



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL REVISION NUMBER 119 OF 2016

RepublicRespondent

VERSUS

Patrick Mureithi Muthee.....1st Applicant

Timothy Kirema Impwe.....2nd Applicant

Nahason Gitau Kimani.....3rd Applicant

RULING

By requesting that this file be brought before the high court for revision, the applicants' advocate in an application dated 24th March 2016 cited the provisions of Article **49 (1) (h)** of the Constitution of Kenya 2010 and Section **362** of the Criminal Procedure Code^[1] which provides for powers of Revision conferred upon the High Court.

Article **49 (1) (h)** of the Constitution of Kenya 2010 provides for the right of an accused person to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released while Section **362 (2)** of the Criminal Procedure Code^[2] provides that:-

“The High Court may call 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 subordinate court.”

Further, Section **364** confers the powers to the high court to revise lower courts decisions and these powers include **(a) exercising any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and (b) in the case of any other order other than an order of acquittal, alter or reverse the order.** Also relevant are the provisions of Article **165 (6)** and **(7)** of the constitution of Kenya 2010 which provides as follows:-

(6) *The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

(7) *For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

Clearly, from the constitutional and statutory provisions cited above, the High Court has wide powers to review proceedings in subordinate courts and other judicial and quasi-judicial bodies except superior courts.

Section 365 of the Criminal Procedure Code[3] provides that no party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision, hence I did not deem it necessary to hear the parties in the exercise of my discretion provided under the said section.

The crux of the matter is that the applicants herein were charged in Nyeri Criminal case number 938 of 2014 with the offence of removing forest produce without authority contrary to Section 52 (1) (a) as read with Section 52 (2) of the Forest Act[4]. They denied the said offence and they were released on a cash bail of Ksh. 5,000/= each.

On 23rd October 2014 the trial court on an application presented to court by a one Joseph Mugambi Kaindio made an order decreeing that the motor vehicle registration number KBM 691H which was used to ferry the forest produce the subject matter of the charges facing the applicants herein be released to the said person. The said person had in his aforesaid application argued that he was the owner of the said vehicle. While making the aforesaid orders, the court made further orders *inter alia* that the said vehicle shall be produced in court during subsequent hearings as the court directs.

On 30th January 2016, the said vehicle is said to have been involved in an accident making it impossible for the vehicle to be brought to court as directed and this development was brought to the courts attention on 14th March 2016. The court directed that certain documents be brought to court for verification among them (a) Police abstract report and (b) certificate of examination and test of a vehicle.

The record shows that on 21st March 2016 counsel for the state informed the court that the documents produced were copies. The court observed that "*the documents presented did not depict the true picture of the question*" and proceeded to suspend the bond granted to the applicants. As a consequence, the applicants were remanded in custody.

The Supreme Court of India in *Gulabrao Baburao Deokar v. State of Maharashtra and Others*[5] cited its previous decision in *Masroor v. State of Uttar Pradesh and Anor*[6] where it stated as follows as follows:-

"There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts...."

I wholly associate myself with the above decision and hold the view that the court has a duty to protect the liberty of an individual. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, during trial or pending hearing of an appeal cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are *compelling reasons for refusing bail*. The accused is constitutionally entitled to bail *until and unless compelling reasons are demonstrated*. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail, the court may properly review the matter on the basis of the compelling reasons shown. The question is, does the issue of the documents in question constitute compelling reasons to warrant suspension or cancellation of the bail granted to the applicants?

The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case.

Article 49 (1) (h) of the Constitution guarantees the right to bail unless there are compelling reasons to warrant the refusal or cancellation of the bail or **suspension** as in the present case. I appreciate that the

right to bail is not absolute. Clearly, the right to be released on bail or bond is constitutionally circumscribed by the presence of **'compelling reasons.'** The right to be released on bail is, with the greatest respect, not 'an inalienable right' as was correctly stated by **Justice Ibrahim** (as he then was) in *Republic vs Danson Mgunya & Another*.^[7] By definition, an inalienable right is a sacrosanct right, an absolute, unassailable and inherent right and not transferable. It is a non-negotiable right. Like the right to life, a fundamental inviolable right.

