



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
CRIMINAL CASE NO 20 OF 2020
REPUBLIC
-VERSUS-
KESUUNTU OLE NTIMAMA...ACCUSED
RULING

Erroneous release on Bond

[1] Parties herein put the court in such awkward position. It all started when Mr. Mengaiti, the defence counsel applied for the accused to be granted bail. The court granted the accused bail/bond. Later, Mr. Masikonde, counsel watching brief for the victims, and Mr. Mengaiti the defence counsel at the time relative to this ruling, entered into a consent to set aside bail/bond that the court had granted the accused. Mr. Masikonde's application for cancellation of bond was therefore compromised. The court, (Bwonwong'a J.) found the said consent to be valid and considered bail application by the accused. He was denied bail.

[2] The foregoing is not the end of things. Thereafter, the defence approached the Deputy Registrar to have bond terms that had initially been granted to be approved; quite inappropriate and in breach of court order. The bond terms were approved and the accused was released "on bond".

[3] This prompted Mr. Masikonde and the prosecution to apply for cancellation of "the bond" on the basis that; (a) the initial bond had been cancelled following the consent between the counsels which the court found to be valid; (b) the accused was denied bail/bond; (c) there was no review or reversal of the order cancelling and denying him bail; and (d) in the circumstances, the release of the accused could only be erroneously. Therefore, the accused must remain in custody.

[4] Mr. Martin Ole Kamwaro, the current defence counsel argued that counsels cannot compromise the liberty and right of the accused to freedom through consent. In any case, the said consent compromising his liberty was never communicated to the accused. He insisted that the accused has right to bail and he has not breached any of the conditions set in the bond granted. He has faithfully attended court and lives 120 km from the family of the deceased. He urged that cancelling his bail/bond is equal to conviction. He asked the court not to cancel his bond.

[5] Now you know why the court laments that parties herein put the court in quite awkward position.

Denial of liberty: by consent of counsels

[6] I am aware that the court (Bwonwong'a J.) found the consent between the advocate for the victims and the advocate for the accused to be valid. But, I doubt that counsels have the power to compromise the freedom and liberty of an accused person by consent or in any other manner under article 49(1)(h) of the Constitution. In my view, consent of counsels can never be a compelling reason to deny an accused bail. Denial or grant of bail is always the decision of the court after hearing the parties on, and applying the thresholds provided in the Constitution and other implementing legislations. Of great significance is that, denial of bail is only upon the proof of compelling reasons by the prosecution; and, the standard thereof is quite stringent given the philosophy of the Constitution which insists on promotion and protection of rights.

[7] Be that as it may, the accused has not absconded. Except, however, the record show that his application for bond had been denied by the court. From the record, the defence acted inappropriately in seeking for approval of bond terms which had been set aside by the court. Thus, despite faithful attendance in court, or quarrels the accused may fasten on the propriety or legality of the consent herein, it would be abnormal assumption that his release "on bond" was not in violation of the court order. Hence, he cannot continue to enjoy fruits of abuse of process of court and his breach of court order. Accordingly, I cancel the bond and the accused will remain in custody unless otherwise ordered.

[8] I, however, declare not any foreclosure on this aspect, for I do not accept the proposition by Mr. Masikonde that, the accused should file an appeal to challenge denial of bail/bond. Bail/Bond is a question of right under the Constitution and may be applied for again through the process of review as long as the criminal proceeding is still alive.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 11TH DAY OF MARCH 2021

F. GIKONYO

JUDGE

In the Presence of:

1. Mr. Kasaso – CA
2. Ms. Torosi for DPP
3. Accused person
4. Ole Kamwaro for accused

F. GIKONYO

JUDGE