



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL REVISION NO. 277 OF 2015**

**GEORGE ALADWA OMWERA .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 2/12/2015 brought under Article 165(6) of the Constitution Sections 362 and 364 (I) (L) of the Criminal Procedure Code, the Applicant moved the court for the following orders:-
  1. ***THAT The Honourable court do call for and examine the record of the proceedings in Criminal CMCC No. 1816 of 2015 Republic Vs George Aladwa Omwera for purposes of satisfying itself as to the correctness and legality of the findings and order of Chief Magistrate Court on November 6 2015 granting the Respondent bail pending trial.***
  2. ***THAT The Honourable court do reverse the order of November 6 2015 in CMCC No. 1816 of 2015 granting Respondent bail and do order that the Respondent be remanded in custody pending trial.***
2. The application was premised on the grounds that the Applicant had opposed the grant of bail to the Respondent on the grounds:-
  - a. ***THAT the circumstances of the case it was very likely that the Respondent if granted bail would continue to engage in incitement to violence.***
  - b. ***THAT National security and public safety consideration of public interest required the denial of bail to the accused.***
  - c. ***THAT cases of hate speech and incitement to violence had recently increased with several investigations and new court cases currently pending.***
3. It was the applicant's contention that in granting bail the subordinate court failed to adequately address itself to the compelling reason stated in their submission before the same and therefore arrived at an incorrect decision on bail having found that the attendance at the trial of the Respondent was the overriding consideration when granting bail and therefore the said decision was subject to the supervision and intervention by this court.
4. In opposition to the application the Respondent through the law firm of KHAMINWA & KHAMINWA filed grounds of opposition to wit:-

1. ***THAT the application is without merit and attempt to abrogate rights to a fair trial and an abuse of court process***
  2. ***THAT the application is in violation of the constitutional rights made in bad faith and in contempt of court order issued in CMCC No. 1816 of 2015.***
  3. ***THAT the Honourable court in granting bail exercised its discretion upon being satisfied that the Respondent met the requirement to be admitted to bail.***
5. The application was certified urgent and when the same came up for interpartes hearing before me, Dr. Khaminwa appeared for the Respondent while Dr. Maingi appeared for the applicant.

## **SUBMISSIONS**

6. It was submitted on behalf of the applicant that in granting bail the trial court committed error by failing to consider the public interest and the likelihood of the accused committing the offence while out on bond and therefore incorrect bail decision was arrived at. It was submitted that this court has jurisdiction to correct the errors committed by the lower court.
7. It was submitted that the court failed to take into account the BAIL & BOND POLICY GUIDELINES and the following authorities which were submitted by the applicant.
  - a. ***R v MILTON KABULIT & 6 OTHERS (2011) eKLR on public interest consideration while granting bail.***
  - b. ***R v DIANA SULEIMAN SAID & Another (2014) eKLR on the requirement to take into account public safety.***
  - c. ***R v AHMAD ABOLAFATHI MOHAMED & Another (2013) eKLR on the likelihood of the accused committing further offence.***
8. It was submitted further that the court has a duty to protect the Rule of Law and that since the accused is alleged to have called for the death of fellow Kenyans there were compelling reasons enough to deny the accused bail and therefore the order should be reversed.
9. On behalf of the Respondent, Dr. Khaminwa submitted that this was the first case where the state was asking the court to cancel bail. He submitted that under the Bills of Rights Article 52(a) every accused person is entitled to be presumed innocent until proven guilty which burden of proof is upon the state and does not shift to the accused contrary to the provision of Section 96 of the Penal Code under which the accused was charged which he submitted and not have the force of law.
10. It was submitted that the state was relying on precautionous principles that the accused is likely to repeat his statement which will prejudice public safety and that this argument was before the trial court which took it into account while granting bail. He submitted that preventive justice is unknown to our legal system and relied on the case of **MUITE v REPUBLIC (1991) KLR 579**. He submitted further that the appellant's argument was before the trial court who took them into account while granting bail.
11. Mr. Khaminwa submitted that the only important issue while granting bail is whether the accused will comply with the court order in coming for trial and that no complaint has been made that the accused has failed to appear for hearing neither has it been said that the accused has made further statements since the order was granted. He submitted that if bail is cancelled the perception that will be created is that the accused is being punished because he is a politician. In support of his submission on conditions for granting bail and cancelling bond the following cases were submitted:-
  - a. R v KIMUNYA EARL (2011) VOL. 2
  - b. R v MGUNYA & Another EARL (2011) VOL. 2
  - c. MNYELE v REPUBLIC EARL (2011) VOL. 2
  - d. ALI v REPUBLIC EARL (2013) VOL.1
12. It was stated by Dr. Khaminwa that the court lacks jurisdiction to cancel bail since there is no suggestion that the accused has committed any wrong since the offence has not been proved and if the court grants the order sought the same shall have undermined the constitutional principle of

