



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

MISC. CR. APPLICATION (REVISION) NO. E109 OF 2021

DENNIS MASETE MAKOKHA...APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant filed an application dated 18/11/2021 brought under article 50 of the constitution and section 362 of the Criminal Procedure Code seeking the following reliefs:

a. (Spent).

b. That the orders made by the trial magistrate Hon Stephen O. Mogute PM on 11/11/2021 and all subsequent orders thereto cancelling and/ or suspending the applicant's bond terms be varied and/ or set aside and the bond with surety be reinstated forthwith.

c. That pending the hearing and determination of the application, all proceedings in Bungoma Chief Magistrates Sexual Offence Case No. 73 of 2020: Republic Vs Dennis Masete Makokha be stayed.

d. An order in the nature of revision do issue calling for the record and examination of the proceedings of Bungoma Chief Magistrates Sexual Offence Case No. 73 of 2020: Republic Vs Dennis Masete Makokha for purposes of this court satisfying itself as to the correctness, legality or propriety and regularity of the said proceedings.

e. An order directing that Bungoma Chief Magistrates Sexual Offence case no. 73 of 2020: Republic Vs Dennis Masete Makokha be heard by a magistrate other than honourable Stephen O. Mogute PM.

f. Costs of the application be provided for.

2. The application is supported by the grounds set out on the face of the application as well as the applicant's affidavit sworn on even date. The applicant's gravamen is inter alia; that on 6/4/2021, during a hearing of the matter before the trial court, a witness made an allegation against him whereupon the court in anger and suo moto cancelled his bond and remanded him in prison for three months before being reinstated on 16/7/2021 without an explanation; that from July 2021 he attended court religiously even when the prosecution kept on seeking various adjournments and that on 11/11/2021, he attended court but unfortunately fell ill while outside the court and suffered bouts of diarrhea and was forced to return home and was thus not present when the matter was called out; that on 18/11/2021, he attended court in the company of his advocate who made an application for the warrants of arrest to be lifted to which the court informed him that the bond had already been canceled and went ahead to remand him in prison; that he has a constitutional right to bond and that the court cannot cancel his bond before he explains the reasons for his absence from court.

3. The application was canvassed by way of oral submissions. Mr. Simiyu and Mr. Nyongesa for the applicant submitted that the court has jurisdiction under section 362 of the Criminal Procedure Court to entertain the application. They submitted that matters of bond is a right under Article 49 of the Constitution. It was contended that trial court violated the applicant's rights under Article 47 and 50 of the Constitution. According to counsels, any judicial proceedings should be conducted in the presence of the accused person and therefore the order cancelling the applicant's bond is illegal and ought to be reversed. It was submitted that the applicant was present in court before he fell ill and the prosecution was supplied with the treatment notes and did not object to the application for reinstatement of bond. Finally, it was submitted that the trial court has been quite unfair towards the applicant as can be explained in the proceedings of 6/6/2021 when the applicant was remanded in prison following a complaint raised by a witness during her testimony yet the applicant was not given a hearing to contest the allegations and that the applicant remained in prison for three months before the bond was reinstated after the alleged complaint could not be established. It was the view of counsels that the trial court is biased against the applicant and hence the need to shift the case to another court.

4. Miss Omondi for the respondent submitted that the proceedings of 11/11/2021 are regular since the applicant was absent on the said date whereupon a warrant of arrest was issued against him and that the surety was summoned to appear on 18/11/2021. She submitted that on the said date, the applicant turned up in court without the surety who has not appeared in court to date. It was the view of counsel that bond under Article 49 of the constitution is not an absolute right. Finally, it was submitted that the applicant did not give a satisfactory explanation for his absence and that no evidence of the illness was given. She therefore urged the court to dismiss the application.

5. I have considered the application for revision and the oral submissions by learned counsels. The only issue for determination is whether the applicant's request for an order of revision is merited. The enabling law for revision is found in Article 165(6) and (7) of the constitution and section 362 and 364 of the Criminal Procedure Code. Article 165(6) 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.

Section 362 of the Criminal Procedure Code 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 subordinate court.

