



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. 35 OF 2019

REPUBLIC.....APPLICANT

VERSUS

MATHIAS KAZUNGU JOHN.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the Applicant

Respondent in person

RULING

The Respondent faces the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The Respondent pleaded not guilty to the alleged offence and subsequently admitted on bond terms. The Applicant seeks a review of the terms of bond initially granted in the Defilement case citing that he had absconded attending court proceeding in which he is the accused person until he was rearrested on 16th June 2019 after being on warrant of arrest for a period of 12 months which 18 sittings extending warrant of arrest.

The Applicant asserted that they raised concerns regarding the breach of bond terms by the Respondent and had proved that he was a flight risk but however, the lower court chose to ignore the same and proceeded to admit the accused on fresh bond terms on the 25th of July 2019 even after the sureties had withdrawn themselves.

Determination

In terms of Section 362 of the Criminal Procedure Code, the High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself to the correctness, legality and propriety of any finding sentence or order recorded or passed, and as to the regularity of the proceedings. I shall proceed to examine the correctness, legality and propriety of the record of proceedings herein as under.

In terms of Article 49(1)(h) of the Constitution, every accused person is entitled to bail pending trial, unless there are compelling reasons for its refusal. Section 123A of the Criminal procedure code lays down the parameters for the grant of the right to bail as under:

“123A. (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 fulfillment 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 (whatever 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.

In light of the foregoing provisions of the law, the accused herein is facing the offence of defilement and he is entitled to be presumed innocent until the contrary is proved. If he is denied bail, the same would not amount to derogation of his right to be release of bail pending trial but rather the simple reason that the court would have found a compelling reason within the meaning of the constitution to deny bail in a certain case. The Respondent has previously been admitted on bail but failed to attend court proceeding a whole year and he has failed to give sufficient reasons to the satisfaction of the court as to why he failed to attend court. That alone makes him illegible to be admitted on fresh bond terms.

In that regard, I turn to the Judicial policy on bail as set out in Kenya Judiciary’s Bill and Bond Policy Guidelines, March 2015 at p.25 recommends the parameters for the grant and refusal of bail:

“The following should apply to 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 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 of the right to bail stipulated under section 123A of the Criminal Procedure Code is applicable in the circumstances; or*
- d.*
- e.*
- f.*
- g. That it is the public interest to detain the accused in custody.”*

In the foregoing, it is the court’s view that the Respondent having previously failed to attend court proceedings while on bond terms, he ought not to have been granted fresh bond terms. The decision by the Learned Magistrate to grant the Respondent fresh bond terms after having missed court for a whole year was not only erroneous but infringes upon the parties’ right to a fair trial. Justice ought to be dispensed expeditiously. I therefore order that the charge of defilement be expedited to quick determination.

Orders

- 1. For the reasons above, the application for revision made by the applicant herein to review the trial court’s decision to grant fresh bond terms to the Respondent is hereby allowed.**
- 2. The fresh bond terms granted by the Senior Principal Magistrate at Kilifi is hereby set aside. The Respondent shall proceed with trial in custody.**
- 3. That the defilement matter be dispensed with expeditiously and the hearing on a date to be fixed at a mention thereof for that purpose within fourteen days hereof.**

It is so ordered.

DELIVERED, DATED AND SIGNED AT MALINDI THIS 1ST OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state

2. The respondent