Baugartner v Republic (Criminal Appeal 26 of 2023)
[2024] KEHC 2749 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 26 OF 2023

SM MOHOCHI, J

MARCH 11, 2024

BETWEEN

MARTIN HERMANN BAUGARTNER ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Applicant, Martin Hermann Baugartner, is charged with an unspecified offence under the *Sexual Offences Act* 2006 in Nakuru Sexual Offences Case No. E008 of 2023. The Matter is pending trial but owing to a Ruling dated 30th June 2023 the Applicant being aggrieved filed an Appeal against the same.

2. Together with the Memorandum of Appeal the Applicant filed an application vide a Notice of Motion dated 1st July 2023 pursuant to Articles 45,50, and 165 of *the Constitution* and Sections 362,363,364 365 and 367 of the Criminal Procedure Code and Paragraph 1,1,1.2 and 3.1 of the Bail and Bond Policy Guidelines, seeking the following orders:

    i. Spent

    ii. That, this Honorable court be pleased to review and/or set aside the ruling issued on 29th June 2023 by Hon E. Soita S.R.M against the Applicant herein in Chief Magistrates S.O.A Case No. E008 of 2023.

    iii. That, this Honorable court be pleased to review and/or set aside the bail/bond term V in Misc. Application No. E32 of 2023 issued on 23rd March 2023 and allow the applicant to access Twajenga Holding Company Limited.

    iv. That, this honorable court be pleased to issue an order directing the respondent, to release the applicant's gadgets being two mobile phones models Samsung M32 and Samsung A52, laptop Asus model and a flash drive to the Applicant Martin Herman Baugartner forthwith.

v. That, pending the hearing and determination of this appeal, the court be pleased stay the hearing in S.O.A Case No. E008 of 2023 Republic -versus- Martin Herman Baugartner

vi. The costs of this Application be provided for.

3. The Court had on the 29th September 2023 directed that the Application shall be heard and disposed off by way of written submissions with the state requesting for 21 days. Eventually the state briefly orally submitted and relied on the Replying Affidavit sworn by Monica Wanjiru Mburu Prosecution counsel dated 28th November 2923. On his part the Applicant filed his written submissions on the 29th November 2023.

4. Directions were issued on the 17th January, 2023 for the application to be heard and disposed-off by way of written submissions and parties were to file their respective submissions.

Applicants Case

The Applicant has identified two issues for determination

i. Whether the honourable trial court erred in retaining the appellant's gadgets hence denying him the right to put forward a defence?..

ii. Whether the honourable trial court erred in issuing unreasonable and harsh conditions for release on bond and denying the appellant access to his home?

5. As to whether the honourable trial court erred in retaining the Applicant's gadgets hence denying him the right to put forward a defence the Applicant contends that, the trial court undermined his rights specifically as under Articles 49 and 50 (2) of *the constitution*.

6. That the trial magistrate denied the Applicant his gadgets including a laptop, a phone and a flash drive which contains the material necessary to his defence and instructed him to disclose to the prosecution the materials he needs and he be supplied with them.

7. That the prosecution does not own the Applicant 's gadgets and should have extracted whatever they need and release them back to the appellant since they have had sufficient time and the hearing already commenced the applicant is entitled to his own defence and as such should be allowed access to his gadgets in good time to facilitate the adequate preparation of his defence.

8. That the accused person does not have a duty to disclose his defence to the prosecution reference is made to Criminal Revision Number 4 of 2019 Joseph Nduvi Mbuvi v Republic held:

> "It is therefore clear that Article 50(2) only applies to the accused person. Accordingly, Article 50(2) of *the Constitution* which provides for right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence can only inure to the benefit of the accused. The prosecution cannot therefore rely on the said provision as a basis for seeking that it be informed in advance of the evidence the accused intends to rely on, and to have access to the same".

9. Further reliance is placed on the case of Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR the Court of Appeal held that:

> "We start from the point that in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere

whose grandson the appellant is said to be so if at the beginning of the trial, *the Constitution* obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance".

