



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER 199 OF 2020

MICHEAL LUSENO alias MOSES.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(From original order in Mavoko Sexual Offence Case No. 27 of 2020)

BETWEEN

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

-VERSUS-

MICHAEL LUSENO ALIAS MOSES.....ACCUSED/APPLICANT

RULING ON REVISION

1. The applicant herein was charged with the offence of defilement contrary to section 7(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006 the particulars being that the applicant on the 13th day of June, 2020 at around 1700 hours at [particulars withheld] Area in Athi River Subcounty, within Machakos County intentionally and unlawfully caused his male genital organ (penis) to penetrate the genital organ (Vagina) of NOK, a child aged 14½ years.

2. From the proceedings, when the applicant was arraigned in court on 23rd June, 2020, he pleaded not guilty and prayed for release on bond on reasonable terms. In his application through his learned counsel **Mr Odhiambo**, he stated that he was working together with the complainant's mother at Wilson Airport and that he did not intend to stay away from the jurisdiction of the court.

3. That application was however opposed by the Prosecution through learned friend **Ms Kenyatta**. According to her, the applicant was a first cousin to the complainant and was living in the same house with the complainant's family hence there was a lot of interference from the extended family. It was therefore felt that in the event that the applicant was granted bail, the complainant might not get justice. The allegations of interference were however denied by the learned counsel for the applicant.

4. The trial court then fixed the matter for hearing on 25th June, 2020 for the taking of the complainant's evidence and stated that thereafter, the court would set the bond terms for the applicant. The court then directed that copies of the witness statements be supplied to the defence alongside the documents.

5. Come the said 25th June, 2020 counsel for the applicant stated that he was not ready to proceed with the case as he was unable to hold a meeting with the applicant since though he received copies of the witness statements and copies of the documents, he had no time to take instructions. Apart from that he required the OB Report and Investigations Diary. The Prosecution however indicated that it was ready to proceed with two witnesses on that day. At that time learned counsel for the defence sought a hearing date in two weeks' time. As a result,

the learned trial magistrate stated that she had given directions on 23rd June, 2020 and that she had not denied the applicant bond. She accordingly adjourned the matter to 13th July, 2020 in order to give the defence ample time to prepare for the trial.

6. The applicant has moved this court vide an application dated 27th June, 2020 seeking the following orders:

- 1) **THAT this application be certified as urgent and heard ex-parte in the first instance.**
- 2) **THAT pending the *inter partes* hearing and determination of the application herein, this Honourable Court be pleased to grant an order of stay of the proceedings in Sexual Offence Case No. 27 of 2020 in the Chief Magistrate's Court at Mavoko.**
- 3) **THAT that this Honourable court do call for and examine the record in Sexual Offence Case No. 27 of 2020 in the Chief Magistrate's Court at Mavoko and revise, review and set aside the orders of the court, Hon. C. C. Oluoch, issued on 23rd and 25th June, 2020 suspending ruling on bail/bond application until the minor testifies.**
- 4) **THAT the Honourable Court be pleased to release the Applicant on reasonable/lenient/favorable Bail/Bond terms.**
- 5) **THAT in the alternative to prayer 4 above, this honourable court to order and direct the trial court to release the Applicant on reasonable/lenient/favorable Bail/Bond terms within the next 2 days.**
- 6) **THAT the cost of this application be provided for.**

