



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL REVISION NO. 81 OF 2020**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**LEONARD KIPSANG CHANGTOEK.....RESPONDENT**

*(Being a ruling from the original order of Hon. G. N. Wakahiu CM, delivered on 22/06/2020*

*in the Chief Magistrate's Court in Criminal Case No. 422 of 2015, Republic v. Leonard Kipsang Changtoek)*

**RULING**

**THE CASE FOR THE PROSECUTION**

1. The Senior Assistant Director of Public Prosecutions, Mr Zachary Omwega, has pursuant to the provisions of sections 362 and 364 (1) (c) of the 2010 Constitution of Kenya, applied under certificate of urgency for revision of the Chief Magistrate's order that was issued releasing the accused on bail following his arrest for absconding bail. The said bail was granted to the applicant on 22/06/2020 by that lower court
2. The application is supported by four (4) grounds that are set out on the face of the notice of motion and a twelve (12) paragraphs supporting affidavit of Zachary Omwega.
3. The grounds in support of the application are as follows. First, the accused had been granted bond by the Hon. Chief Magistrate (Hon. G.N. Wakahiu) vide that court's order of 22/06/2020, despite the fact that he had absconded upon conspiring with other people who are under investigation for causing the disappearance of the court file.
4. Secondly, the bond of the accused had been cancelled by another Hon. Chief Magistrate (Hon. W. Juma). Thirdly, the facts that led to the cancellation of the bond are contained in the subordinate court file, which the learned Chief Magistrate (Hon. G. N. Wakahiu) ought to have considered when he reinstated the bond of the accused. The fourth ground relates to investigations of the court file, which are not necessary in determining the instant application. It is therefore not necessary to set out the contents of that ground.
5. Furthermore, it is equally unnecessary to set out the averments in the supporting affidavit for reasons that will appear in the body of this ruling.

**THE SUBMISSIONS OF THE ACCUSED**

6. Mr. Kilele made a short oral submission in court. He first submitted that there is no competent application for revision in this court. The prosecution has filed their application by way of a notice of motion under sections 362 and 364 of the 2010 Constitution of Kenya, which provisions in law do not exist. The prosecution should have sought revision through a letter and not through a notice of motion.
7. Furthermore, he submitted that bail may be granted at any stage of the proceedings. In the instant application the court did not exercise its discretion wrongly in admitting the accused to bail.
8. He also submitted that there is no limitation as to the number of applications an accused may make for bail and that the accused has not been charged with the offence of "absconding."
9. Mr. Kilele continued to submit that under section 364 (1) (c) of the Criminal Procedure Code (Cap 75) Laws of Kenya the order of the lower court may not be stayed for more than 14 days.
10. It was also his submission that the accused is not a flight risk. And that if an accused is a flight risk, the risk may be cured through a requirement of a suitable surety.

11. Based on *Mwakio v. Republic [2011] e-KLR*, Mr. Kilele submitted that an order of stay of proceedings in criminal cases should only be made in exceptional circumstances and sparingly.

12. Based on the foregoing, Mr. Kilele urged the court to dismiss the application.

#### **Response of the prosecution to the oral submissions of the accused.**

13. Mr. Wanga for the applicant (the prosecutor) submitted that an application for revision may be initiated by an application through a notice of motion under sections 362 and 364 of the Criminal Procedure Code. He also submitted that the reference to sections 362 and 364 of the Constitution is a typing error and the sections refer to the Criminal Procedure Code and not the Constitution.

14. Furthermore, he submitted that there is no charge of absconding in law. The bail of the accused was cancelled because he had absconded. The respondent was arrested following the issuance of a court warrant of arrest. He therefore urged the court to grant their application because the accused was a flight risk.

#### **Issues for determination.**

15. I have considered the submissions of both counsel. I have also borne in mind the applicable law. I find that the following are the issues for determination.

- 1) Whether there is a competent application for revision in this court.
- 2) Whether an order reinstating the bail granted to the accused following his arrest for absconding is revisable.
- 3) What are the final appropriate orders?

