



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL REVISION NO. 166 OF 2015**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**FEISAL MOHAMED & OTHERS.....RESPONDENTS**  
**RULING**

By way of a letter dated 21st August, 2015 the office of the Director of Public Prosecutions sought Revision of a ruling delivered on the same day in Chief Magistrate's Criminal Case No. 1098 of 2014 whereby the trial magistrate Honourable Karani - Principal Magistrate admitted the sixth Accused Feisal Ali Mohamed to bond.

The prosecution has raised several issues;

1. Whether the trial magistrate can lawfully review orders of a high Court Judge in view of the provisions of Article 165 (6) of the Constitution
2. Whether a Constitutional issue once determined by the High Court can be re-litigated before a magistrate and a contrary opinion rendered by dint of the provisions of article 165(5) of the Constitution.
3. Whether the hierarchy of Courts in Kenya under chapter 10 of the Constitution of Kenya binds all Judicial officers in the exercise of their Judicial Powers.
4. Whether the magistrate by granting the orders for the release on bail for the 6th Accused violated his oath of office by failing to apply his mind to the provisions of article 3(1) Article 10(1) and chapter 10 of the Constitution of Kenya 2010.
5. Whether in light of the orders granted by Honourable Justice Muya on 30th March, 2015 the matter of bail could in any circumstances fall for consideration before any magistrate without a review of the Honourable Justice Muya's orders.
6. Whether the magistrate having determined that there was need to protect Witnesses he could lawfully proceed and grant bail to the 6th Accused person before Witness Protection measures are in place.
7. Whether "*flight risk*" as a compelling reason and as determined by the High Court, can ever change.

8. Whether a Court that has reserved a matter for directions can during the mention, deliver a ruling and issue substantive orders.

The Applicant vide revision No. 81 of 2015 had successfully obtained revisionary order against granting bail to the 6th Accused and the Judge made the following order:-

***“I accordingly, find that the Director of Public Prosecution proved on a balance of probabilities that the Accused was and is a flight risk. This is a compelling ground to deny him bond which I hereby do. The order of the trial magistrate granting the Accused bond is hereby revised. The Accused to remain in custody unless contrary orders are granted by a Higher Court.***

***It has been submitted that the Accused is ailing. The state to accord him proper medical care and facilities”.***

### **Introduction**

The six Accused persons are charged in two Counts. The first one relates to possession of Wildlife Trophies contrary to section 95 as read with section 82 of the Wildlife Act No. 47.

The particulars being that:-

***“On the 5th day of June, 2014 at the business premises of Fuji Motors East Africa Limited situated along Tom Mboya Avenue Tudor Estate Mombasa County, jointly with others not before the Court were found in possession of Wildlife Trophies of an endangered species namely 314 pieces of Elephant tusks weighing 2152.45 kilogrammes without a permit”.***

In the second count, the six accused persons were charged with the offence of dealing in Wildlife trophies contrary to section 84(1) as read with section 92 of the Wildlife Conservation and Management Act in that:-

***“They were found dealing in Wildlife trophies of an endangered species namely 314 pieces of Elephant tusks weighting 2152.45 kilogrammes without a licence”.***

The first application for bond in respect to the sixth accused was made before Honourable Kituku – Principal magistrate who rejected it on the grounds that the sixth accused left the jurisdiction of the Court to avoid trial.

Subsequently, another application for bond was made before the same magistrate who in his ruling (at page 6 paragraph 2) observed:-

***“Actually the right to health is a Constitutional right. See article 57 of the Constitution”.***

He then proceeded to grant the sixth Accused a bond of Ksh. 10 million with one surety of similar amount.

The prosecution being aggrieved of that ruling rushed to the High Court seeking orders of revision. In my ruling dated 30th March, 2015, I had this to observe,

***“Whereas Courts have a discretion in the granting of bonds that discretion should be exercised judiciously and not whimsically”.***

***I accordingly, find that the Director of Public prosecution proved on a balance of probabilities that the Accused was and is a flight risk. This is a compelling ground to deny him bond which I hereby do. The order of the trial magistrate granting the Accused bond is hereby revised. The Accused to remain in custody unless contrary orders are granted by a higher Court “.***

Thereafter another application for review was filed in Court premised on the grounds that, at the time of making orders for revision, the Court did not have the benefit of perusing the proceedings and appreciating, the issues raised by the applicants as regards his health status and prison department reluctance in compliance with Court orders.

In my ruling dated 18th May, 2015 I had this to say:-

***“In the instant case the issue of health was adequately canvassed and dealt with in the application for revision. There are no new facts or matters presented before this Court for its consideration.***

***The application for review has no legs to stand on and its dismissed”.***

The gist of the defence case in this application is that there were timelines within which the case was to be heard and that the prosecution was in breach of those timelines and this necessitated the trial magistrate to grant the sixth Accused bond on account of new and changed circumstances.