7. The said application was based on the following grounds:

- 1) **The Applicant was arrested on 22nd June, 2020 and charged with defilement contrary to section 8 (3) of the Sexual Offences Act on 22nd June 2020.**
- 2) **The Applicant denied the charges and made both an oral as well as a written application to be released on bail or bond.**
- 3) **The trial magistrate irregularly, unprocedurally and without lawful authority suspended her ruling on the bail application until the minor who was allegedly defiled testifies. The trial court made this order yet it did not even find that the Applicant is likely to interfere with the witness in any way. There was no justifiable basis for the order.**
- 4) **The order of the trial court to suspend ruling on bail application until the minor testifies was irregular as it implies that the Applicant is guilty and not fit to be granted bail.**
- 5) **The order of the trial court intimates denial of bail without reasons. It unconstitutionally limits the Applicant's right to bail and bespeaks abuse of discretion by the trial court.**
- 6) **The order of the court is to the effect that regardless of when the minor testifies, the Applicant will remain in remand.**
- 7) **The matter is slated for hearing on 13th July, 2020 when no one knows whether or not the hearing will proceed considering the prosecution is yet to supply the defence with crucial documents.**
- 8) **The Applicant is an employee of Kenya Civil Aviation Authority stationed at Wilson Airport.**
- 9) **Under section 44 (4) (f) of the Employment Act, 2007, the Applicant's employer will be at liberty to summarily terminate the employment contract of the Applicant if the Applicant is not released on bail/bond within 14 days from 22nd June, 2020 when he was arrested.**
- 10) **Unless this honourable court intervenes, the Applicant will most likely lose his job, his dignity and the right to be presumed innocent till proven guilty.**
- 11) **The trial court irregularly and incorrectly issued the orders/directions.**
- 12) **The ongoing criminal proceedings in Sexual Offence Case No. 27 of 2020 in the Chief Magistrate's Court at Mavoko are irregular and amount to an abuse of court process.**
- 13) **Trial ought not to commence when the application for bail/bond is still pending before the trial court and also before pre-trial conference is conducted.**
- 14) **This honourable court has supervisory roles over subordinate courts under article 165 (6) of the Constitution of Kenya.**
- 15) **This honourable court has revisionary jurisdiction to look into any order and to stay the proceedings.**
- 16) **It is therefore in the interest of justice that this matter be heard expeditiously and without delay.**

17) That the Respondents stand to suffer no prejudice if temporary orders are issued.

18) The application has been brought promptly and in good faith.

19) It is in the interest of justice to allow this application.

8. The application was supported by the Applicant's affidavit in which he stated that he was arrested on 22nd June, 2020 and charged with defilement contrary to section 8 (3) of the **Sexual Offences Act** on 23rd June, 2020 which he denied and made both an oral as well as a written application to be released on bail or bond. However, the trial magistrate irregularly, unprocedurally and without lawful authority suspended her ruling on the bail application until the minor who was allegedly defiled testifies without even making a finding that he was likely to interfere with the witness in any way. It was his view that there was no justifiable basis for the order of the trial court as they were based on an affidavit of a police officer who did not explain the sources of the facts deposed thereto. It was his case that there was no compelling reason to keep him in custody until the minor testifies as he lives with his uncle in Lang'ata in Nairobi County while the minor lives with her parents at Katani in Machakos County and the possibility of him contacting the minor is not there, neither is it contemplated.

9. The applicant contended that had the trial court evaluated his application for bail she could have appreciated the fact that he works in the same place with the minor's mother and 10 days after the incident allegedly occurred and before he was arrested, he did not bother to contact the minor's mother over the issue nor did he try to intimidate or reach out to her in any manner that would jeopardize her expected testimony in court. He deposed that he reported to work every day from the date the alleged incident occurred until the date of his arrest. It was therefore his case that the averments by the police that he is likely to interfere with the minor were far-fetched and replete with hearsay and not backed by any shred and/or credible evidence.

10. The applicant averred that neither the mother of the minor nor the minor herself was interrogated by the court with a view of assessing the credibility of the police officer's wild claims. He therefore averred that the order of the trial court to suspend ruling on bail application until the minor testifies was irregular as it meant that trial was to commence regardless of the pendency of the bail application. It was his case that the said order of the trial court intimates denial of bail without reasons and unconstitutionally limits his right to bail and fair process since the order of the court is to the effect that regardless of when the minor testifies, he will remain in remand.

11. The applicant was of the view that though the matter is slated for hearing on 13th July, 2020, no one knows whether or not the hearing will proceed considering the prosecution is yet to supply his advocate with crucial documents such as the OB Report and the investigation diary which documents will be significantly relied upon in my defence and which documents were also sought in the pending application.