#### **ISSUE 1**

16. It is the contention of Mr. Kilele for the accused that the application for revision is incompetent for two reasons. First, it is brought by way of a notice of motion under section 362 and 364 of the 2010 Constitution of Kenya, which provisions do not exist. Mr. Wanga for the respondent submitted that this was a typing error. According to Mr. Wanga, sections 362 and 364 refer to the Criminal Procedure Code and not the 2010 Constitution of Kenya. I find that sections 362 and 364 of the Criminal Procedure Code are the proper provisions that govern the initiation, hearing and determination of the application for revision. In the circumstances, I agree with Mr. Wanga that these are typing errors

17. The second reason advanced by Mr. Kilele for his submission is that the application is incompetent in that it should have been filed by way of a letter and not through a notice of notice. He cited the Court of Appeal decision in *Goddy Mwakio & Another v. Republic, Criminal Application No. NAI 8 OF 2010 (CR. 6/2010)*, in which that court dismissed an application for stay of criminal proceedings on the ground that there was a dispute over the subject plot which was the subject matter in a civil case. Counsel for the respondent submitted that the application was properly brought by way of a notice of motion. In this regard, the provisions of section 362 of the Criminal Procedure Code are relevant. By section 362 of the Criminal Procedure Code, the High Court has power to call for and examine the record of any criminal proceedings before any subordinate for purposes 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 such subordinate court.”*

18. It is clear from the foregoing provisions of the law that there is no prescribed procedure to be used in applying for revision in the High Court. It is also clear that matters which are the subject of revision are the legality of any finding, sentence or order. Additionally, the regularity of any proceedings in the subordinate court is also subject to revision.

19. All that a person or party who desires an order, finding or sentence to be revised is to draw the attention of the Court either by letter, notice of motion or any other means. The High Court may on its own motion call for the record of a lower court to satisfy itself that the proceedings are regularly conducted or not. The attention of the court may be drawn by a newspaper or a radio broadcast or any news media.

20. Furthermore, it is important to point out that the High Court may act on its motion to revise a matter even where the matter has been brought to its notice by an aggrieved party, who has a right of appeal. See *Regina v. Ajit Singh s/o Vir Singh [1957] EA 822 cited in Procedures in Criminal Law in Kenya, by Momanyi Bwonwong'a, East African Educational Publishers 1994, at pages 311, 312.*

21. However, in applying for revision the person or party doing so must set out the reasons upon which the revision is based, as this will enable the revising court to see at a glance the basis of the revision. This is a requirement, which will expedite the revision of the order or the matter sought to be revised. See *Uganda v Welli [1966] EA 324 cited in Procedures in Criminal Law in Kenya, supra, at page 310.*

22. Furthermore, I agree with counsel for the accused that an accused may be granted bail at any stage of the proceedings. This is, however, subject to there being no compelling reasons to deny him bail. I also agree that there is no limitation as to the number of applications an accused may make in court. This may be so as long as the said applications do not amount to the abuse of the court process.

23. In view of the foregoing, I find that the attention of the court was properly drawn to the order reinstating the bail of the accused by way of a notice of motion. I therefore find that the application is competent and is properly before the court.

## **ISSUE 2**

24. The order that is sought to be revised arises from a ruling of the chief magistrate (Hon G.E. Wakahiu), which reinstated the bail of the accused following its cancellation by the trial chief magistrate (Hon. W. Juma). The flight risk cannot be cured by the provision of a suitable surety. The abscondment of the accused and his being brought to court under a court warrant of arrest is in itself ample proof of the accused being a flight risk within the meaning of article 49 (1) (h) of the 2010 Constitution of Kenya.

25. Additionally, it is a fundamental rule of law that a person should not benefit from his own wrong doing. I therefore find that the order of reinstating the bail of the accused breached this fundamental rule of law. It seems to me that the lower court was rewarding the accused based on his own wrong doing. In the circumstances, the order of reinstatement is hereby revised by setting it aside.

## **ISSUE 3.**

26. In the premises, the revision application succeeds with the result that order of reinstatement of the bail of the accused is hereby set aside. The trial court now should continue to enforce the order against the surety or sureties.

**Ruling signed, dated and delivered at Narok this 21<sup>st</sup> day of July 2020 through video link in the presence of Mr. Karanja for the applicant and Mr. Kilele for the Respondent.**

**J M BWONWONG'A**

**JUDGE**

**21/07/2020**