10. As to whether the honourable trial court erred in issuing unreasonable and harsh conditions denying the Applicant access to his home. That the trial court also issued an order barring the Appellant from accessing Twajenga Holdings which is his home and office as a condition for his release on bond. That the Applicant a needs to access his home lest he is rendered homeless and that, he has been subjected to harsh treatment and has been made to live off his savings by seeking accommodation in hotels.

11. That, he has also been subjected to economical difficulty since Twajenga Holdings is located within his home and is his company and only source of income. That the trial court has denied the Applicant access to his home since according to the Respondent, there still are vulnerable witnesses within Twajenga Holdings. The court entirely ignored the basic human rights of the Applicant including but not limited to fair trial and hearing, fair and equal treatment and human dignity. Denying him a home and putting his company at a risk of mismanagement and failure even before he is proven guilty is unjust.

12. That the court in Criminal Revision Number 4 of 2019 Joseph Nduvi Mbuvi v Republic further held:

> " I therefore agree with Kimaru, J in Patrick Mugambi vs. R that:
>
> > "Where the exercise of right to fair trial by the accused conflicts with that of the victim, then the right of the accused shall take precedence or shall prevail... [The] accused person, cannot be compelled to disclose to the victim or for that matter the prosecution, the evidence that he may or may not adduce in his defence [as]...this would be in breach of his constitutionally guaranteed right to fair trial as provided by Article 50(2) of *the Constitution*."

13. The trial court gave priority to the rights of the victims and the witnesses over that of the Applicant. The Bail and Bond Policy Guidelines Advocate for bond reasonable terms and denying the Applicant access to his home is unreasonable.

14. The Applicant is the person who stands to lose his freedom and much more and is the person standing trial not the victims and not the witnesses. The court should not aid in actions against the natural rules of justice that could occasion injustice upon the Applicant.

15. That the court in Criminal Misc. Case No. 29 Of 2018 Kirit Bhangwanda Kanabar Vs Director of Public Prosecutions & Another held:

> " Considering the impugned order what matters were taken into account by the learned trial Magistrate" This was a case involving grant of pre-trial release on reasonable bail terms. The learned Magistrate had the duty to consider the application fairly under the power conferred upon her of unfettered discretion with regard to every aspect of this right to bail. However, in construing Article 49(h) and the Criminal Procedure Code on bail provisions or for any other reasons she exercised her discretion as to thwart or run counter to the policy and objects of *the constitution*. The most important view as far as this revision is concerned is that setting bail terms so high which are not attainable by the accused persons is simply another way of lawfully denying bail altogether. The decision is also questionable for its legality; regularity and propriety for no reasons were given for the decision. its effect was substantial and as a result of the error the accused was deprived the benefit of reasonable bail terms and

was not accorded the reasons that might have been conceivably taken into account by the learned trial Magistrate."

The court further held, "As argued elsewhere, bail condition should not be equated with punishment against the offender for committing an offence yet to be proved by the State "

16. The Applicant pray that this court allows the Applicant's appeal and review and/ or set aside the court's ruling dated and allow the Appellant to access Twajenga Holdings which is his home and company and his gadgets being two mobile phones models Samsung M 32 and Samsung A52, laptop Asus model and a flash drive in order to prepare for his defence and put it forward.

Respondents Case

17. The Application is opposed by a replying Affidavit by Monica Wanjiru Mburu Prosecution counsel dated 28th November 2023.

18. That, the application herein seeking to review the ruling issued on 29th June, 2023 by Hon. E. Soita (SRM) lacks merit and is meant to delay the expeditious disposal of the case therein.

19. That, if indeed the purpose for requesting for the said items was for purposes of extracting information meant for preparation for his defence, then it his wish has already been granted by the trial court vide Ruling of the court dated 29th June,2023 and thus the application herein is an abuse of the court's process.

20. That, in response to prayer 4 of the application the trial magistrate issued directions that the Applicant together with his advocate do have a Pre-trial conference with the ODPP and the investigation officer to have the Applicant and his Counsel extract the information they intend to rely on which are in the stated gadgets i.e.2 phones (Samsung M32 Samsung A52), laptop make Asus and the flash drive for purposes of preparation for their defence.