presumption of innocence.

13. Dr. Khaminwa further relied upon the following scholars on when bond can be cancelled.

1. CRIMINAL PROCEDURE CODE 1973 – Dr. DURGA DAS BASU.
2. RATANLAL & DHIRAJLALS - THE CODE OF CRIMINAL PROCEDURE ISSUES. (Act 11 of 1974).

### ISSUES

14. From the submissions by the parties herein the following issues have been identified for determination.

- a. *Whether the court has jurisdiction to grant orders sought.*
- b. *Whether the applicant has made up a case for grant of the orders.*

### JURISDICTION

15. On the issue of jurisdiction, I must point out that bail is now a constitutional right under **Part 2 RIGHTS & FUNDAMENTAL FREEDOMS** and is specifically provided for under Article 49(i) (h) to any arrested person under the following terms:-

1. *To be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.*
2. *49(2) any person shall not be remanded in custody for an offence if the offence is punishable by a fine or by imprisonment for not more than six months.*

16. The constitution does not define what compelling reasons are, while Section 123 – 133 of the Criminal Procedure Code gives the statutory provisions on bond with Section 124 specifically providing that:-

***124. Before a person is released on bail or on his own recognizance, a bond for such & sum as the court or police officer thinks sufficient shall be executed by that person and when he is released on bail, by one or more sufficient sureties conditioned that the person shall attend at the time and place mentioned on bond and shall continue so to attend until otherwise directed by the court or police office.***

It therefore follows that the purpose of bond is to secure the attendance of an accused person at the trial.

17. Section 123(3) gives the High Court the power to direct that a person charged before a lower court be admitted to bail or that bail required by a sub-ordinate court or police officer be reduced. The question to be answered in this application is whether the High Court has powers to cancel bail granted by the lower court?

18. Article 165(6) of the Constitution of Kenya 2010 provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person or body or authority exercising judicial or quasi judicial functions and in sub-article (7) for the purpose of exercising the supervisory jurisdiction the High Court may call for the record of proceedings before any subordinate court or person, body or authority referred herein and may make any order or give **any directions it considers appropriate to ensure the fair administration of justice** (*Emphasis added*)

19. A reading of this Article of the Constitution clearly shows that the High Court now has supervisory jurisdiction both in respect of civil and criminal matters arising from the subordinate courts in addition to the supervising quasi judicial bodies to ensure the fair administration of justice.

20. In respect to criminal matters Section 362 and 364 (1) (b) of the Criminal Procedure Code provides as follows:-

**S. 362** *the High court may call for and examined the records 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.*

**S. 364(1)** *in the case of a proceeding in subordinate court the record of which has been called for or which has been reported for order or which otherwise comes to its knowledge, the High Court may*

**(b)** *in the case of any other order other than an order of acquittal alter or reverse the order.*

21. It therefore follows that this court has both Constitutional and statutory jurisdiction to determine this matter herein by calling for the records of the trial court to satisfy itself as to either the correctness, legality or propriety of the finding of the trial court however the jurisdiction of the court herein must be exercised with the legal splenic of revisionary jurisdiction is upon which the application is brought which jurisdiction include cancelling or reversing the bonds terms granted in appropriate cases.
22. In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.
23. In **VEERAPPA PILLAI v REMAAN LTD** the Supreme court of India has this to say:-

