applicant

Ms. Manyal for Respondent

Mr. Njoroge for victim