



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC APPLICATION NO. 104 OF 2015

REPUBLIC THROUGH THE DIRECTOR
OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

UMMULKHEYR SADRI ABDALLA.....RESPONDENT
KHADIJA ABUBAKAR ABDULQADIR.....RESPONDENT
MARYAM SAID ABOUD.....RESPONDENT
HALIMA ADAN ALI.....RESPONDENT

R U L I N G

1 By way of Notice of Motion application dated 16th November 2015 brought under Articles 45,157 and 159 all of the Constitution of Kenya 2010 and section 5 of the office of the director of Public Prosecutions Act, 2013, the applicant seeks the grant of the following orders:

(a) that the ruling and orders of the court (Chepkwony J) granted on 22nd October, 2015 in the High court Misc Criminal Revision No. 169 of 2015 affirming the bond granted to the respondent in CMC Cr case No 799/2015 be stayed pending the hearing of this application inter parties.

(b) that the ruling and orders of the court (Chepkwony J) granted on 22nd October 2015 in HC Misc Cr revision No 169 of 2015 affirming the bond granted to the respondent in CMC Cr C. No. 799/2015 be reviewed, varied, discharged and is vacated pending the hearing of the application interpartes.

(c) that the ruling and orders of the court (Chepkwony J) granted on 22nd October 2015 on HC Misc Cr revision No 169 of 2015 affirming the bond granted to the respondent in CMC Cr No. 799/2015 be reviewed, varied, discharged and or vacated.

(d) that the bond granted to the respondent be cancelled.

(e) that the respondent be denied bond.

2 The grounds upon which this application is premised are as follows:

(i) that there are changed circumstances justifying a review of the ruling and orders of the court (Chepkwony J) granted on 22nd October 2015 in HC Misc CR Revision No 169 of 2015.

(ii) that bail can be reviewed at anytime pending trial.

(iii) that the respondent are a flight risk and they will leave the jurisdiction of this court by fleeing to other countries if released on the bond granted.

(iv) that there are complex and highly technical investigations which are pending in the Westgate Mall terror attack and the Garissa University terror attack which the accused persons are linked to as shown in the supporting affidavit of Fogal Abdii. This will lead to highly possible new charges against the accused persons.

(v) that from Cyber crime report the accused/respondents are linked to terror suspect and accomplices who are still at large and who are being sought by the police in connection with the offences herein, the Westgate mall terror attack and Garissa University terror attack. If released on bond these terror suspects and accomplices will assist them jump the bail granted to them.

(vi) the material presented in this application and in the supporting affidavit of Forget Abdi is new and compelling enough to warrant the review.

(vii) the supply of this material from the cyber crime unit to the respondents in this application offer further compelling reason that the respondent will more likely jump bail if the bond is not cancelled.

(viii) the erroneous to avail this information to court previously was later invited to deliberate but the prosecution as at that time was not in possession of the same and it did not therefore supply.

3 The application is supported by the affidavit of Corporal Fogat Abdi dated 10th November and annexures marked 'FA 1' where he has deponed that:

(a) there are now changed circumstances to warrant cancellation of bond granted to the accused person.

(b) the cyber crime report which has now been supplied to us by the cyber crime unit, Nairobi shows that from mobile No +254706330130 there is contact in Malindi believed to be one Fatuma Said whose contacts and place of residence remains unknown.

(c) the laptop Samsung serial number ZTEJ93NZ900709N has been analyzed and there are skype contacts in Sri Lanka, Malindi, United Kingdom, Mombasa, Montreal Canada, Nairobi, United Arabs Emirate, Turkey, Tanzania, Oatar, Rwanda, London and Khartoum in Sudan.

(d) one of this contacts in Mombasa is one Shuaib Mbarak of Mombasa and there was a message downloaded from the laptop that reads ***"am just a little fish in a big pond full of much bigger sharks"*** clearly indicating that there is a life network of terrorism in all the countries mentioned above and in particular in Mombasa who have links with the accused persons.

(e) cybercrime analysis of the laptop reveals the laptop appears to have been previously used by a man who claims to be Rogo junior and who is wanted by the police in relation to terrorism offences following this information and his whereabouts remains unknown.

(f) the laptop also contains material (videos and photos) that promotes jihad and killing of kafiris (non-believers).

(g) further evidence shows that they share the ideology that:

(i) "jihad itasimama Kenya".

(ii) “Naam itasiamama bendera ya jihad katika nchi yako na ukiwza kupigana juhad pamoja na waishlamu wenzako bais pigana na waislamu katika nchi yoyote kwa malengo”.

(h) the effect of this is a declaration of war by the terror network against all the countries of the world.

