



**Mugo v Director of Public Prosecution (Criminal Revision
E091 of 2024) [2024] KEHC 5891 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E091 OF 2024
LM NJUGUNA, J
MAY 23, 2024**

BETWEEN

THOMAS MBITI MUGO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. For determination is the notice of motion dated 06th May 2024 through which the applicant seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to exercise its discretion to call for and examine the record in Siakago Criminal Case No E187 of 2024 for purposes of satisfying itself on correctness, legality and propriety of the findings and orders as well as the regularity of the proceedings giving rise thereto;
 - d. That this court to revise and set aside the orders of 02nd May 2024 in Siakago Criminal Case No E187 of 2024 and do reinstate the applicant's bond terms; and
 - e. That the court issues any other orders that it may deem fit.
2. The applicant stated that the trial court cancelled his bond terms based on an affidavit by PC Jacob Mutua who stated that the prosecution witnesses have turned hostile and their testimonies are different from the statements initially recorded. The applicant is charged with the offence of being in possession of unaccustomed goods contrary to section 200 (iii) of the East Africa Community Customs Management Act. He was committed to bond of Kshs 300,000/= . It is his case that the court rushed to cancel bond terms based on the affidavit of the named police officer. That he has not been



in communication with any of the prosecution witnesses neither has he missed court before. The trial court cancelled bond citing witness interference.

3. The respondent filed grounds of opposition stating that the trial court gave sufficient reasons for cancellation of bond terms. That the application does not disclose in what ways the court's order cancelling the bond terms is wrong or misdirected and justice has been miscarried.
4. The application was canvassed by way of written submissions.
5. The applicant submitted that he has never influenced witnesses and that the investigating officer should not blame his incompetence on the applicant. That no evidence has been produced to show that the applicant is interfering with witnesses. He placed reliance on the cases of *Republic v Saidi & another* (2013) eKLR and *Republic v Tsuma* (2017) eKLR and article 49(1) (h) of the *Constitution*. He stated that it is not unusual for prosecution witnesses to give testimony that contradicts their initial statement and so it cannot be concluded that there is witness interference. That none of the witnesses have been declared as hostile. He also relied on the case of *Patrick Muthuri Mwenda v Republic* (2022) eKLR and urged the court to revise the trial court's findings.
6. The respondent submitted that this court's power for revision is provided for under section 362-264 of the *Criminal Procedure Code* and it may only be exercised when there was impropriety at the trial court. It relied on the case of *Cyrus Kipruto Serem v Republic* (2020) eKLR where the court relied on the case of *Mbogo v Shah* (1968) EA 93. That 2 witnesses had testified and the 3rd witness was stood down and the prosecution sought time to investigate possible witness interference. That one witness who had been bonded and confirmed failed to appear to testify. The trial court allowed the investigating officer time to investigate and the court consequently cancelled bond terms.
7. It was the respondent's argument that under Article 49(1) of the *Constitution*, an accused person is entitled to bond/bail but the same may be limited for compelling reasons. Reliance was placed on paragraph 4.9 of the Judiciary's Bail and Bond Policy Guidelines and the respondent stated that the conduct of the accused person is part of the considerations for limiting bond terms. That the respondent sought that bond terms be cancelled until all the civilian witnesses have testified. That the applicant has failed to demonstrate how wrong the trial court was in its finding. It urged the court not to disturb the trial court's finding.
8. The issue for determination is whether the application has merit.
9. The revisionary power of the High Court is drawn from Article 167(6)&(7) of the *Constitution* which provides:
 - “(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.”
10. Section 362 of the *Criminal Procedure Code* provided as follows on the High Court's supervisory jurisdiction:

“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.”

11. Every accused person has a right to be released on bail or bond terms but the right is not without limits and it may be limited under certain circumstances. Article 49(1)(h) of the Constitution provides for the right to bail pending trial as follows:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”
12. The Judiciary Bail and Bond Policy Guidelines provide guidance on factors the court can consider in assessing whether or not to grant bail. They are, inter alia;
 - a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
 - b. The strength of the prosecution case.
 - c. The character and antecedents of the accused person.
 - d. The failure of the accused person to observe bail or bond terms.
 - e. The likelihood of interfering with witnesses.
 - f. The need to protect the victim or victims of the crime.
 - g. The relationship between the accused person and the potential witnesses.
 - h. The best interest of child offenders.
 - i. The accused person is a flight risk.
 - j. Whether the accused person is gainfully employed.
 - k. Public order, peace and security.
 - l. Protection of the accused persons.
13. The trial magistrate noted in the ruling delivered on 02nd May 2024, that the applicant has been continually trying to influence the court through his “connections” but the court has stood firm. That he resorted to compromising the prosecution witnesses who are his relatives and he has fast access to them. The court also noted that the applicant is unwell and it registered its sympathy then proceeded to order cancellation of bond terms on account of witness interference, until all the civilian witnesses had testified. The court stated that any future application for bail/ bond will be considered on its merit and shall be dependent on the circumstances prevailing at the time.
14. In his affidavit for cancellation of bond, PC Jacob Mutua stated that the prosecution witnesses have become hostile as a result of witness interference. He also deposed that the applicant has not complied with bond terms. From a perusal of the proceedings of the trial court, the court continually reminded the witnesses that they were on oath. The prosecution ought to have proved beyond reasonable doubt that the applicant was indeed interfering with the witnesses. The trial court record simply brings out a suspicion that the applicant is interfering with the witnesses because they are his relatives and he has easy access to them. Suspicion alone is not enough to prove that the demeanor of the witnesses is as a result of witness interference by the applicant.



15. That being said, the cancellation of bond terms was not founded on any tangible or specific evidence of interference with witnesses, therefore, the ruling of the trial court delivered on 02nd May 2024 is hereby set aside. Nonetheless, in the circumstances, the court is compelled to make the following orders, being conditions for the applicant's release:

- a. The applicant shall not interfere, or make any contact by himself or through other people, whether directly or indirectly with any witness or witnesses during trial; and
- b. The applicant shall personally report to the OCS Siakago Police Station twice every week until conclusion of the trial; and
- c. Any breach of any of these conditions will lead to automatic cancellation of his bond.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF MAY, 2024.

L. NJUGUNA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

..... for the Applicant

..... for the Respondent

