



REPUBLIC OF KENYA



**Gudow & another v Office of the Director of Public Prosecutions (Criminal Revision E002 of 2025) [2025] KEHC 2299 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MANDERA  
CRIMINAL REVISION E002 OF 2025  
JN ONYIEGO, J  
FEBRUARY 6, 2025**

**BETWEEN**

**ABDIRIZAK MUHUMED GUDOW ..... 1<sup>ST</sup> APPLICANT**

**FARAHAN MOHAMED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. The applicants herein were jointly charged with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act*. Having denied the charge before Honourable Omondi, a plea of not guilty was entered on 27-12-2024. Subsequently, prosecution requested for the applicants to remain in custody till the victim testified. The court graciously acceded to the request and detained the applicants at Mandera GK prisons till 03-01-2025 when hearing was scheduled. On 03-01-2025, the victim failed to turn up on grounds that she was sick. Consequently, the court granted the applicants a bond of kshs100,000 /= with one surety of similar amount. The court then set the matter down for mention on the 10-01-2025 for directions on the hearing.
2. On the 10-01-2025, the file was placed before Hon. Benson Khapoya who allegedly cancelled the applicants' bail terms on grounds that the applicants had interfered with witnesses more particularly the victim whom they warned against turning up in court to testify.
3. Aggrieved by the said cancellation, the applicants moved to this court vide a notice of motion dated 13<sup>th</sup> January 2025 pursuant to Section 362,363 and 364 of the *CPC* seeking; to set aside Hon. Khapoya's orders of 10-01-2025 canceling their bail terms and subsequently reinstate the bond terms imposed by Hon. Omondi on 03-01-2025; stay of proceedings in Mandera MCSO 18 of 2024 pending the hearing and determination of the revision application herein and; that this Honourable court does call for and examine the record of the proceedings.



4. The application is based on the particulars set out on the face of it and further amplified by the averments contained in the applicants' respective affidavits in support sworn on the 13-01-2025. It was deposed that there was no justification for Hon. Khapoya to have assumed hearing of a matter that was assigned for and scheduled for mention before Hon. Omondi. Secondly, it was averred that there was no plausible ground laid before Hon. Khapoya to cancel bail terms granted to the applicants by Hon. Omondi hence assuming appellate and or revisionary jurisdiction over Hon. Omondi's orders. This court was called upon to revise Hon. Khapoya's orders as they amount to a procedural technicality.
5. In response, the respondent relied on the replying affidavit sworn by the investigating officer one PC Fanuel Mogeni sworn on 17-01-2025 in which he averred that the applicants having been released on bail, they proceeded to threaten the victim on 09-01-2025. He proceeded to attach an OB number 20/09/01/2025 as proof of the said threats (see OB extract marked F.M.1). That in the said complaint, the applicant was said to have approached the complainant with some money thus enticing her to disappear from the court's jurisdiction. That the second applicant ordered the complainant to accept the money offered by the 1<sup>st</sup> applicant lest they eliminated her life.
6. It was averred that as a result of the said threats, the complainant fled to her uncle's home for her safety. That it was on the basis of the said complaint that he swore an affidavit on 10-01-2025 seeking cancellation of the bail terms. He deposed that there are compelling reasons to justify the cancellation of bail terms and that bail is not an absolute constitutional right.
7. During the hearing, both parties adopted the content contained in their respective affidavits. Mr. Nyamwaro for the applicants submitted that Hon. Khapoya's action in taking over proceedings pending before another competent magistrate was unprocedural and without any legal basis.
8. Mr. Namiti prosecution counsel opposed the application arguing that prosecution had tendered compelling reasons for the court to cancel bail terms on account that the applicants had threatened witnesses. Counsel contended that the court was ready to reinstate bail terms once the victim testified.
9. I have considered the application herein and the response thereof. The only issue for determination is whether the applicants have met the threshold for grant of revision orders sought. This courts' jurisdiction has been summoned pursuant to Article 165(6) and (7) of the Constitution and Sections 362,363 and 364 of the Criminal Procedure Code.
10. Article 165(6) does provide as follows;

“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”.
11. Article 165 (7) provides that;

“For the 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 any order or give any direction it considers appropriate to ensure the fair administration of justice.”
12. Section 362 Power of High Court to call for records-

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.

