REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 43 OF 2014

REPUBLIC...……...APPLICANT

VERSUS

YOUSUF YAQOOB & 11 OTHERS ………............................…RESPONDENTS

RULING

This revision has been brought by way of a letter dated 5th September, 2014 and is premised under section 362 and section 364 of the Criminal Procedure Code.

The applicant challenges the legality and propriety of the orders made by the learned trial magistrate on the following grounds.

1. That the magistrate failed to consider the case law presented by the prosecution in opposition to the application for bail.

2. That the magistrate in his ruling contradicted his earlier rulings denying bail where he had found that the gravity of the offence is a compelling reason.

3. That the Court granted bail on the renewed application of the 10th to 11th Accused persons without regard to the fact that there was no change of circumstances to warrant the review of his earlier orders declining to grant bail.

4. That the magistrate went on a fishing expedition to find that the Accused persons had proved that they were Kenyan nationals despite the prosecution objections as to the authenticity of the documents provided in proof of their nationality.

5. That the magistrate in his ruling failed to follow High Court decisions which are binding upon him on what amounts to compelling reasons.

6. That the magistrate erred in law in holding that being a Kenyan citizen is a primary consideration in granting bail despite high Court authority to the contrary.

7. That by granting bail to the 10th, 11th and 12th Accused persons, and denying bail to the 1st–9th Accused persons amounted to discrimination since all face the same charge and further that the finding is not only unconstitutional but unprecedented in criminal law and

practice.

8. That the honourable magistrate delivered a skewed ruling wholly based on the defence submissions completely ignoring submissions of the Counsel for the prosecution.

Section 362 of the Criminal Procedure Code in which this application is brought 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 and as to the regularity of any proceedings of any such subordinate Court".**

In the exercise of its revision powers the High Court does not have to be addressed by any of the parties.

Section 365 of the Criminal Procedure code provides,

> **"No party has a right to be heard either personally or by an Advocate before the High Court when exercising its powers of revision.**
>
> **Provided that the court may, when exercising the powers, hear any party either personally or by an Advocate, and nothing in this section shall affect section 364(2) of the Criminal Procedure Code".**

The import of this is clear and is that the correctness, legality an propriety ought to be ascertained on the face of the record and the input of the applicant or his Advocate is not necessarily required.

What is before this court are serious issues of law which-need to be addressed in an appeal.

The Court was addressed by Counsel's for two days. The applicant raises issues on the failure by the magistrate to consider case law presented by the prosecution. That would call for determination of the law applicable and whether the magistrate erred or not.

The learned trial magistrate is also accused of having issued rulings which were contradictory.

He is also blamed for delivering a skewed ruling in favour of the defence.

This case has its own fair share of drama.

The first plea was taken on 31st July, 2014. At the time only 9 Accused persons were present. These are the ones who have been referred to as foreigners. They are also the ones who were found in a ship going by the name of ***Amin*** ***Darya*** also known as ***Al noor.***

An application for bond was opposed at that stage. After hearing both sides the learned trial magistrate reserved his ruling for delivery on 18th August, 2014. In his ruling the learned trial magistrate did find that the 9 Accused persons were a flight risk owing to matters of their citizenship and he denied them bond. He also indicted that he would fast track the case as he had denied them bond.

On 26th August, 2014 an application for consolidation was heard and allowed.

The intent of the consolidation was to add three more Accused persons to the charges of trafficking in Narcotic drugs. The three Accused persons Khalid Agil Mohamed (Accused Number 10), Mohamed Osman Ahmed (Accused number 11) and Maur Abdalla Bwanamaka were subject of a bond application whose ruling delivered on 5th September, 2014 has brought up this application for revision.

In his ruling at page 213 the magistrate notes that,

> **“Some of the best, local and international law on bail has been cited by both sides. The constitution especially articles 49(i) (h) Article 20 (2) (b) and article 50 have been referred to either directly or otherwise. The bottom line on the law on bail is that the prime consideration in granting bail is simply whether or not an Accused person will attend trial. All other considerations Count, but not as much”.**

The learned trial magistrate also observed that it was the third time he was making a ruling on bail application regarding the same matter. The learned trial magistrate further observed that n the first Ruling dated 18th August 2014 bail was denied as the 9 accused persons were foreigners whose attendance in Court could not be guaranteed.

In the second ruling which was contained in **Chief Magistrate's Criminal Case No. 1493 of 2014** the 10th and 11th accused had been denied bail because the particulars of their nationality and occupation were scanty but subsequent evidence had been adduced to the effect that they were Kenyan Citizens and were engaged in credible businesses in the country.

