



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 4 OF 2020

REPUBLIC.....APPLICANT

VERSUS

ABDI BILE ORE alias TABLIQUE.....1ST RESPONDENT

MOHAMED ISAK ALI alias GURE.....2ND RESPONDENT

RULING

1. By application dated 15/5/2020 the applicant seeks orders specifically and mainly prayer:

- the proceedings in CRC No. 285 of 2020 of 15/5/2020 be set aside.
- Bail/bond application by respondents be heard afresh before Court 1 on 25/5/2020 upon investigating officer filing affidavit.

2. Same notice of motion is based on grounds that the accused were charged with 7 counts relating to terrorism which resulted to death of 3 police officer as a result of (IED):

- Committing terrorism act contrary to section 4(2) of the Prevention of Terrorism Act.
- Facilitating commission of terrorism contrary to section 9(A) of the Prevention of Terrorism Act.
- Being a member of terrorism group contrary to section 24 of the Prevention of Terrorism Act.
- Possession of uncustomed goods contrary to section 200(d) (iii) of the East African Community Customs Management Act.
- Possession of a forged licence plate contrary to section 40(1) (b) of the National Transport and Safety Authority Act No. 33 of 2012.

3. The accused persons were taken to court on plea taking and investigating officer indicated that there was intention to file an affidavit to oppose bail.

4. Affidavit was ready but couldn't be filed as it was not commissioned as no Commissioner was available. Thus, the matter was fixed for hearing on bail application on 25/5/2020.

5. On 15/5/2020 one accused was taken to court on production order and court granted bail/bond to 2 accused one in absentia without even advocate of accused being properly on record.

6. The prosecution officer in court didn't address issues as to the fact that affidavit had not been filed as stated and matter was to be heard before Court 1 on 25/5/2020.

7. The court went ahead to grant bail obvious of orders/directions or orders of 12/5/2020. If matter was heard with affidavit being on record, the prosecution would have demonstrated compelling reasons to deny bond/bail.

8. Thus the application seeks the orders here:-

9. The respondents via advocate Faruq has opposed the application mainly on the grounds that: at the time bail was granted, the prosecution

never objected to the application for bail. The orders were granted on merit. A bail is a Constitutional right. The accused are presumed innocent until proved guilty vide Article 49 of the Constitution of Kenya. The accused will abide by bond terms imposed once they are approved.

10. Mr. Magero for prosecution in rejoinder adds that the bail application could not be argued on merit as affidavit by investigating officer had not been filed. In any case the matter was to be heard on bail application on 25/5/2020 before Court 1. After going through the proceedings and above submissions I find the are: -

- Whether the magistrate committed any irregularities in making the orders of bail he issued?

- If above is in negative, what is the appropriate order to make?

ANALYSIS AND DETERMINATION

11. **Article 165 of the constitution of Kenya states that;**

“1. (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”

12. The impugned record of the learned magistrate demonstrates what transpired in court on the 2 different dates subject of the application to wit;

“12/5/2020

Before: Hon. J. J. Masiga – SRM

Court Prosecutor: Mr. Mulati

Court Clerk: Mohaa

Accused: Both present

1ST ACCUSED: It is not true.

2ND ACCUSED: It is not true.

ALTERNATIVE TO COUNT I

1ST ACCUSED: It is not true.

2ND ACCUSED: It is not true.

COUNT II

1ST ACCUSED: It is not true.

2ND ACCUSED: It is not true.

COUNT III

1ST ACCUSED: It is not true.

2ND ACCUSED: It is not true.

ALTERNATIVE TO COUNT III

1ST ACCUSED: It is not true.

2ND ACCUSED: It is not true.

COUNT IV

1ST ACCUSED: *It is not true.*

COUNT V

2ND ACCUSED: *It is not true.*

COUNT VI

2ND ACCUSED: *It is true.*

COUNT VII

2ND ACCUSED: *It is true.*

Mr. Nura holding brief for Mr. Faruq.

COURT: Mention before Court I on 25/5/2020.

J. J. MASIGA

SRM

15/5/2020

Before: Hon. J. J. Masiga – SRM

Court Prosecutor: Magero

Court Clerk: Taib

Accused: Absent

MR. FARUQ: I wish to make an application in respect of the 2nd accused. The application is for grant of bond. The ground of the application is that bail is a fundamental right of the accused person. In determining whether to grant or not to grant bond, the court should ask itself whether the accused will be available during the trial. The accused is a Kenyan citizen and therefore, he is not a flight risk. The accused operates a tax business. He has a wife and children within the Country. The accused is prepared to offer substantial sureties to secure his attendance in court. The accused is a person of ill-health. During this pandemic it is safe for him to stay home.

