



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MISC CRIMINAL APPLICATION NO 98 OF 2016**

**GULANI HUSSEIN HASSAN .....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION .....RESPONDENT**

**RULING**

By way of Notice of Motion application dated 7<sup>th</sup> September, 2016 brought under section 362 of the Criminal Procedure Code, Article 50 (7) of the Constitution, the inherent powers of the court and all enabling provisions of the law, M/s Kanyi and company, advocates seek revision of a ruling delivered on the 31<sup>st</sup> August, 2016 and of the proceedings generally.

This application is premised on the grounds that:

- (a) That applicant who was arraigned in court on 23<sup>rd</sup> August, 2016, before Hon D. Mochache, Principal Magistrate at Shanzu law courts charged with three counts of sexual assault and an alternative count of indecent act to each count, pleaded NOT GUILTY and was informed by the court that as a policy, the court does not grant bond to persons accused of sexual offences until the witnesses have testified;
- (b) the matter was set down for hearing on 31<sup>st</sup> August, 2016 and the applicant remanded in custody but on this day the matter could not proceed when the defence found that the prosecution had not disclosed to them copies of medical records they intended to rely on the matter was then adjourned and applicant ordered released on a bond of Ksh 300,000 with one surety;
- (d) the case was transferred to court No. two (2) and on 13.9.2016 the same was fixed for hearing by Hon. Ndungu, who without any explanation and suo-moto rescinded the order of Hon. Mochache granting the applicant bond and ordered he be remanded in custody;
- (e) these orders of the two courts violated the applicants constitutional right to bail and fair trial;
- (f) the conduct of the proceedings by both courts create uncertainty into proceedings, undermine procedural legitimate expectation on the part of the applicant and generally undermine confidence;
- (g) Under the prevailing circumstances, it is not definite how long the applicant will remain in custody or when his application to be admitted to bond might be entertained by the court;
- (h) The applicant is a Kenyan permanently resident in Mombasa and a single parent with two minor children aged 9 and 11 years who depend on him as their bread winner.

(i) The applicant's sister Ngire Hassan Ali is willing to stand as a surety to ensure the applicant is released from custody to enable him take care of his children.

These are the grounds the applicant deponed to in his supporting affidavit. The court has been requested to call for the record in Shanzu Principal Magistrate's criminal case No S.O. 76 of 2016, Republic Vrs Gulani Hussein Hassan Ali for purposes of satisfying itself on the correctness, legality and propriety of the proceedings therein and in particular the orders of the trial Magistrate suspending the bond that the applicant had been granted by Hon Mochache, the Principal Magistrate.

The orders are for revising the said order and readmit the applicant to bond on reasonable terms.

The power of revision is accorded to the High court by Section 362 of the Criminal Procedure Code, which states;

***“The High court may call for and examine the record of any criminal proceedings before any subordinate court for the propriety 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 the proceedings of any such subordinate court”***

Upon calling for the record of Shanzu Principal magistrate's Criminal case No 76 of 2016, Republic Vs Gulani Hussein Hassan Ali , I have examined the record and confirmed that the applicant was indeed charged with three (3) counts of sexual assault contrary to Section 5 (1) (b) as read with section 5 (2) of the Sexual Offences Act and alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act, to each count.

He pleaded NOT GUILTY and the case was fixed for hearing.

I have also confirmed that the applicant was remanded in custody and case marked for fast tracking. However, on 31.8.2016, when the case was to be heard and could not be reached because the defence had not been supplied with copies of medical records, the trial magistrate, Hon. Mochache, admitted the applicant to bond of ksh 300,000 with surety. She, then transferred the case to court no 2 to be heard by Hon. Ndungu.

Hon. Ndungu on the other hand, suspended the said order by Hon. Mochache on 13.9.2016 when the charges were amended and ordered him to be remanded until when the complainants will have testified.

It is instructive to note that Article 49 (1) (h) of the constitution grants the accused person the right

***“to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released:”***

The courts have discretion under the Constitution and Criminal Procedure Code to admit or deny an accused bail or bond. However, in exercising this discretion, courts are expected to complying with the requirements of Article 49 (1) (h) and 50 (2) of the Constitution to ensure that the rights of suspects and accused persons to liberty and to be presumed innocent are balanced with the public interest, including protecting the rights of victims of crime “ (Bail and bond policy guidelines at page 6, paragraph 1.9).

“In the instant case, the applicant is charged with serious offences where the victims are vulnerable and the likelihood of compromising them are high. But it is worth -noting that an accused can only be denied bail or bond “where it has been established that there are compelling reasons for him/her not to be released.”

At lines 25 to 28 of page 10 in Bail and bond policy guidelines, it is stated “in denying and accused person bail or bond, it must it must therefore be demonstrated in convincing evidence his or her release will present risk and that such risks cannot be managed even with the attachment of appropriate conditions “

In suspending the bond which had been granted to the applicant by Hon. D Mochache, on 31<sup>st</sup> August, 2016, Hon Ndungu did not give any reason why he had to be denied bond until complainant testified. There is also no indication that the prosecution had a problem with the applicant being on bond before the complainant's testified. The applicant, like all accused person is entitled to the disclosure of any information that would be relied upon to deny his release bond unless there is good reason for withholding the same. The applicant was not accorded such opportunity.

I therefore find the Honourable trial magistrate's decision to suspend the bond that was accorded to the applicant/accused person in this case in- appropriate.

I allow the application for revision as per the power accorded to me by the provisions of section 362 of the Criminal Procedure Code.

I order the reinstatement of the bond terms and conditions granted to the applicant by Honourable D. Mochache.

**Ruling signed, dated and delivered this 18<sup>th</sup> day of September 2016.**

**D. O .CHEPKWONY**

**JUDGE**

**In the presence of:**

M/s Mutua for the state- present

Mr Maundo for Applicant – Present

C/Clerk- Kiarie