Compelling reasons is a qualification to the right to bail. The principle of the right to bail is more poignantly described in *Republic vs Ahmed Mohamed Omar & 6 others*^[8] where **Ochieng J** agreed with the assertion that '*compelling reasons*' are a qualification to the right to bail.

The Supreme Court of Nigeria in *Alhaji Mujahid Dukubo-Asarivs Federal Republic of Nigeria*^[9] set out several criteria on whether or not to grant bail. Justice Ibrahim T. Mohammed JCS stated:-

"When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have well-articulated in several decisions of this court. Such criteria include, among others, the following:-

- i. *The nature of the charges.*
- ii. *The strength of the evidence.*
- iii. *The gravity of the punishment in the event of conviction.*
- iv. *The previous criminal record of the accused, if any.*
- v. *The probability that the accused may not surrender himself for trial.*
- vi. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.*
- vii. *The likelihood of further charges being brought against the accused.*
- viii. *Detention for the protection of the accused.*

The Supreme Court of Malawi in *M. Lunguzi vs Republic*^[10] stated that another ground of refusal is where the court "*is satisfied that the interests of justice so require.*"

I hold the view that after considering the circumstances of each case, the court has discretion to grant or refuse bail or cancel bail provided that the discretion is exercised judicially. It is important to note that there was no application by the prosecution to cancel the bail, so the accused or their advocates did not have an opportunity to give reasons as to why the bail ought not to have been cancelled. The effect is that the magistrate acted on her own motion or *suo moto*, a scenario which left the accused persons condemned unheard.

The decision taken by the magistrate was so grave and drastic that since it affected the rights of the accused persons, it was only just and fair that they ought to have been heard and in this regard I find that the decision was arbitrary and a abuse of discretion and the consequence was that there was a grave miscarriage of justice.

In *Republic vs Milton Kabulit & 60 Others*^[11] **Justice Emukule** in a well-reasoned decision said:-

"My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application....."

Though the list may not be exhaustive and each case depends on its own merits, the compelling reasons why bail may be cancelled may include the *likelihood of failing to attend court, the character of the accused, the possibility of interfering with witnesses, the interests of justice and even the nature of the offence.*

In the present case, no reasons were granted by the court to justify the basis upon which the bail was

"suspended" nor was it shown that there were compelling reasons to take such a drastic step which infringes on the constitutional rights of the applicants. The record does not show that the applicants were afforded the opportunity to explain or state their position regarding the documents in question. It has not been shown that the documents sought are in the power, custody or control of the applicants. The original police abstract was produced in court, but the Certificate of Examination and Test of Vehicle is copy. There was no attempt to get an explanation to establish who had the original or whether there were other photographs which could provide a clearer picture.

In any event, the vehicle was released to a one **Joseph Mugambi Kaindio** and not the accused persons and the court ought to have considered this reality before making the drastic orders complained of.

I find there were no compelling reasons to warrant the court to "**suspend**" the bail granted to the applicants. Accordingly, I order and decree as follows:-

- a. ***That*** the orders of the learned Magistrate made on 21st March 2016 in criminal case number 938 of 2014 and all the consequential orders be and are hereby set aside.
- b. ***That*** the cash bail of Ksh. 5,000/= granted to the applicants on 17TH October 2014 in criminal case number 938 of 2014 be and is hereby re-instated forthwith.
- c. ***That*** I further order and direct that the applicant **Patrick Mureithi Muthee, Timothy Krema Impwe and Nahason Gitau Kimani** be released from custody immediately on the aforesaid original bail terms granted by the said court in criminal case number 938 of 2014 unless otherwise lawfully held.

Signed, delivered and dated at Nyeri this 30th day of March 2016.

John M. Mativo

Judge

[1] Cap 75 Laws of Kenya

[2] Ibid

[3] Ibid

[4] Act No. 7 of 2005

[5] Criminal Appeal 2113 of 2013

[6] (2009) (14) SCC 286

[7] Mombasa HCCR CASE No. 26 OF 2008

[8] {210}eKLR

[9] SC 20A/2006

[10] Misc. Appeal No. 1 of 1995

[11] [2011} eKLR