The defence relies on the authority of **Republic -Vs- Nottingham Justices, exparte Davis- Queens Bench Division**, where it was held,

***“Where a magistrate court had been satisfied on an application for bail that one or more of the exceptions set out in schedule 1 to the 1975 Act applied and accordingly remanded the Accused in custody the court whether, differently constituted or not, could not on a subsequent application for bail ignore the earlier decision, since it was a finding by the Court that schedule I circumstances existed at the time of previous application and it had, like every other finding of the Court, to be treated as Res Judicata or analogous thereto. On the renewed application for bail the Court could only investigate whether there were any new considerations which were not before the Court on the previous occasion”.***

In the present application the issue as to whether there were changed or new circumstances was not relevant.

**The main issue is jurisdiction.**

Article 165 (6) of the Constitution confers supervisory powers of the High Court to the subordinates Courts in the following manner:-

***“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 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 an order or give any direction if it considers appropriate to ensure the fair administration of Justice”.***

**In answer to issue No. 1.** Whether a trial magistrate can review orders of a High Court Judge?

The answer is no. Article 162 of the Constitution provides for the system of our Courts and places them in hierarchical order from the Supreme Court to the subordinate Courts, (which are established under article 169 of the Constitution).

It follows that a magistrate cannot lawfully review orders of a High Court Judge.

**The second issue** is whether a Constitutional issue once determined by the High Court can be re-litigated before a magistrate and a contrary opinion rendered by dint of provisions of Article 165 (5) of the Constitution.

Article 165(5) of the Constitution provides,

***“The High Court shall not have jurisdiction in respect of matters***

***(a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or***

***(b) Falling within the jurisdiction of the Courts contemplated in article 162 (2) of the Constitution.***

***The Courts contemplated under article 162 (2) are;***

***(a) Employment and Labour Relations Courts.***

***(b) The Environment and Land Courts.”***

The subordinate courts do not fall under clause 2 but under clause 4. So the issue of re-litigation does not arise.

**Issue No. 3.** Whether the hierarchy of Courts in Kenya under chapter 10 binds all Judicial officers in exercise of their Judicial powers.

Chapter 10 provides for national values and principles of governance and binds all state organs, state officers, public officers and all persons whenever any of them-

(a) applies or interprete this Constitution

(b) enacts, applies or interprets any law

(c) .....

**Issue No. 4.** Whether the magistrate by granting the orders of release on bail for the 6th Accused violated his oath of office by failing to apply his mind to the provisions of article 3(1). Article 10(1) and chapter 10 of the Constitution of Kenya.

In answer to this question I find I would not be doing justice by condemning the magistrate without giving him an opportunity to be heard.

**Issue No. 5.** Whether in light of the orders granted by this Court on 30th March, 2015 the matter of bail could fall for consideration before any magistrate without a review of the said orders of the Judge.

The orders of 30th March, 2015 were clear and succinct,

***“The Accused to remain in custody unless contrary orders are granted by a higher Court”.***

Those orders ousted the jurisdiction of the subordinate Court from considering the issue of bond in respect to the sixth accused. The Court did not shut the sixth Accused from approaching the High Court or the Court of Appeal on the issue of bond. Indeed the sixth Accused did make an application for review of the High Courts orders and I am told he has filed an appeal in the Court of Appeal. That was the proper procedure.

It was improper for the sixth Accused, to go back to the lower court and purport to make an application for bond for whatever reason. It was improper for the trial magistrate to clothe himself with jurisdiction which had been ousted from him and purport to review the orders of a Judge.

**Issue No. 6.** Is whether the trial magistrate having determined that there was need to protect witnesses he could lawfully proceed to grant bail to the sixth Accused before Witness Protection measures are in

place. The answer to this question is from the word go the trial magistrate did not have powers to grant bail which had been denied by a higher Court and specific orders issued.

***Issue No. 7.*** Whether “***flight risk***”, as a compelling reason and as determined by the high Court can ever change? The high Court had determined that the sixth Accused was a flight risk. A contrary finding could be arrived at by the High Court under review or by the Court of Appeal but not by the lower Court.

The upshot of it is that, the application for revision is allowed. The sixth Accused to stay in remand as earlier ordered by this Court in its ruling dated 30th March, 2015. The Court is informed that there is an application for disqualification of the magistrate from continuing handling Case no. 1098 of 2014.

This Court has been requested to have the case transferred to another magistrate. I am of the considered view that the issue of disqualification be canvassed before the trial magistrate first before its cascaded upwards to the High Court.

The sixth Accused is in remand custody. There is need for the matter to be expedited.

Ruling read and delivered in open Court this **26th** day of **August, 2015**.

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**M. MUYA**

**JUDGE**

**26TH AUGUST, 2015**

***In open Court in the presence of:-***

Nabwana and Magolo

Muteti, Kiprop and Wamotse

Miss Gitari watching brief for Complainant.

**M. MUYA – JUDGE**

**Magolo, Mr. Gikandi for Respondents:**

We applied that we be supplied with proceedings and ruling and that the matter be mentioned before the trial magistrate.

**Court:**

Certified copies of the ruling to be furnished to the Defence and the Director of Public Prosecution.

Mention before the trial magistrate today.

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**M.MUYA**

**JUDGE**

**26TH AUGUST, 2015**