21. That, if the Applicant was seeking the said items for other reasons then the same were not disclosed to the trial court and the court ruled based on the material presented before it.

22. That, the said items are still the subject of investigation and scrutiny for purposes of the prosecution of the case at the subordinate court hence cannot be released at this juncture.

23. That, in response to prayer 3 of the application, vide the Ruling of the court alluded to herein above, the trial court ordered that the Accused/Applicant would only access Twajenga Holding Company Limited after all victims and the non-professional witnesses have testified.

24. That, it therefore goes without saying that it is the trial court that has the jurisdiction to review the said order upon application by the Applicant once the said witnesses have testified.

25. That, no material has been placed before this court to demonstrate that the said Order was erroneous and illegal as it is meant to safeguard and protect the said witnesses and avoid interference by the Accused/Applicant in order to ensure that justice is not obstructed.

26. That, nothing bars the Applicant herein from making an application to be granted access to the said company premises before the trial court once the said witnesses have testified.

27. That, in response to prayer 5 of the application which seeks stay of proceedings in S.O.A. NO. E008 of 2023 Republic vs Martin Herman Baugartner, the determination of the application and/or the orders sought herein does not have any bearing whatsoever on the proceedings in the case cited hereinabove.

28. That, the Applicant herein has not demonstrated any prejudice and/or any likelihood of irreparable harm that may be occasioned to him if the said proceedings continue during the pendency of this application.

29. That, the application herein lacks merit, is meant to delay and/or obstruct justice and is an abuse of court process and ought to be dismissed by this honorable court.

30. The Respondent thus prays that the Application be dismissed.

Analysis and Determination

31. This is an interlocutory Appeal that simultaneously invokes the supervisory jurisdiction of the court seeking to set aside the impugned ruling, seeking orders of release of exhibits, seeking review of Bail/ Bond terms as well as stay the criminal proceedings pending hearing of the Appeal, without seeking to call for the proceedings from the trial court.

32. The Court equally notes that, the Grounds of Appeal as contained in the Memorandum of Appeal are similar and almost identical and the instant Application if allowed in favour of the Applicant shall determine the Appeal.

33. The High Court is vested with Revisionary Powers under *the Constitution* and Section 362 to 366 of the Criminal Procedure Code Cap 75. More particularly, Article 165 of *the Constitution* provides as follows: -

    (6) 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 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.

34. The Criminal Procedure Code, Cap 75 under Section 362 states as follows: -

> " Power of the High Court to Call for Records:
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> 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."

35. Section 364 further outlines the manner in which the revision jurisdiction should be exercised. It states as follows: -

> " Powers of the High Court on Revision
>
> (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 –
>
> (b) In the case of any other order other than an order of acquittal, alter or reverse the order.

(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 defense:

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.

36. The Court of Appeal when dealing with the right to appeal against an interlocutory ruling in a criminal matter in the case of Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR, held that:

"In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence..."

37. In the Supreme Court's decision in Joseph Lendrix Waswa V Republic, [2020] eKLR which opened a window for filing of interlocutory appeals in criminal matters but only in exceptional circumstances. The Supreme Court stated as follows:

"86. There is no provision in both *the Constitution* and the CPC for interlocutory criminal appeals. *The Constitution* under Article 50 (q) provides that every accused person has the right, 'if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law.' Similarly, the CPC under sections 347 and 379 (1) only allows appeals by persons who have been convicted of an offence....

94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and await the final determination by the trial Court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal within 14 days of the trial Court's judgment.

However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;

b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;

c. Where the decision entails the recusal of the trial Court to

38. In the case of Republic vs. Samuel Gathuo Kamau [2016] eKLR, the court discussed the supervisory jurisdiction of the High Court at length and observed as follows:

"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc... it does not include any perceived power to make a decision on behalf of a subordinate court... In the case of appeals, the supervisory power dis exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal

Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings see Article 165 (7) of *the Constitution* and sections 362 and 364 of Cap 75..."