Under section 362 stated above, the court in an application for revision, is called upon to call for the record and inquire into the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. In so doing, the court ought to scrutinize the record and upon satisfying itself that the matter properly falls for an inquiry under revision, reverse the orders made. It is trite law that revision is discretionary. In the case of B.G.M (HCCCR Revision No. 27 of 2013- Martin Maruti Kituyi Vs Republic) the court rendered itself on the revision jurisdiction of the High Court as follows;

“(11) Under Article 50(2)(q) of the constitution, appeal and revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an appeal as a matter of right whilst revision under article 165(6) and (7) of the constitution is a matter for the discretion of the court. Revision is a constitutional relief only those sections 362 to 367 of the Criminal Procedure Code are merely the statutory expression of and the procedural prescriptions attending the remedy of revision. Therefore, the very nature of revision as a discretionary remedy explains the policy underpinnings of section 364(5) of the Criminal Procedure Code; Revision primarily serves to put right instances where a finding, sentence, order or proceedings of lower courts are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the revision jurisdiction. Broadly put, whenever the integrity of any proceedings is put to question, the revision jurisdiction of the High Court comes into play and may disturb the decisions of the lower court purely in the interest of justice.”

The High Court of Malaysia in **Public Prosecutor Vs Muhari Bin Mohd Jani and Another [1996] 4LRC 728** at 734 held as follows regarding the issue of revision:

.....The object of revisionary power of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.....”

6. In the present case, the applicant has maintained that the cancellation of his bond by the trial court without giving him a hearing violated his right to a fair trial under articles 47, 48 49 and 50 of the constitution. The applicant maintains that he had never absconded court in the past except on the 11/11/2021 when he fell ill while within the court's compound. The applicant has also claimed that the trial court has been rather harsh on him and cited the proceedings of 6/6/2021 when the trial court remanded him for three months upon receiving some unsubstantiated allegations against him by a certain witness while giving her testimony in court. It is the feeling of the applicant that he is not likely to get justice in the trial court. I have perused the lower court record and note that the orders complained of in these proceedings are the ones made on 11/11/2021. The Coram for the day shows that the applicant was absent and that the prosecutor sought for certain orders as follows;

Prosecutor: I apply for warrant of arrest to issue to the surety.

Court: warrant of arrest to issue. Mention on 18/11/2021. Summons to the surety.

When the matter came up again for mention on 18/11/2021, the applicant was in court with his learned counsel. The record reads;

Mr Simiyu for the accused; the matter came up in court on 11/11/2021 because he was sick.

Prosecutor: the surety was summoned.

Prosecutor: the surety to appear as ordered on 11/11/2021. Accused to remain in custody up to the time the surety appears before the court for further directions. Mention later at 3 pm today.

The record further shows that later at 3 pm, the court made an order remanding the applicant in custody and fixed the matter for hearing on the 30/11/2021.

Those are the issues that have been brought before this court for consideration as to whether the court is entitled to set aside and or reverse the orders of the trial court.

The applicant has relied on the provisions of Articles 47, 49 and 50 of the Constitution. The respondent on the other had contends that the right to bond as provided for under article 49 is not absolute. This court need not reproduce these provisions.

