REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HIGH COURT REVISION NO. 181 OF 2019

SAMUEL MUTHAURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Samuel Muthaura** *(the applicant herein)* filed an application dated 22nd November 2019 expressed to be brought under **Articles 49 (1) (h), 50 (2) (a), 159 (1) & (2), 165 (6) and 258 (1) of the Constitution of Kenya 2010** & sections 123 (3), 362, 364, 365, 366 & 367 of the Criminal Procedure Code Cap 75 Laws of Kenya . He asked the court to call for the file at **Tigania in Cr. Case No. 1078 of 2018** and revise the Orders given by the Principal Magistrate Court on 4th November 2019 in which he cancelled his bond/cash bail.

2. The application was supported by the sworn affidavit of **L. Mutinda,** the advocate in conduct of this matter. She averred that on 2nd August 2019 when the matter came up for routine mention the applicant failed to attend court as he was conducting a census exercise which he was in charge of. That he however sent his advocate in good faith to explain to the court. That despite the reasons advanced by the advocate, the court issued warrants of arrest and forfeited his cash bail.

3. The advocate applied for reinstatement of his bond terms or readmitting him to new bail and bond terms; but the court declined the request. She took the view that the charge is a misdemeanour attracting a maximum sentence of six months and a minimum sentence of probation, and the offence is also fineable; these should be among the basis for upholding the applicant basis fundamental freedoms and human rights guaranteed under the Constitution.

4. Counsel lamented that continued detention of the applicant pending conclusion of the trial gravely undermines his constitutional right to be presumed innocent until the contrary is proven. Accordingly, absence of compelling reasons amounts to being punished before the finding of guilt is made by a competent court of law.

5. On 17/12/2019 both parties made Oral submissions to the application. The applicant submitted that the offence is a misdemeanour hence the constitutional rights of the petitioner will be violated by hearing the applicant in prison. The Respondent submitted that the bail was properly cancelled, **Section 362** requires an error to be present and in this case no error is present to warrant revision.

Analysis and Determination

6. I have looked at the proceedings in the trial Court. The applicant herein was arrested and charged with the offence of creating disturbance in a manner likely to cause the breach of peace contrary to Section 95 (1) (b) of the Penal Code. He was released on a bond of Kenya Shillings Forty Thousand (Kshs. 40,000) cash bail and or Kenya Shillings Sixty Thousand (Kshs. 60,000/=) with surety.

7. The matter was listed for hearing on subsequent days i.e. 16/4/2019, 12/6/2019, 9/7/2019 and 30/08/2019. On 30/08/2019 the prosecution was ready to proceed with the hearing but the 3rd Accused person (the applicant herein) was not present. Warrants of arrest were issued and the applicant's cash bail was forfeited. Later, on the same day, later at 10:50 a.m. Mr Kaume, the then advocate for the applicant prayed for the warrant of arrest to be lifted. He informed the court that the applicant was engaged in the ongoing census exercise.

8. The prosecution opposed the application and stated that the court process takes precedence over any other tasks. The trial court concurred with the prosecution and declined to lift the warrant of arrest and cash bail forfeiture.

9. The matter was subsequently mentioned on various dates i.e. 6/9/19, 20/9/19 and 4/10/19. In all these dates the applicant was absent. On 4/10/19 the court directed the matter to proceed in the absence of the applicant and the warrant of arrest to remain in force. The matter proceeded on 29/10/2019.

10. The applicant was brought to court on 4/11/2019 under warrant of arrest. He alleged that there were letters from the Director of Public

prosecution recommending the case not to proceed. This was denied by the prosecution who stated that they do not have such correspondence. The trial court ruled that the applicant had not presented any papers showing withdrawal of the case and has not offered any explanation as to his non-attendance- the subject of the warrants of arrest that were issued against him.

11. The court therefore held that that the applicant shall remain in custody pending further hearing and determination of the case.

12. The matter proceeded for hearing, two witness would thereafter testify. On 5/11/2019. **Ms Kiyuki**, counsel for the accused person prayed for reinstatement of the bond terms or imposition of fresh conditions. The prosecution opposed the application stating that the applicant had caused a delay in the trial, the census process was conducted in a week and the accused failed to show up even after the process. That the court had already made a pronouncement on the question of reinstatement of bond terms and the correct procedure therefore is for the deference to appeal.

13. In a Ruling Delivered on 14/11/2019 the trial Court agreed with the submissions of the prosecution counsel and dismissed the application for reinstatement of bond terms. It held as follows;

> **"This court concurs with the prosecution that the 3rd Accused has not rendered an explanation as to why, at the very least, he failed to return to court soon after the subject census which he was allegedly involved in with a view of regularizing his affairs with regard to his attendance record, this court having taken judicial notice that the said exercise lasted a mere week. He therefore has been at large for an inexplicable duration of more than two months unperturbed that the trial if his co-accused who are his close relatives, if the record of trial is anything to go by had already commenced.**
>
> **The actions of the 3rd accused as highlighted hereinabove only server to portray him as one who has no fidelity to the criminal justice process that confronts him in the instant case; basically a flight risk not worthy of readmission to the facility of bond/bail he erstwhile enjoyed."**