39. In the case of Republic vs James Kiarie Mutungei [2017] eKLR Nyakundi J. held thus;

> " the rationale of the High Court as a revisionary authority can be initiated by an aggrieved party or suo moto made by the court itself, to call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, propriety or correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits."

40. The threshold for determining whether a decision is correct, proper and legal is found in Constitutional and statutory provisions. The Oxford English Dictionary Vol. VIII defines the word propriety to mean fitness, appropriateness suitability, conformity with requirements, rule of principle rightness, accuracy, correctness, justness. The depth of revisional jurisdiction of the high court was set out by the court of appeal in which cited the case of Sriraja Lakshmi Dyeing Works vs. Pangaswamy Chettair [1980] 4SCC 259 where the Supreme Court of India elucidated the principles as follows: -

> " The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statues is always included in appellate jurisdiction but not vice versa. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words 'to satisfy itself' under section 25 read (which has similar provisions with Kenya's section 362 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya) is essentially a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, is quite obviously a much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied)."

41. According to Black's Law Dictionary, 10th Edition, Review has been defined as a consideration, inspection or re- examination of a subject or a thing. It entails a second view or revision; consideration for purposes of correction. Bail review means, "A process of re-examination of bond terms to an accused person who has been unable to post bail before the same court."

42. The above means that an application for reviewing bail or bond terms should be made to the trial court granting the same. A person is therefore expected to seek redress in a higher court after seeking review in the trial court. This position was clearly articulated by Lessit J. in the case of Harish Mawjee & another vs. Republic [2020] eKLR Criminal Revision case no 545 of 2020, as follows:-

> " There are certain overarching principles that govern the administration of bail and bond by Courts. First of all, courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must

consider the relevant factors affecting issuance of bond including penalty of offence and the accused's ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court or appeal..... an accused can apply for review of bond terms given by the trial court. The application should be made before the trial court which granted the bond. If, however the accused is still aggrieved by the decision of the trial court, he can still approach the higher court for relief."

43. In the present case, the Applicant did not seek review in the trial court. Needless to state, it is the duty of the trial court to determine whether to grant bail or bond and under what terms. The judicial power with respect to such application is discretional and exercisable in the first instance by the trial court. While the High Court is vested with wide powers to supervise the subordinate courts, it is the trial court that is seized of the facts and circumstances of the case and the socio-economic circumstances of the accused person which are key in determining whether or not to grant bail and on what terms and conditions.

44. Where an application for bail has been made and the trial court under the circumstances is unable to make a determination due to inadequacy of information, it is at liberty to seek more information from the accused person or other necessary parties in order to arrive at an informed decision. This may be done through further inquiries as outlined in the Judiciary Bail and Bond Guidelines which states at paragraph 4.26 (c) that:-

> " The court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision, including the following instances – (c) Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms."

45. Following the above, I consider it procedural that an Application for review ought to have been made in the trial court in the first instance and that a revision or appeal to the High Court would follow upon dissatisfaction. Be that as it may, I now consider the grounds set out in the Application within the parameters of Section 362 of the Criminal Procedure Code for incorrectness, illegality or impropriety. For certainty, I restate in the succeeding paragraphs the principles that usually guide a court in considering an application for bail bond.

46. This court must be reluctant to interfere in the exercise of judicial discretion in a lower court unless it is convinced that doing so would be in furtherance of the administration of justice. This principle was clearly stated by the court of appeal in Mbogo v. Shah (1968) EA 93 thus: -

> " A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

47. Judicial discretion is exercised judiciously. The Judiciary Bail and Bond Policy Guidelines of 2015 have provided parameters to assist the court in exercising discretion judiciously. With respect to bail and bond, they require that the court in granting bail should consider the seriousness of the offence, the strength of the case, interference of witnesses, failure of the accused to attend or where the accused is charged with another case, the need to protect the victim(s), the security and safety of the accused, the likelihood of absconding from the jurisdiction of the court and other factors which must be weighed by the court in the interest of justice. Such an exercise of discretion requires a wholistic approach and

the court must, in close circumspection, take to account the circumstances of the case and the accused person individually.