***“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made.....”***

24. The above principle is applicable to the exercise of revisional jurisdiction of the court wherein the court too cannot sit in appeal and re-appreciate the evidence. It 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 Revisional 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. See **PATHUMMAA & Anor v. MUHAMMED 1986 (2) SCC 585** where it was stated that in revisional jurisdiction the High Court would not be justified in substituting its own view for that of the magistrate on question of facts.
25. On the application before the court – the respondent having pleaded not guilty applied to be released on bond pending trial which application was opposed by the applicant on grounds that the respondent was a threat to public interest and safety and that the cases of hate speech and incitement to violence were on the rise and further that the Respondent was likely to repeat the offence if released on bond.
26. In granting bail the trial court had this to say,

***“On the first grounds, this court is well cognizant of the need to maintain public order and security. The court is further convinced that indeed an act of incitement to violence indeed threatens public order, peace and security..... It is however for the prosecution to prove in fact that the actions of accused threatens such breach of public order or peace as to enable the court deny accused the right to bail, in particular case, the incident allegedly occurred on 20/10/2015. There is no evidence shown by the prosecution that pursuant to the***

***aggrieved statement that was an incident of breakdown of law and order immediately thereafter, soon after or that violence is on the verge of eruption at this moment.***

***On possibility of committing similar offences, of course this is only of precaution of what could happen in the future parallels were drawn with certain persons (Hon. Muthama, Hon. Kuria) who are alleged to have repeated similar statement to those they had been charged with. With respect I am not persuaded by this argument since accused is facing this trial independently....”***

27. Upon those findings, the trial court proceeded to grant the respondent bond on the following conditions:-

- i. ***That accused be released on bond of Kshs.3,000,000/- with one surety of a similar amount or an alternative of cash bail of Kshs.500,000/-***
- ii. ***That in view of the serious threat to public safety, security and order that this offence poses, accused, if released on bond, must desist from any activity that could jeopardize public safety, security and order. And that breach of this order may lead to cancellation and or review of the bond of accused.***

### **DETERMINATION**

28. The issue which the court therefore called upon to determine in exercise of both supervisory and revisionary jurisdiction is whether there was incorrectness, illegally or improperly with the decision herein in granting the Respondent bail or whether the principle of fair administration of justice were violated so as to be subject of revision?
29. It was upon the applicant to demonstrate to court what irregularity, illegality, impropriated or error on record unless the file is called at the instance of the court before the court can exercise jurisdiction herein. From the submission by the applicant the only ground upon which this application was made is that the trial court did not take into account the issue of public interest and public or national safety as stated in the supporting Affidavit of Phyllis Kanina and therefore exercised his discretion incorrectly.
30. As stated herein above the grant of bail/bond is now a constitutional right which is only limited when there is a compelling reason to deny the accused his right. The courts have developed what they consider compelling reasons most of which have been stated in the Bail & Bond Policy Guidelines and therefore in exercising the discretion to grant bond, the same must be done fairly and within the law.
31. None of the compelling reasons stated in the policy guidelines and or in the authorities submitted by the applicant rank above the other and shall be determined based on the fact of each case noting that as submitted by Dr. Khaminwa in deciding whether or not to grant bail the basic factor or denomination is to secure the attendance of accused person to answer the charges brought against him.
32. Whereas national interest, security and safety is a paramount compelling reason to be considered, to hold that the court was in error in granting bond without considering this aspect of compelling reason would be to elevate the same over and above other considerations which will not be appropriate since the issue of compelling reason, is a matter of malice which is decided based upon the evidence as tendered by the prosecution.
33. Having set out the ruling of the trial magistrate herein in full, I would agree that the submissions by Dr. Khaminwa that the trial court took into account all the material presented before him and in respect of the possibility of the accused committing further offence went ahead and made a specific order that the accused desist from any activity that would jeopardize public order security and order in breach whereof the bond will be cancelled.
34. 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.

35. 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 therefore, find that the applications lacks merit and is hereby dismissed.

Dated, signed and delivered at Nairobi 27<sup>th</sup> day of January, 2016.

.....

**J. WAKIAGA**

**JUDGE**

***In the presence of***

***Miss Mwaniki for Dr. Maingi for the State***

***Mr. Ndumbi with Mr. Nyamai holding for Dr. Khaminwa for the Respondent***

***Gitonga – court clerk***