12. It was averred that the trial court did not even conduct pre-trial to confirm that the defence had been served with all documents before giving the hearing date. According to the applicant, on 25th June, 2020 his advocate had protested about these and requested the trial court to first deal with the application for bail but his arguments were summarily dismissed. It was deposed that his advocate on record informed the court of the need for sufficient time and facilities to enable him prepare for his defence but his pleas were not taken seriously.

13. The Applicant averred that besides the concept of presumption of innocence, the issuance of bail is also fundamental as it goes to the root of his right to fair hearing and he stands a better chance to prepare for trial if granted bail as he will have enough time to discuss the issues and interrogate the witness statements with his counsel. It was his view that the minor is the most critical witness and her testimony ought not to be rushed and impliedly removed from the other parts of the trial. This greatly infringes on his right to fair hearing and he does not intend to delay the hearing with many applications including a potential application to recall the minor after she has testified.

14. The applicant disclosed that he is an employee of Kenya Aviation Authority stationed at Wilson Airport, Flight Training Center and since he is currently in police custody he cannot access his employment records. Further, under section 44 (4) (f) of the **Employment Act, 2007**, his employer will be at liberty to summarily terminate his employment contract if he is not released on bail/bond within 14 days. The said section provides that the employer can dismiss the employee if, quote:

In the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty.

15. The applicant therefore averred that unless this court intervenes, he will most likely lose his job, is dignity and the right to be presumed innocent till proven guilty. In support of his case the applicant relied on the case of **Republic vs. Muneer Harron Ismail & 4 Others [2010] eKLR**.

16. The orders of the trial court if not revised, the applicant contended, will jeopardize my livelihood and permanently injure his dignity, yet there is no cogent evidence against him as the medical report confirms that the minor in question has never even had sexual intercourse. He stated that it is because the state has no case against him that they introduced the alternative charge of indecent act with the minor which too is bereft of evidence. He therefore contended that he ought to be immediately released on bail/bond as he has succinctly explained in the annexed application for bail which he urged this court to duly consider. He reiterated that the ongoing criminal proceedings in Sexual Offence Case No. 27 of 2020 in the Chief Magistrate's Court at Mavoko are irregular and amount to an abuse of court process and that the hearing ought not to commence when the application for bail/bond is still pending before the trial court.

17. It was argued that this court has supervisory roles over subordinate courts under article 165 (6) of the Constitution of Kenya.

18. The application was opposed by the 1st Respondent vide grounds of opposition and replying affidavit. In the said grounds, it was averred that:

1) That the instant application is frivolous, vexatious and an abuse of the court process.

- 2) That the 2nd & 3rd respondent be struck out of the revision as they were not a party to the criminal proceedings in the lower court.
- 3) That the application does not meet the legal requisite for the orders sought.
- 4) That right of bail is not absolute when there are compelling reasons.
- 5) That the trial court took note of the compelling reason for interference with witnesses (complainant) adduced by the prosecution and gave the defense the nearer hearing date for the complainant to testify, which was three days after the plea taking.
- 6) That the court took into consideration the interest of justice visa vis the rights of the accused person while giving a hearing date and the defense failed to appreciate this fact.
- 7) That the prosecution was ready to proceed with the hearing on 25/6/2020 only for the defense counsel to come and make further application and delay the case.
- 8) That the defense is not keen at proceeding in the case and only want to delay the case.
- 9) That the accused person has never been denied bond by the trial court.