48. Section 123 of the Criminal Procedure Code provides that: -

> "(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:
>
> Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.
>
> (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.
>
> (3) 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."

49. Section 123A Criminal Procedure Code CAP 75 provides as follows:

> Exception to right to bail
>
> (1) Subject to Article 49(1)(h) of *the Constitution* and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
>
> (a) the nature or seriousness of the offence;
>
> (b) the character, antecedents, associations and community ties of the accused person;
>
> (c) the defendants record in respect of the fulfillment of obligations under previous grants of bail; and;
>
> (d) the strength of the evidence of his having committed the offence;

50. In granting bail, the court must ensure that bail or bond terms must not be excessive or unreasonable and should not be far greater than what is necessary to ensure or guarantee the accused person's appearance before court. Where this is the case, it would be tantamount to a denial of bail, a right which is enshrined in *the Constitution* and the Criminal Procedure Code as outlined above. This position was expounded in the case of Taiko Kitende Muinya (2010) eKLR.

51. With Regards to the Applicants plea for review of the Bail bond Terms, nothing has been presented to demonstrate that the Ruling setting out bail/bond terms was tainted with incorrectness, illegality or impropriety and the fact that the Applicant is preparing for his defense is indicative that the pre-condition attached prohibiting him from setting foot at Twajenga Holding Company Limited until all prosecution witnesses have testified will be extinguished at the close of the Prosecution's case setting stage for possible review by the trial court.

52. In this case, the Applicant has not advanced any good reason as to why the criminal proceedings should be stayed. He has also not demonstrated how he is going to be prejudiced if he tenders his evidence in defence. From the above case law, it is clear that a ruling of a case to answer does not mean the court will convict the accused and it will cause no harm to the accused if the matter is heard to conclusion.

53. Owing to the scanty presentation by the Applicant the court is not convinced that, the Applicant will suffer grave injustice if the trial court proceeds to take his defence at this stage.

54. With Regards to an Order sought to release the three (3) exhibits, two mobile phones models Samsung M32 and Samsung A52, Laptop Asus model and a flash drive the Applicant has not demonstrated that the Order to extract data to rely on prejudices his fair trial rights this court is guided by case of Simon Okoth Odhiambo v Republic [2005] eKLR where the court held thus:

> " As regard the release of exhibits, this was most unfortunate. The prosecutor applied for the release of the exhibit long before judgment was delivered. The court for unexplained reasons granted the application. As we understand it exhibits should never be released by court until it is satisfied that in the case of conviction, no appeal has been preferred and if the appeal has been filed, such exhibits should only be released once the appeal has been heard and determined."

55. This Court equally appreciate that it cannot either on appeal or in exercises its supervisory review jurisdiction interfere with case management in the subordinate court by issuing case management-oriented orders and may only interfere where the trial court has not exercised its discretionary power judiciously.

56. In this case, given the nature of the ruling sought to be appealed against, I am not persuaded to find that it falls under any of the exceptions the Supreme Court envisaged in the Joseph Lendrix Waswa V Republic, [2020] eKLR above decision.

57. This Court has examined and reviewed the impugned trial court order and owing to the foregoing reasons the Application. Notice of Motion dated 1st July 2023 has not laid any basis to interfere with the exercise of discretion by the trial magistrate, and that the Impugned Ruling lawfulness and propriety has not been dented.

58. The Application dated 1st July 2023 is accordingly found to be without merit and the same is dismissed.

59. Upon Perusal of the Notice of Appeal dated 1st July 2023, this court is persuaded that the same is bereft of sufficient grounds for interfering and I am thus constrained to reject the same summarily pursuant to Section 352 (1) of the Criminal Procedure Code.

60. The Applicant is directed to resume his trial before the Trial Court in Nakuru Chief Magistrate Court Sexual Offences Case No. E008 of 2023.

61. This Matter-(Nakuru Chief Magistrate Court Sexual Offences Case No. E008 of 2023) shall be mentioned before Hon E.S Soita for further directions, on or before the 14th March 2024.

It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF MARCH, 2024

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Mohochi. S. M.

Judge