13. Section 363- Subordinate court may call for records of inferior court-

- 1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.
- 2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court.
- 3) [[Act No. 17 of 1967](#), s. 35.]

14. Section 364 provides for the Powers of High Court on revision as hereunder;

- 1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
  - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
  - (c) in proceedings under section 203 or 296(2) of the *Panel Code* (Cap. 63), the *Prevention of Terrorism Act* (Cap. 59B), the *Narcotic Drugs and Psychotropic Substances (Control) Act* (Cap. 245), the *Prevention of Organized Crimes Act* (Cap. 59), the *Proceeds of Crime and Anti-Money Laundering Act* (Cap. 59A), the *Sexual Offences Act* (Cap. 63A) and the *Counter-Trafficking in Persons Act* (Cap. 61), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
- 2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:  
Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- 3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- 4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- 5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.



15. Where a subordinate court acts improperly or erroneously, the high court is clothed with powers to correct such impropriety or error. See *prosecutor vs Stephen Lensiko* (2018)eKLR where the court highlighted on the principles guiding a court when exercising revisionary powers as follows; where the decision is erroneous; where there is no compliance with the law; where the finding of fact affecting the decision is not based on evidence or it is as a result of misreading or non-reading of evidence on record; where the material evidence on the parties is not considered and; where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of a lesser charge.
16. Similarly, in the case of *Joseph Nduvi Mbuvi vs Republic* (2019) eKLR, the court held that;

“In my considered view, the object of the revisional jurisdiction of the high court is to enable the high court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still on going, should be proceeded with...”
17. I am a live of the dictates of Article 49(1)(h) of the *Constitution* that, bail is a constitutional right to an accused person. However, the same is not an absolute right under Article 25 of the *Constitution*. See *Republic V Joktan Mayende & 3 Others* (2012) e KLR.
18. The gist of the revision application herein is the cancellation of the bail terms by a court other than the trial court and that there were no compelling reasons for the cancellation. There is no dispute that plea in respect of the subject criminal case was taken before the Honourable Omondi on 27-01-2024 who deferred release of the applicants on bail till 03-01-25 when the victim would have testified. On that day, the victim did not turn up hence the court fixed the matter for directions on 10-01-2025. He nevertheless released the applicants on bail. On 10-01-2025, the file was taken over by Hon. Khapoya who cancelled their bond based on the allegation that the applicants had threatened the complainant. It is not clear from the record as to why the file was placed before Hon. Khapoya and not Hon. Omondi who was seized of the matter.
19. Ordinarily, it was the trial court which granted bail that was supposed to have reviewed the bail terms save for the situation where the file is re-allocated to another court for trial. If there was any irregularity for review of bail granted by a junior court (Hon. Omondi), the senior court (Hon. Khapoya) would have referred the file with a note to the high court seeking revision pursuant to Section 363 of the *CPC*. Hon. Khapoya improperly did review his colleague’s orders yet the trial court was still working in the same station. Had the file been allocated to his court (Khapoya’s court) for trial, he would have acted properly. I do agree with Mr. Nyamwaro that the action taken by the Hon. Khapoya in reviewing his colleague’s order was improper and inappropriate hence exercise of jurisdiction in excess tantamount to discharge of revisionary or appellate powers.
20. As to the merits of the application for cancellation of bond, the same would have been handled by Hon. Omondi who was seized of the matter. In my view, the application for cancellation of bond terms granted on 03-01-2025 should be argued before Honourable Omondi for consideration on merit. I will therefore not delve onto the merits of the application for review or cancellation of bail terms granted on 03-01-2025. To do so will prejudice the outcome of the application. Therefore, the file should urgently be placed before hon. Omondi for fresh consideration of the application by the prosecution seeking to cancel the applicants’ bond.
21. Having held as above, the inevitable order to make is that the order of Hon. Khapoya made on 10-01-2025 and subsequently confirmed in his ruling delivered on 16-01-2025 cancelling the applicants’ bond is hereby set a side and instead the order for release of the applicants on bail made by



hon. Omondi on 03-01-2025 be and is hereby reinstated and the applicants to remain on bond as they were before the order of Hon. Khapoya issued on 10-01-2025.

22. For avoidance of doubt, the applicants shall remain on bond pending hearing and determination of the application for cancellation of bond by the prosecution before Hon. Omondi. To that extent, the application herein is allowed in terms of the directions given herein above.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**J.N.ONYIEGO**

**JUDGE**