The trial Magistrate found favour with an authority cited by Mr. Magolo. This is the case of ***Aboud Rogo Versus Republic HCCC No. 793 of 2010 NAIROBI*** where Justice Ochieng rendered himself thus,

> **“I must interpret the Constitution in such a manner as to enhance the rights and freedoms granted rather than in a manner that curtails the said right.”**

This must have been in reference to Article 20(3)(b) which provides,

> **” In applying a provision of the bill of rights, a Court shall adopt the Interpretation that must favour the enforcement of a right or fundamental freedom.”**

As argued ***Supra*** the grounds for the application for Revision are found in the order dated 5th September 2014.

The first ground being that the learned Trial Magistrate failed to consider the case law presented by the prosecution in opposition by the application for bail.

This Court did observe that the Magistrate at page 213 did note that the best local and international law on bail had been cited before him by both parties, he however did not cite the particular authorities and expound on them but he proceeded to cite the Kenyan Constitution and in particular Article 49(1) (h).

Article 20(2) (b) and Article 50. It is not correct to state that he did not consider case law presented to him by the prosecution where he clearly states he had done that in respect of both parties.

The second ground is that the learned trial Magistrate in his Ruling contradicted his earlier Rulings where he had found that gravity of the offence was a compelling reason. My reading and understanding of the learned Magistrate’s Ruling was that the main compelling reason is whether if granted bond an Accused would avail himself for trial. He did note that the other compelling reasons do count but the main one is the one he had cited.

The third ground is that the learned trial Magistrate granted bond on the renewed application of the 10th and 11th Accused persons without change of circumstances to warrant the review. In his Ruling which I have substantially quoted, the learned Trial Magistrate did observe that it was the third time that an application for bond was being made before him on the same matter. He gave the reason for refusal of bond in the Ruling dated 18th August 2014 being that the 1-9 Accused persons were foreigners whose attendance in Court could not be guaranteed. The question as to who would house them, feed them and pay for their stay in the Country is germaine, more so when their ship which could have hosted them had been destroyed.

The learned trial Magistrate did observe t hat in the second Ruling contained in ***CMCC No. 1493 of 2014***, the 10th and 11th Accused persons had been denied bail because the particulars of their nationalities and occupation were scanty but subsequent evidence adduced by way of Affidavits did indicate that they were Kenyan Citizens, with families and running credible businesses in the Country. I find circumstances had changed to warrant the review.

The other ground is that the Magistrate went on a fishing expedition in a bid to find whether the Accused persons were Kenyan Nationals and relying on documents whose authenticity was in question I find nothing irregular in a Court receiving evidence relevant to an application before it so long as the other party is given the opportunity to file replying affidavits and or calling for cross-examination of the deponent.

The fifth ground is that the trial Magistrate failed to follow High Court decisions which are binding on him. It has not been shown or clearly indicated which High Court decisions he had failed to follow and in what manner.

On the 6th ground it is contended that the trial Magistrate erred in law in holding that being a Kenyan citizen is a primary consideration in the grant of bail despite High Court authority to the contrary. The trial Magistrate did in his Ruling observe that his quest to find out the Nationalities of the 10th–11th and 12th Accused was with a view of establishing whether they were a flight risk.

On the seventh ground it is alleged that by denying bail to Accused No. 1–9 and granting same to Accused No. 10-12 it amounted to discrimination. Each case has its own different and peculiar circumstances. Each individual's case has to be taken on its own. The issue before the trial Magistrate was that of the granting or refusal of bond. The refusal to grant bond to Accused No. 1-9 was not that they were non-Kenyan citizens but whether if granted bond they would avail themselves in Court.

The eighth ground is that the Magistrate delivered a skewed Ruling wholly based on the defence submissions. This ground is similar to the first one which this Court has dealt with. To my mind this is not a fit case for Revision. The grounds raised can best be addressed in an appeal.

Section 123(3) of the Criminal Procedure Code provides-

> **"The High Court may in any case direct that an Accused person be admitted to bail or that bail required by a Subordinate Court or Police Officer be reduced."**

It is noted that the trial Magistrate did admit Accused No. 10, 11 and 12 to a bond of Kshs. 5 million with two Kenyan Sureties. It is observed that it was not proportionate to the offence facing them. Same is enhanced to Kshs. 10 million shillings with the attendant orders granted by this Court on 18th September 2014.

The original file to be returned back to the Registry for hearing purposes on the dates set by the trial Court.

Reasons for the Ruling of **18th** day of **September, 2014** given and signed this **22nd** day of **September, 2014.**

…...............

M. MUYA

JUDGE

<u>22ND SEPTEMBER, 2014</u>

<u>In the presence of:-</u>

Learned Counsel for the Applicant (absent)

Learned Counsel for the Defence Mr. Magolo and Mr. Ouma for the Defence.