



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CRIMINAL REVISION NO 355 OF 2016

REPUBLICAPPLICANT

VERSUS

HANIA SAID SAGAR

LUUL ALI TAHLIL

NASTEHO ALI TAHLIL

ZAMZAM ABDI ABDULAHI.....RESPONDENTS

R U L I N G

Vide a letter dated 5th October, 2016, the Director of Public Prosecution has applied for review under certificate of urgency and sought;

- (1) grant of stay of orders of the release of the 1st accused/ applicant on bail by the magistrate pending the hearing and determination of this application;
- (2) suspension of the use of a pre- bail report for determining the matter of bail for 2nd,3rd and 4th accused/applicants pending the hearing and determination of this revision.
- (3) the reversal of the orders granting bail against the 1st accused/applicant and to vacate the orders in respect of 2nd,3rd and 4th accused/applicant;
- (4) the grant of any other order that this court may deem fit and just to grant.

On 6th October, 2016, a temporary stay of the orders of the honourable Magistrate on 29.9.2016 granting the accused/Respondent bail were issued by this court.

And on 13.10.2016, the application came up for hearing before me, whereby Mr Muteti, Assistant Director of Public Prosecutions assisted by Mr Jami Yamini and M/s Mutua Ngina learned state counsel, appeared for the Director of Public Prosecutions and Mr A/Applicant Mr Aboubakar, Mr Chacha and Mr Magolo appeared for the accused/Respondent.

What is being sought to be reviewed is the ruling by the Principal Magistrate, Honourable D. Mochache delivered on 29th September, 2010 in which she ordered the release of the 1st accused/Respondent on a bond of one Million shillings with a surety of a similar amount in addition to the depositing her

passport in court and to report to the OCS, Nyali police station on the first Tuesday of every month. For the 2nd, 3rd and 4th accused/Respondent, she ordered that they remain in custody pending a comprehensive pre- bail report.

The high court is clothed with powers of revision by section 362 of the Criminal Procedure Code which provides;

“ The high court may call for 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 to the regularity of any proceedings of any such subordinate court”

As requested by the Applicant/Director of Public Prosecution, the record of proceedings in Shanzu Principal Magistrate’s criminal case No 135 of 2016 were placed before me. And after listening to the arguments by the applicants (he Director of Public Prosecution) and the respondents learned counsel, Mr Aboubakar, Mr Chacha and Mr Magolo, I have read through the proceedings and the ruling of the Hon. Trial magistrate, on 29th September, 2016, with respect to whether the said orders were illegal, in correct or inappropriate in the circumstances.

The grant of bail has always been in the discretion of the court, as long as it takes into account the constitutional and legal provisions applicable.

All that the magistrate is required to do in considering applications for bond/bail is to weigh the Constitutional provisions that guarantee the rights of accused to liberty and presumption of innocence with protecting rights of victims of crime and public interest.

I find the ruling by the Honorable magistrate in regard to the question of whether or not to grant the accused/respondents bond. She analysed the arguments advanced by both sides in addressing this issue and the cited cases on the same. She questioned the grounds of opposition raised by the investigating officer in his affidavit which were relied on by the applicant in requiring the accused/respondents to be denied release on bond. I find the questions and answers raised by the Honourable magistrate quite salient as they assisted her in arriving at her decision in the matter. It was upon the prosecution to persuade her on their grounds of opposing the release of the accused on bond. It appears they did not and so she exercised her discretion and granted the orders she did.

On numerous occasions, courts require to verify information given to it by the parties in a case so as to make informed on fair decisions. In such times, courts may seek the services of independent agencies such a probation and after care services or children’s officers. And again, whether the court will rely on the reports prepared by these agencies or not, is an issue of discretion.

I find nothing incorrect, illegal or inappropriate in the orders the Honorable magistrate made on 29th September,2016. There is nothing improper in a magistrate exercising his/her discretion.

Listening to the arguments that were advanced by the learned counsel for the state, it is clear that they felt aggrieved by the decision by the Honourable magistrate in granting bail for the 1st accused and calling for pre-bail reports in respect of the 2nd, 3rd and 4th accused. In the circumstances, the arguments that the learned counsel for the Director of Public Prosecution have advanced, would best be canvassed on appeal.

Having found that the Honourable magistrate arrived at her decision in the instant case by virtue of her discretionary powers, after evaluating the facts and law presented to her, I find no good reason to interfere with the said decision.

The application for revision is dismissed for it has no merit.

However, I am persuaded by the decision and directions by Honourable Justice Maureen Odero in

criminal revision No 54 of 2014, Republic Vrs Bakfesh Akesh Abdalla and 3 other, in Mombasa, that (verbatim)

“the avenue of appeal however remains open and available to the Hon. DPP”

And in anticipation of such fact, Hon Justice Odero, granted the DPP seven (7) days within which to file and serve such appeal and so as to avoid rendering such an appeal nugatory, Justice Odero went on to stay the ruling of the Honorable Chief Magistrate granting the respondent bail pending the filing of such appeal.

I wish to adopt the decision and direction for purposes of the instant case The DPP is hence directed that;

- (a) If they so wish, to file and serve an appeal within seven (7) days.
- (b) And so as not to defeat the said appeal, I do hereby suo-moto extend the stay of the orders in the ruling of the honorable Principal Magistrate on 29th September 2016.
- (c) If within seven (7) days, no appeal shall have been filed,
 - (i) The 1st respondent will be released on the bond terms and conditions as set out by the Honourable Principal Magistrate on 29th September 2016;
 - (ii) The probation officer to proceed and present the pre-bail assessment report in respect of 2nd, 3rd and 4th respondents as requested on a day that will be set by the Honourable Principal Magistrate.

Ruling signed and dated this 18th day of October 2016.

D. O. CHEPKWONY

JUDGE

Delivered in the presence of:

M/s Wamotsa and Ms Mutua for the state

Mr Abuobakar for the Respondents

C/clerk- Kiarie