(i) from the analysis of the laptop several photographs of high profile jihadists were found which is a clear manifestation that they share the ideals of the jihadists.

(j) corporal Fogat produced the cybercrime report containing the material he has stated above and it is marked “FA ”.

(k) this cybercrime material was the possession of the prosecution at the time thrill bail was argued both at the lower court and in the High court.

(l) if these persons are released on bail when this material has already been disclosed to them they strongly believe that they will take off from this jurisdiction and from the skype contacts contained in the cybercrime report and it is clear that they might migrate to those countries.

(m) the accused persons handsets are still being analyzed and in view of this evidence that there could be more compelling material that may link these person to other terrorism incidences in Kenya or elsewhere and once the prosecution file is reviewed in the light of the evidence it is highly possible that the charges herein would be substituted to include additional grounds.

(n) the accused persons are being investigated from possible involvement in the Garissa university terror attack.

(o) investigations into the Garissa university terror attack are still ongoing to track the suspects who may be within Kenya, Somali and other countries despite CMC Cr. Case No 939/2015 having been initiated.

(p) until a final forensic analysis of all mobile phone handsets is done in connection with the West gate terror attack and the Garissa university terror attack, one cannot possibly rule out the involvement of these respondents and obviously the exercise is complex and highly technical for one to hastily conclude or finalize.

(q) the accused/respondent were arrested on 27th March 2015 and to date forensic analysis of all the electronic gadget is still ongoing.

4 In response thereto, the applicants opposed the applicants application on the grounds to be fund in the affidavit sworn by each one of them filed on 18th November 2015. They deponed that:

(a) the entire application and supporting affidavit do not raise specific issues against them and the allegations made are omnibus in nature,in capable of being relied on.

(b) nowhere have they been specifically linked with any of the allegations made in the application and the supporting affidavit, which clearly shows that these proceedings are precipitated by malice solely meant to defeat the cause of justice.

(c) the orders sought by the applicant are untenable and this honourable court CANNOT issue any of them because of the following reasons:

i. This Honourable court never issued positive orders capable of being stayed.

ii. This Honourable court only declined to exercise its discretionary powers of revision hence cannot be requested to review, vary, discharge orders originally issued by the trial court.

iii. This honourable court never granted the accused persons bond hence cannot be requested to

cancel the same through a miscellaneous application other than through an appeal of the trial court decision.

- iv. This honourable court cannot be requested to cancel bond granted by a court of competent jurisdiction through a miscellaneous application.
- v. This honourable court cannot be requested to deny the accused persons bond granted by a court of competent jurisdiction through a miscellaneous application.

(d) that the right approach by the state was to appeal against the ruling of the trial court and admitting its bond after this court declined to exercise its powers of revision and not to seek drastic orders through a miscellaneous application.

(e) from the paragraph 14 of the replying affidavit where it is expressly stated ***“that this cybercrime material was in the possession of the prosecution at the time bail was granted both at the lower court and in the High court”***.

(f) it is apparent and clear from the supporting affidavit at paragraph 14 that the alleged information by the cybercrime was in the possession of both anti terrorism police unit and the prosecution a long time ago which by reasons that the current application is brought in bad faith solely meant to defeat the course of justice as there is no new information to warrant review of any orders.

(g) this means there has been no change of circumstances as alleged by the prosecution from the date they were granted bond and the current application is only precipitated by malice to deny them bond.

(h) and even if there were any change of circumstances as alleged the proper forum to adjudicate on the issues is the trial court which granted bond but not this court.

(i) they individually denied being the owners of mobile number +254706330 130 or knowing Fatuma Said who they said was being used as a bar to their Constitutional right to be granted bond as their involvement or relationship with her was alleged.

(j) in responding to paragraph 7 of the supporting affidavit, the applicant deponed that the deponent did not disclose the owner of the laptop and emphatically contended that they did not know any person by the name Rogo Junior.

(h)in response to paragraphs 9,10,11 and 12 the applicant deponed that they did not know Shuaib Mubarak and that it was not disclosed from who the contacts were retrieved from.

(i) in response to paragraph 15 of and 16 they state that the allegations that of the applicants are released on bail when this material has been disclosed they may take off from this jurisdiction, is a mere allegation which this court cannot rely on to limit their Constitutional rights.

(m) it was absurd and totally malicious to link them to Garissa University terror attack, an event which occurred when they were already in custody.

(n) in response to paragraph 8 of the supporting affidavit where reference has been made to CMCC NO. 993 of 2015, the applicants deponed that they were not the accused persons there and the same cannot be used to seek cancellation of their bond terms.