19. In the replying affidavit, it was averred that the applicant was charged with the offence of defilement c/sec 8(1) as read with sec 8(3) of the **Sexual Offences Act** No.3 of 2006 with an alternative charge of committing an indecent act with a child. However, the Respondent adduced at the trial court compelling reasons that the minor was vulnerable due to the interference by the family of the complainant as they reside in the same house and the accused was a first cousin to the minor. It was averred that the Applicant did not dispute in the trial court that he was a cousin of the complainant nor did he deny that he resides in the same house with the complainant extended family when the plea was taken. It was therefore averred that the court trial court took into consideration the circumstances of the court and vulnerability of the complainant and fast tracked the case and gave a hearing date which was within 3 days after plea was taken. According to the Respondent, the court took into consideration the interest of justice visa vis the rights of the accused person while giving a hearing date and the defense failed to appreciate this fact.

20. It was the Respondent's position that the court granted the applicant the requisite Order and he was given all the witness statements and other documents by the prosecution which the respondents obliged. While the prosecution was ready to proceed with the hearing on 25th June, 2020 the defense counsel made a further application and delay the case. It was therefore its position that the applicant is not keen at proceeding in the case and only want to delay the case by bringing numerous applications.

21. It was averred that since the right of bail is not absolute when there are compelling reasons, the instant application ought to be dismissed.

Determination

22. I have considered the material before, the submissions as well as the authorities cited and this is the view I form of the matter.

23. 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.

24. "Any criminal proceedings" in my view includes interlocutory proceedings. 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. 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. 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.

25. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, held that:

"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The

advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court.”

26. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers 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...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

27. On the merits, this application is based on the ground that the learned trial magistrate listed the case for hearing before making a determination on the applicant’s application for bail. That the application for bail was never determined is clearly appreciated by the trial court in the order made on 25th June, 2020 in which the learned trial magistrate was clear that she had not denied the applicant bond.

28. In order to fully appreciate the matter before the Court it is important to regurgitate the principles that guide the grant of bail pending trial.

29. Article 49(1)(h) of the Constitution provides that:-

An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

30. The Constitution however has not identified what qualifies under the term “compelling reasons.” The ordinary meaning according to *Thesaurus English Dictionary* of the word “compelling” is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

31. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release. In S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017), the Court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system... the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account...In considering any question... the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody

since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account... In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S v Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S v Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken v AG* 1992 (2) ZLR 249 and *Norman Mapfumo vs. The State* HH 63/2008... The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case.”

32. Gravity of the offence as a consideration was appreciated however by **Mboghli Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive.”

33. The Nigerian Supreme Court (**Justice Ibrahim Tanko Muhammad J.S.C.**) set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- (i) The nature of the charges;
- (ii) The strength of the evidence which supports the charge;
- (iii) The gravity of the punishment in the event of conviction;
- (iv) The previous criminal record of the accused if any;
- (v) The probability that the accused may not surrender himself for trial;
- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
- (vii) The likelihood of further charges being brought against the accused;
- (viii) The probability of guilty;
- (ix) Detention for the protection of the accused;
- (x) The necessity to procure medical or social report pending final disposal of the case.

34. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR**, the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

“...criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence.”

35. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

(1) 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 and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.

36. In Kelly Kases Bunjika vs. Republic [2017] eKLR, Muriithi, J was of the view that:

“The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused ‘if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody’ ...Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court’s mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case.”

37. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary’s *Bail and Bond Policy Guidelines, March 2015* at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a) *The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:*

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

38. I associate myself with the view expressed by Muriithi, J in Kelly Kases Bunjika vs. Republic (supra) that:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused person is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

39. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden

to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in Republic vs. William Mwangi Wa Mwangi [2014] eKLR where Muriithi, J held that:

“It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail...It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

40. In Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120 it was held by the Constitutional Court of Uganda that:

“The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially...]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person’s appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him.”

41. As regards the same issue, Ochieng, J in Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR expressed himself as hereunder:

“Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;

‘Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person’s life, disloyalty to the state of one’s nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society’s sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.’

Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial.”

