REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 64 OF 2017

PETER MOGAKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Peter Mogaka, herein the applicant filed this application pursuant to Section 362 as read with Section 364A of the Criminal Procedure Code. He was charged in Traffic case No. 25472 of 2016 at Milimani Law Courts with the offence of causing death by dangerous driving contrary to Section 46 of the Traffic Act. He was granted a bond of Kshs. 800,000/- or Kshs. 350,000/- cash bail. He submitted that these terms were high and violated his rights under Article 53 of the Constitution. That notwithstanding, he got a surety, one Peter Mwangi Wamuchwe who presented himself in court with all the relevant documents, namely; title documents for **Thika Municipality Block 17/1629** and other documents that confirmed that he was the registered proprietor of the property in question. The surety also presented a search document further confirming the ownership of the said property and a letter from the National Registration Bureau acknowledging that he was the legal holder of Identity Card No. [...]. He submitted that the investigating officer also carried out his due diligence. However, the trial magistrate did not admit the surety based on non-material grounds, namely; that the surety was not aware of the applicant's phone number.

He submitted that the trial magistrate in so doing violated his right to a fair hearing, his right to bail and his right to be presumed innocent until proven guilty. He submitted that the trial court's duty was to consider whether the documents were valid and genuine and whether the surety understood his role and obligations as a surety. He submitted that these grounds were adequately proved in court and that the court in refusing the application took into consideration irrelevant factors.

In view of the above, the Applicant prayed for a stay of the ruling dated 25th April, 2017 refusing to admit the surety. Secondly, that this court should order the proposed surety and documents presented as approved.

The matter came up for hearing on 11th May, 2017. The applicant was represented by Mr. Nyangito while the respondent was represented by Ms. Sigei h/b for Ms. Nyauncho. Mr. Nyangito reiterated the grounds on which the application is premised. Ms. Sigei submitted that the failure to approve the surety was because the matter had proceeded up to the defence stage and that although a defence hearing date was yet to be set it was due to the applicant's assertion that they were going to appeal the trial magistrate's finding that a prima facie case had been established. She concluded by submitting that this court, if inclined, should reduce the bond terms and approve the surety.

Mr. Nyangito, in reply submitted that the right to bail was available to the accused at any time before the judgment is delivered. He relied on the cases of **In the Matter of Lillian Akinyi Alex [2015] eKLR** and **Republic v. Richard David Alden [2016] eKLR.**

This application is premised on a ruling of the trial court in which it was found that the surety provided by the applicant was unsuitable. It is trite as stated in **R v. Warwick Crown Court, Ex parte Smalley[1987] 1 WLR 237**, that:

> **"The principles upon which bail is granted are of the greatest importance to the administration of the criminal law. Where it is considered necessary that there should be a surety, it is very important that the surety should appreciate the significance and consequence of what he is doing. He should appreciate that, in the ordinary way, the sum for which he has stood surety will be forfeited or estreated if his obligation is not fulfilled."**

Section 124 of the Criminal Procedure Code provides a court with the discretion when setting bail/ bond terms to ask the prisoner to provide a surety of a certain amount. In this particular case, the terms offered to the prisoner were initially of cash bail of Kshs. 400,000/- or bond of Kshs. 800,000/- with a surety of a similar amount. The cash bail was reviewed on 16th February, 2017 to Kshs. 250,000/- but the bail terms remained the same. The applicant presented a surety to court on 14th April, 2017. The court questioned him in a bid to ascertain his suitability and his understanding of his duties after which the prosecutor indicted that he had no objection to the approval of the surety. The advocate holding brief on behalf of the deceased's family objected to the approval of the bond on ground that the surety did not have the contacts of the accused. It is on this basis that the approval was declined.

In the view of this court, the finding by the learned trial magistrate is perplexing. As was held in the case of **R v. Warwick Crown Court, Ex parte Smalley[1987] 1 WLR 237**, the basis on which the surety should be approved is if he understands his obligation as a surety and that he was aware that if the accused absconded the amount of bond would be forfeited; in this case the court would realize the amount of the security. All these conditions were met which meant that the surety had satisfied his suitability. The mere fact the surety could not recall the phone number of the accused was an extraneous matter that ought not to have persuaded the court not to approve the surety. After all, the court was informed on its decision by the sentiments made by the family of the deceased. It is common sense that the family of the deceased would wish that the accused remains in custody for as long as is possible. The most important persons in the approval of the surety had been involved namely the prosecution and the investigating officer. They had done their due diligence and irrelevant matters ought not to have been entertained by the court.

I note that in the ruling the learned trial magistrate expressed a reservation at a comment made by counsel for the Applicant after the ruling was made. I would not wish to comment on it as it is clear that if anything happened between the magistrate and the counsel, it was after the ruling was delivered. The other issue raised by the respondent was that bond should not be approved because the case is near completion. I note that bond was granted at the commencement of the trial and what kept the applicant in custody was because he had not found a surety. Furthermore, the case before this court is not for reversal of the bond but for the court to find that the trial court unjustifiably declined to approve the surety. I have adequately addressed myself on this issue and I need not add more.

In the result, I arrive at a finding that was an irregularity in the learned magistrate's order declining to approve the surety. I set aside the order issued to that extent. I substitute it with an order that the said learned magistrate admits the security documents together with the surety presented to the court. This order be served upon her for compliance.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2017.

G. W. NGENYE - MACHARIA

JUDGE

<u>In the presence of;</u>

1. M/s Kosgei h/b Nyagito for the Applicant.

2. M/s Kimiri for the Respondent.