(o) in response to paragraph 19 of the supporting affidavits contents are mere speculations as forensic analysis has not been done and the same cannot be used as evidence to grant the orders sought.

(p) they further deponed in response to paragraph 20 of the supporting affidavit that the applicants

were arrested on 27th March 2015 they have been in custody throughout and the state is never ready to proceed with its cases for lack of witness.

(q) on the issue of being flight risk, according to the applicant the same was canvassed by both the trial court and this court, therefore it does not amount to a new issue at this stage.

(r) they have been pointed as very dangerous persons which negates the cardinal principal of presuming an accused person innocent until proven otherwise.

5 In their oral submissions the learned counsel submitted in line with the grounds they had deponed and cited a number of authorities for this court to consider in determining this application.

6 I have considered the application, grounds upon which it is premised in the supporting affidavit and on the face of it, the replying affidavit and arguments in submissions by all counsel together with the cited authorities.

7 I wish to state that vide an application dated 13th October 2015, the prosecution counsel came to me seeking for a revision of the orders by Mr Odenyo, the Senior Principal Magistrate dated 12th October, 2015 as per the provisions of section 362, 363 364 and 365, all of the Criminal procedure Code.

8 Having deliberated on the reason for the application and circumstances surrounding the case, I found nothing illegal, improper or irregular or incorrect in the orders that had been granted by the learned magistrate in which he had granted the accused persons a bond of ksh 500,000 with one surety each.

9 But, while dismissing the application to review, I took cognizance of the nature and gravity of the offence the accused persons are charged, with the frequency with which these acts are known to occur in the country and enhanced the bond terms on 22nd day of October 2015.

10 On 16th November 2015 the Director Public prosecution filed an application by way of notice of motion dated 16th November 2015, seeking to have this court:

(i) stay the Ruling and orders of this same court granted on 22nd October, 2015 in High court on Miscellaneous Criminal revision No. 169 of 2015 where the bond granted to the respondent herein was affirmed.

(ii) review, vary, discharge and or vacate the ruling and orders of this court granted on 22nd October 2015 in High Court Miscellaneous Criminal Revision No 169 of 2015 affirming the bond granted to the respondents in chief Magistrate's Court Criminal case No. 799/2015 pending hearing of application interparties.

(iii) cancel the bond granted to the respondents.

(iv) deny the respondents bond.

11 The grounds upon which this application was premised was that:

(i) there are changed circumstances justifying a review of the Ruling and orders of this court granted on 22nd October 2015 in High court Miscellaneous Criminal Revision No. 169 of 2015.

(ii) the respondent were a flight risk and were likely to leave the jurisdiction of this court by fleeing to other countries if the bond granted is not cancelled.

(iii) there was material in their possession which would be served on the respondents in this application and in the ongoing investigations in the Westgate Mall terror attack and the Garissa University terror

attack that offer strong reason for the respondents to flee the jurisdiction of this Honourable court and go to other countries with the help of their accomplices in the global terror network:

(iv) this evidence offers new and compelling reasons that the accused person are extremely a flight risk and will jump bail if released.

12 It is clear from the applicants application and submissions that they are raising fresh or new issues which were not prevailing before the trial court at the time the respondents were granted bond by he learned trial magistrate.

13 This matter came to me for revision vide High Court Miscellaneous Revision Criminal Application No. 169 of 2015. And even though this court is vested with unlimited original jurisdiction in criminal and civil matters, I am of the considered view that it would not be proper practice to review, vary ,discharge or vacate my own orders arrived at on revision of the lower court's decision. In fact as it is now, this court is functus officio in so far as that order of 22nd October 2012 is concerned.

14 While I appreciate that the office of the Director of public prosecution may have come across new evidence that forms compelling reason why the respondent should not be released on bond, I would be denying them their right to due process before the court of first instance if I deal with these new matters.

15 if I consider and allows this application by the Directory of Public Prosecution, I would be opening a pandora box and set a dangerous precedent, that a party who is not happy with a court ruling will always come up with new issues to invoke this court's jurisdiction.

16 In fact it would be extremely prejudicial to the accused/respondents if the application is allowed as the orders can be subsequently used in the trial court to deny them bond even if there were new or changed circumstances in their favour as they would have no basis for applying for bond.

17 I believe since the original orders admitting the respondents a bond was an order of the trial magistrate in CMC Cr case No 799 of 2015, the Director of Public Prosecution should canvass this application there, before it is cascaded upwards to the High court, if need be.

Ruling delivered, dated and signed this 9th day of December 2015.

D. CHEPKWONY

JUDGE

In the presence of

Mr Wamotsa for the state

Mr Mwadzuga for the respondents

Mr Chacha for the respondents

Mr Kiarie – C/Assistant