J. J. MASIGA

SRM

MR. MAGERO: I acknowledge the fact that the accused enjoy fundamental rights under the Constitution. They are not absolute. There are instances where the court can decline to grant bond. We have not been provided with documentation to show that he is a Kenyan. It is not safe to issue cash bail. Should the court be inclined to issue bond terms, accused should supply his travel documents?

MR. FARUQ: The State has acknowledged that it is a fundamental right. Unless there are compelling reason to deny the accused this right, the right should be exercised in his favour. No compelling reasons has been given. If the accused was not a Kenyan he would be charged with offence of being in Kenya unlawfully. The charge sheet indicates that he is a Kenya.

J. J. MASIGA

SRM

COURT: I have carefully considered the submissions by both counsels on the issue of bond for the 2nd accused person. I would agree with Mr. Faruq that bond is a fundamental right under the Constitution. I would agree too with Mr. Magero that though bond is a fundamental right, it is not an absolute right. It is also true that the court canfor compelling reasons to deny an accused person bond. In this case Mr. Faruq for the 2nd accused submits that the accused person is a Kenyan therefore he is not a flight risk. Family in Kenya and runs a business in Kenya. In reply Mr. Magero for State submits that no documentation has been provided to demonstrate that the accused is a Kenyan. I have looked at the charge and at the top of the first paper, it is clearly indicated that the accuseds are Kenyan citizen. Since Mr. Magero is not entirely opposed to grant of bond, I will allow the application of bond for both accused persons on the following terms:

Accused persons are hereby granted bond of Kshs.500,000/= each plus 1 surety each.

Accused persons are hereby ordered to deposit in court travel documents if any.

Accused persons are hereby ordered to report to the Investigation Officer on the 28th day of every month.

J. J. MASIGA

SRM”

13. On 12/5/2020 the learned magistrate took plea of the accused persons in presence of Mr. Mulati SC for ODPP and Mr. Nura who held brief for Mr. Farouk but record does not say for which accused. There was no application for bail/bond on that day and the matter was fixed for mention before court 1 On 25/5/020.

14. However, on 15/5/2020 the same matter was mentioned before the same magistrate though it is not indicated why the matter was brought for mention earlier than date fixed 25/5/020 and who could have moved the court for that mention. It is worth noting that, the accused persons were not present and this time the counsels present were different namely Mr. Magero for the ODPP and Mr. Farouk for accused number 2.

15. Mr. Farouk this time applied for bond for his client accused No 2 and Mr. Magero feebly opposed the bail application though he was of the view that in event court was inclined to grant the application, the accused to be ordered to furnish court with documents to show accused is a Kenyan citizen and his travel documents be deposited in court.

16. The court after hearing the both sides counsels made the following orders:-

“I have looked at the charge and at the top of the first paper, it is clearly indicated that the accused are Kenyan citizen. Since Mr. Magero is not entirely opposed to grant of bond, I will allow the application of bond for both accused persons on the following terms:

Accused persons are hereby granted bond of Kshs.500,000/= each plus 1 surety each.

Accused persons are hereby ordered to deposit in court travel documents if any.

Accused persons are hereby ordered to report to the Investigation Officer on the 28th day of every month.”

17. The court never considered the issue of the nature of the charges accused were facing thus need to confirm their citizenship. The reason for the recall of the file before the due date and even the fact that matter was to be handled by Court 1 is not recorded.

18. Then the court assumed that Mr. Farouk represented both accused and went ahead to grant conditional bail terms without hearing accused no 1.

19. I have considered the material before me, including the submissions thus this is the view I form of the matter.

20. Section 362 of the Criminal Procedure Code provides 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.”

21. Section 367 of the Criminal Procedure Code, on the other hand, provides as hereunder:

“When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”

22. A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court’s revisionary jurisdiction to final adjudication of the proceedings. The section talks of ***“any criminal proceedings”***. ***“Any criminal proceedings”*** in my view includes interlocutory proceedings.

23. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with.

24. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches.

25. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.

26. In my view the impugned proceedings prima facie lies within the cited provisions of revision and disclose irregularities as earlier indicated which warrants this court to interfere with the same and make appropriate directions.

27. Thus, the court makes the following orders/directions;

(i) The proceedings in GSA CRC No. 185 of 2020 made on 15/5/020 are hereby set aside.

(ii) The matter is remitted back to the Chief Magistrate's Court for mention and directions, including entertaining bail applications on 25/5/020 or any other date appropriate to court and both sides in Court No 1.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 20TH DAY OF MAY, 2020.

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C. KARIUKI

JUDGE