42. If the allegation of interference emanates from the extended family rather than the accused, nothing stops action being taken against the said persons. In addition, the fact that an accused person is facing a charge of murder does not bar further charges being preferred against him his being in custody notwithstanding since obstructing a cause of justice itself is a criminal offence. It is the duty of the State to ensure that all persons enjoy their fundamental rights and this applies to both the victims and the accused persons. As for the allegation of interference by the accused himself, I associate myself with the opinion expressed in Rep vs. Dwight Sagaray & Others High Court Criminal Case No. 61 of 2012 that:

“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others..., at least some facts must be placed before the court otherwise it is asking the court to speculate.”

43. Therefore, the Court in making a determination must consider whether such safeguards, if invoked, are unlikely to have any impact of the safety of the witnesses including barring the accused from stepping in the jurisdiction where the witnesses are as was held in Republic vs. Zacharia Okoth Obado & 2 Others [2018] eKLR. In that case the Learned Trial Judge found that:

“On the whole question of the likelihood of interference with the case witnesses and intimidation this cannot be taken lightly. The Accused persons have been supplied with the witness statements and have the names and contacts of those who have adversely mentioned them in connection with the case. The manner in which the deceased met her death is in the public domain and the evidence has also been provided. I find that given the circumstances of this case the likelihood of the adversely mentioned

Accused persons contacting the witnesses can inflict genuine fear and anxiety to them. I think that the mere release of the Accused is sufficient to inflict anxiety and fear leading to intimidation of potential witnesses.”

44. Notwithstanding that finding the Learned Trial Judge proceeded to grant the 1st Accused bail on the following terms:

1. The 1st Accused may be released upon deposit into court of cash bail in the sum of Kshs. 5 million.
2. In addition the 1st Accused will provide two sureties of Kshs. 5 million each.
3. The 1st Accused must deposit all his travel documents including his Kenyan, East African and Diplomatic passports which he holds.
4. The court will be at liberty to cancel this bail and bond and to remand the 1st Accused in custody if any of the following conditions, which I hereby set as part of the terms upon which he is released, are breached:
 - i. He shall not cause an adjournment in this case.
 - ii. He shall report once a month to the Deputy Registrar of this court.
 - iii. He shall not go anywhere within 20 kilometers of Homabay County boundary on all sides of that County.
 - iv. He shall not contact or intimidate, whether directly or by proxy any of the witnesses in this case as per the Witness Statements and other documents supplied by the State to the defence.
 - v. He shall not intimidate the parents, siblings or other close relations of the deceased.
 - vi. He shall refrain from mentioning or discussing the deceased and or this case in gatherings or political meetings.

45. What comes out from the said decision is that there are in place constitutional and legislative mechanisms in place to protect witnesses who are shown to be under real threat if an accused person is released.

46. However, once an accused is arraigned before the trial court, whether or not an application for release on bail is made, it is the duty of the trial court to deal with the issue. It is for the prosecution to present before the court the existence of compelling reasons and in the absence of so doing the accused person is entitled to be released on bail. However, where compelling reasons are given nothing bars the court from denying the release of the accused on bail for a definite period. In other words, the trial court may find from the material placed before it that at that stage it would not be just to release the accused on bail and that the application may be renewed at a later stage when the circumstances have changed, for example where vulnerable witnesses have testified. Either way, the court is obliged to make a ruling on the application. In other words, the Court ought to make a specific finding as to whether or not it is satisfied that compelling reasons exist that militate against the admission of the accused to bail at any particular stage of the proceedings.

47. In this case, it is clear that no ruling has been made in the application for bail. To that extent, I agree with the applicant that the order made on 23rd June 2020 may well have amounted to denial of bail without the ruling having been made on his application.

48. Section 367 of the *Criminal Procedure Code*, 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.

49. Since the trial court has not made a ruling on the application, the order which commends itself to me and which I hereby make is that **Mavoko Sexual Offence Case No. 27 of 2020** be mentioned before the trial court on 8th July, 2020 with a view to making a determination on whether or not to admit the applicant to bail pending trial.

50. It is so ordered.

Read, signed and delivered in open Court at Machakos this 6th day of July, 2020.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Onditi for the Applicant

Mr Ngetich for the Respondent

CA Geoffrey