14. I am now called upon against the foregoing backdrop to revise the decision of the trial court. The applicant has invoked supervisory jurisdiction of the High Court conferred by **Article 165 (6) & (7) of the Constitution stated below: -**

> **(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.**

15. Section 362 of the Criminal Procedure Code is also relevant as it hemps the revision jurisdiction as follows:

> **"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"**

16. Be that as it may, this application is founded on bail or bond and therefore, article 49(1) (h) of the Constitution as well as Section 123 of the Criminal Procedure Code are relevant. Section 123 A specifically provides;

> **"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 in particular nature and seriousness of the offence, the character, antecedents, association and community ties of the accused person the defendants record in respect of the fulfilment of obligations under previous grants of bail the strength of the chance of his having committed the offence."**

17. In **Republic v James Kiarie Mutungei [2017] eKLR R. Nyakundi. J.** on the provisions of **Section 362 of the Criminal Procedure Code** observed as follows;

> **"As can be seen from this analysis the function of the court under section 362 of the Criminal Procedure Code as read with section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal so as to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning. It can be deduced from this evaluation that the jurisdiction on revision will be invoked where there is a decision by a subordinate court, the decision is not subject of appeal, the grounds of revision must exist against the decision being challenged from the subordinate court. The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness and suitability to trial. The trial magistrate has not complied with the provisions of the law, the findings made and the decision reached failed to take into account the evidence that there was a misdirection of facts on the face of the record, the parties in the case were not heard or given an opportunity to present the case before the decision or the decision being contested by the aggrieved party was arbitrary amounting to abuse of the court process."**

18. In **Prosecutor v Stephen Lesinko [2018] eKLR R. Nyakundi** outlined the principles which will guide this court when examining the issues pertaining to section 362 of the Criminal Procedure Code as follows;

> **a. Where the decision is grossly erroneous**

b. Where there is no compliance with the provisions of the law.

c. Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record

d. Where the material evidence on the parties is not considered.

e. where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence, (See Article on Revision in civil and criminal cases by Rabia Tus – Sarela and Marya http/www:academia.Edn/24795/revision is in Civil and Criminal Cases).

19. The above recapitulation of the events in this case is relevant in this revision request. The applicant stated that the trial court failed to consider the reasons forwarded by the applicant i.e. that he was engaged in a census activity hence his unavailability to attend court. The applicant also stated that the offence is a misdemeanour and that the continued custody of the applicant will gravely his constitutional rights, in particular his right to liberty and freedom of movement. The applicant therefore submitted that the judicial discretion of the trial Magistrate was exercised arbitrarily.

20. The record show that prior to the day the accused absconded, he had attended court as required. During the trial his advocate was equally present. I need to emphasize, however that it is the duty of the accused to attend court at all times so required. And, if he fails to so appear in his case, he must provide sufficient and plausible reason for his absence lest he should be brought under a warrant of arrest, have his bond cancelled and sureties summoned and or cash bail forfeited. Previous and regular attendance in court does not excuse or licence subsequent non-attendance or a bar to the court taking one or more of the distasteful measures I have stated above. The applicant ought to have known the case he faced seriously. Therefore, the warrant of arrest and/or subsequent forfeiture of the cash bail was issued in a proper exercise of discretion by the trial magistrate. In the circumstances, the applicant ought to have presented himself before court as soon as possible and explain to the trial court the reason for his non-attendance, and of course with official documentation to show that he was involved in the census. Such diligent acts would persuade a court of law to lift the warrants. But see what the applicant did. He did not attend court on his volition. He was brought under the compulsion of a warrant of arrest. As shown by the trial court it took a period of two months for him to be availed to court through arrest. The conduct of the applicant after the issuance of the warrant of arrest did not therefore depict a person who is keen to attend court.

21. At this point, needless to state that the purpose of bail or bond is to protect the rights and freedom of the accused while at the same time ensure the attendance of the accused at his trial. This preserves the integrity of trial and judicial system as the constitutionally-mandated method of administration of criminal justice. The applicant absconded and it took two months to arrest him. Absconding is surely a compelling reason not to release the accused on bail or bond. Accordingly, given the circumstances of this case, the trial magistrate was right in rejecting review of his orders to cancel the bond and other attendant orders thereto. This court also finds that the accused absconded and his attendance in court may not be guaranteed. For that reason, I reject his plea for bail and or bond on fresh terms.

22. In the upshot, I find that the impugned decisions by the trial Magistrate were legal, correct and in accordance with the law as applied to the facts of the case. I also find that there is a compelling reason not to release the accused on bond or bail on fresh terms. I dismiss the revision application. Nonetheless, as the applicant has been in custody for over four months now, I direct the trial herein to be fast tracked and concluded within reasonable time.

Dated signed and delivered in open court this 20th day of February, 2020

F. GIKONYO

JUDGE

IN PRESENCE OF

M/S Kiyuki for applicant

M/S Nandwa for respondent

Applicant – absent

F. GIKONYO

JUDGE