7. It is not in dispute that the applicant had been granted bond which was still in force at the time he was committed to prison. The reason for his detention is that the surety had not attended court as ordered on 11/11/2021. I have perused the record and note that no summons or warrants were issued to be served upon the surety as there are no copies left in the court file. May be the surety might have turned up had he been served and could have responded to the same. Hence, as it is, the surety is still in the dark about what has transpired so far. Further, it is noted that the prosecution did not avail tangible evidence of service upon the surety save only to claim that the surety had been served. The summons to the surety could have spelt out the reasons for requiring him to attend court. The court is alive to the fact that one of the surety's role is to ensure that the accused attends court and that in certain circumstances an accused's bond is liable to be cancelled if he fails to attend court and the surety fails to offer a plausible explanation for the absence or when the surety withdraws from continuing to stand for the accused. None of these events occurred in the present case. It seems the learned trial magistrate was rather too quick to push the accused to remand custody without getting a response from the surety regarding the issue of the accused's absence from court on the material date. Those circumstances are rather disconcerting and seem to support the applicant's claim that the trial court has always been quick to send him to prison on the slightest opportunity as happened on 6/6/2021 when it sent him to prison based on an unverified allegation made by a witness during her testimony and in which he had to cool his heels in prison for about three months. Even upon his release the surety had to be made to go through a fresh interview. The record for the 11/11/2021 shows that the prosecutor sought for warrants to be issued against the surety and not the accused and further the court ordered that the surety be summoned. The applicant's liberty being at stake, dictated that he be accorded the principles of fair hearing set out in Article 50 of the constitution by the trial court. It seems the trial court acted rather capriciously towards the applicant by declining to consider the explanation tendered by the applicant over his absence in court on the material date and proceeded to send him to prison to cool his heels there until the surety turns up in court to do the explanation himself. I find that it was appropriate for the applicant to first explain himself since the factors surrounding his absence in court were well within his knowledge and which the court ought to consider first before deciding to summon his surety. The trial court seems not to have made a decision as to whether or not the explanation tendered by the applicant was plausible before making the drastic order now complained of. There is thus some apparent irregularity in the proceedings meriting this court to interfere. I find the circumstances did not warrant the applicant's bond to be interfered with as the trial court could as well have even directed the applicant to come along with his surety who would then be put to task and upon rendering his explanation, the court could then proceed to make orders as appropriate. Even warning the accused could have been appropriate in the circumstances given the fact that it was the first time to abscond court. The accused has also claimed that he had fallen sick on the material date while he was within the court precincts. The learned counsels for the applicant have attempted to raise an issue that the treatment notes had been made available and known to the trial court prosecutor but who has not filed an affidavit to that effect. As the accused's right to liberty was taken away, it was incumbent upon the trial court to consider the reasons for failure to attend court and to be slow at cancelling the applicant's bond without summoning the surety to render an account regarding the absence by the applicant. The record also shows that there is no evidence that the prosecutor made an application to cancel the bond and there is no evidence either showing that the same was cancelled. The order of committal was made *suo moto* by the trial court without first cancelling the accused's bond. The trial court has not yet cancelled the applicant's bond and that the title deed used as security is still in custody of the court as the surety is unaware of the new developments as he has not been served with summons to appear in court over the applicant's failure to attend court on the 11/11/2021 and that he has not withdrawn from standing surety for the applicant. In any case, the applicant was in court on the 18/11/2021 and explained the reasons for his absence from court. The trial court did not indicate whether it was satisfied with the said explanation but went ahead to remand him in prison just because the surety had not turned up yet there was no evidence of service of summons served upon him. It is also noted that the prosecution did not apply for the cancellation of the bond. Under those circumstances, it is clear that there is an irregularity in the proceedings of the trial court which warrants this court to exercise its supervisory powers under Article 165(6) and (7) of the constitution and section 362 of the Criminal Procedure Code in order to ensure the interest of justice is served.

8. The applicant has also sought for an order that the matter be heard by another trial court on the ground that the applicant is not likely to get justice from the court currently hearing it. I must state at the outset that it is always appropriate for parties to have their cases heard and determined by the courts to which their cases have been assigned as it is prudent that way and to prevent parties engaging in forum shopping thereby creating some chaotic and messy situations which will be a mockery of the independence of the judiciary that should always be jealously and scrupulously guarded. It is also a cardinal rule that parties are expected to have faith and confidence in the courts trying their cases unless there are really cogent reasons to be presented to the judicial officers seeking for their recusal. It is the considered view of this court that the prayer sought by the applicant herein for the matter to be heard by another court ought to be made in the form of an application for recusal before the trial magistrate for consideration. It is clear that the applicant does not seem to have made an application in that court and hence i find the prayer unmerited in the circumstances.

9. In the result, the applicant's application dated 18/11/2021 is allowed in the following terms;

a. The orders made by the trial court on 11/11/2021 and 18/11/2021 and all subsequent orders thereto cancelling and/or suspending the applicant's bond terms be and are hereby varied and/or set aside and that the applicant's bond with surety be reinstated forthwith.

b. The applicant is hereby ordered released from custody forthwith and to continue being on bond pending trial until otherwise cancelled by the trial court or the surety withdraws.

c. The file is hereby remitted back to the trial court for further hearing and final determination.

DATED AND DELIVERED AT BUNGOMA THIS 6TH DAY OF DECEMBER, 2021

D.KEMEI

JUDGE

In the presence of:

Dennis Masete Malwaha Applicant

Wanga for Simiyu for Applicant

Miss Mukangu for Respondent

Wilkister Court Assistant