

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 11 OF 2016

(From original conviction and sentence in Criminal Case No. 291 of 2016 of the Chief Magistrate's Court at Garissa).

REPUBLIC APPLICANT

V E R S U S

1. JOHN MUTUNGI KILUNGU1ST RESPONDENT/ACCUSED

2. ISAAC MARTIN OMONDI2ND RESPONDENT/ACCUSED

RULING

By a request for revision of terms of bond dated 21st March 2016, the Director of Public Prosecutions has asked this court to revise, vary or set aside the terms of bond determined by Hon. Ole Tanchu – Senior Resident Magistrate in Garissa, CMC Case No. 291 of 2016 Republic –vs- John Mutungi Kilungu and Isaac Martin Omondi.

The complaint of the Director of Public Prosecution is that the two accused persons in the Magistrate's court were charged with stealing by servant contrary to Section 281 of the Penal Code, and fraudulent false accounting Contrary to Section 330 (a) of the Penal Code, as well as altering false documents contrary to Section 535 of the Penal Code. The charge sheet contained a total of 11 counts.

When plea was taken, the magistrate ordered the accused to be released on same bond terms as were granted in Nairobi Misc. Criminal Application No. 600 of 2016, that is personal bond of Kshs 300,000/- each. It was contended by the Director of Public Prosecutions that the gravity of the charges was such that the bond terms determined by the magistrate were inadequate.

The application was opposed through a replying affidavit sworn by Isaac Martin Omondi the 2nd accused person. It was also opposed by an affidavit sworn by John Mutungi Kilungu the 1st accused.

Mr. Wanyonyi learned Assistant Director of Public Prosecution made submissions in support of the request for review of bond terms. He relied on a number of case authorities.

Mr. Topoti learned counsel for the accused persons also made oral submissions highlighting written submissions which had been filed. Counsel also relied on a number of case authorities.

In my view, this court has powers to review bond terms which have been determined by a subordinate court. Such review might either result in more stringent bond terms or it might result in less burdensome bond terms. - see section 123 of the Criminal Procedure Code (cap.75). During the canvassing of the application, I was informed by both sides that the accused persons had been attending court religiously without failure in compliance with the bond terms. I was also informed that the prosecutions had already closed its case and that it was now the defence case for hearing. At one point, Mr. Wanyonyi asked that this application be deferred and left in abeyance, to await the decision of the trial court. This court felt that such action would leave the matter hanging while the application was an application for bail pending trial.

I must say that in my view, the action which should have been taken by the Director of Public

Prosecution in the circumstances of this was to withdraw the application and if there were development which necessitated the filing of fresh application for review of bond terms, then a fresh application be filed in the High Court. As I make this ruling now, I am not sure whether or not the criminal case is still pending before the trial magistrate or it has been finalized. This situation has created a predicament on this court. This court cannot act in vain. It cannot give orders in a vacuum or in an uncertain situation.

As such, I find that the application herein is misconceived. I dismiss the same without going into its merits, as I do not know the current status of the criminal case before the trial court. This is a dismissal on a technicality, and as I have said above, the Director of Public Prosecution can if circumstances do permit file a fresh application for review of the bond terms, assuming that the criminal proceedings in the trial court are still in progress and that there are developments that justify the making of such an application.

I thus dismiss this application.

Dated and delivered at Garissa this 29th day of September 2016.

GEORGE DULU

JUDGE