



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL REVISION NO. 2 OF 2019

SALLY TUWEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In Criminal as in Civil process, an appellate Court may only interfere with the exercise of discretion by a trial Court where it can be shown that the latter was wrong in taking into account irrelevant matters or failing to take into account a material factor and thereby reaching an unjust decision, or where the Court is plainly wrong on the applicable law. See *Wanjema v. R* (1971) EA 493 with regard to discretion in sentencing and *Mbogo v. Shah* (1968) EA 93 with regard to civil cases, where Newbold P. put the principle admirably as follows:

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice;

2. The revision before the Court seeks to challenge the exercise of discretion of the trial Criminal Court in cancelling the bail, previously granted to the applicant, on account of perceived interference with witnesses. From the record of the trial Court, it is apparent that the Court moved to cancel the bail when a potential witness told the Court that the applicant had approached him with a view to having the matter settled by withdrawal of the complaint.

3. The applicant is facing a charge of benefiting from child prosecution contrary to section 15 (a) of the Sexual Offences Act No. 3 of 2006, the particulars of which are:

SALLY TUWEI: On diverse dates between 23rd and 26th day of September 2018 at [particulars withheld] in Koibatek Sub-County within Baringo County knowingly permitted JWM, a girl child aged 15 years to remain in her premises for the purposes of causing her to be sexually abused by BENARD KIPROTICH NG'ETICH who was her houseboy.

4. While Criminal charges are generally subject to withdrawal by a complainant under section 204 of the Criminal Procedure Code, sexual offences may by virtue of section 40 of the Sexual Offences Act be withdrawn by the DPP only.

5. Counsel for the applicant urged the Court to revise the Order for cancellation of the bail order on the ground that the applicant was given an opportunity to explain her conduct before being found guilty of interfering with witnesses. It was contended that the finding of the trial Court had for that reason infringed upon the applicant's fair trial rights under Articles 49, 50 and 25 of the Constitution.

6. The Revision was not opposed by the DPP whose Counsel pointed out that the applicant may in approaching the witness for purposes of seeking a withdrawal of the charges may have been labouring under a mistake that the charges before the Court were subject to withdrawal provisions of section 204 of Criminal Procedure Code, and, therefore, ought not to have punished from pursuing the settlement out of Court and it was not, therefore, a compelling reason to warrant the denial of bail, and, consequently, to cancellation of the bail previously granted in the matter.

7. The record of the trial Court for 24/1/18 is as follows:

“24.01.2018

Coram Before Hon. J. Nthuku – SRM

PC: Miss Mburu

CC: Beatrice

Accused: Present

Court Prosecutor:

I am ready.

Yogo for accused person

I have been instructed that they were having discussions i.e the accused and JM have been having discussions with regard to the involvement of the accused in the alleged offence and they are not interested in pursuing the case.

Court:

Section 37 and 40 of the Sexual Offences Act provide that the Attorney General is the only person with powers to discontinue a sexual offence and whatever the counsel has submitted amounts to interference with witness and a reason for bond cancellation.

Yogo:

I was quite apprehensive of stating the instructions I got from my client. It's not my client who apprehended the said witnesses I initiated the talks. She was only responding to a request/approach from the family of the minor therefore I submit that my client did not do an act of interference or intimidation of witnesses as that was not her intention. I therefore pray that the bail condition given by this court be maintained and with the court's directions I will be seeking we do proceed with the matter on another date to allow me have further consultation with my client/prepare.

Mburu:

On the Application for adjournment, counsel was well aware the matter was for hearing. He hasn't been ambushed. He had been supplied with statements and the fact that there were attempts to have an out of court settlement an adjournment would cause trouble to us; the witnesses may be intimidated or lured not to attend court so as to sabotage the case.

JM Male Adult Sworn in Kiswahili:

I am JM I stay in Timboroa. It's the accused person herein who approached my aunt Sarah are in court and gave her numbers saying I need to call her. I called her and she said she wants us to deal with the case outside court. I told her as a cousin to the child I can't withdraw the case and it's the court to decide. We never approached her. She has come to our home to twice to try settle this case.

RULING

From the submissions of the defence counsel, its evidence there have been attempts to settle this case outside court which is against the Law. The person mentioned as the contact person on the complainants side has stated on oath that those were efforts by the accused who visited their home twice to have this case settled outside court.

The Constitution of Kenya provides that an accused person has a right to bond but those rights shall be denied if there are compelling reasons i.e Article 49 (1) b of the Constitution one of the compelling reasons for denial of bond is that the accused is likely to interfere with witnesses that he may suppress any evidence incriminating him. By approaching the relatives of the child and holding discussions which issue was raised by the defence counsel whose words were **"the complainant/her relatives are not interested in pursuing this case after the discussions"** this is clear case of interference with witnesses in a sexual offence case involving a minor. I hereby cancel bond for the accused person to forestall further interference until the case is determined.

She is remanded in custody. Since the defence for the second consecutive hearing isn't ready I grant them an adjournment and make it as the last one on the part of the defence."

8. I have considered the matter and I do not find in the record of the trial Court any evidence that the applicant had sought actively to interfere with the witness or witnesses in the trial as to influence their testimony in a particular way or to prevent them from so testifying before the Court. What was sought was the withdrawal of the complaint by settlement of the case out of Court not interference with evidence or witnesses. In the words of the witness, "*She has come to our home to twice to try settle this case.*"

9. In seeking the withdrawal of the complaint, the applicant may - and she gets the benefit of the doubt - have only sought to pursue the avenue of withdrawal of complaints available in regular Criminal proceedings under section 204 of the Criminal Procedure Code, which provides as follows:

204. If a complainant, at any time before a final order is passed in a case under this Part, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the Court may permit him to withdraw it and shall thereupon acquit the accused.

10. The prohibitive section of the Sexual Offences Act which outlaws withdrawal of a complainant by an individual complainant is in the

following terms:

40. The decision as to whether the prosecution or investigation by any police officer of a complainant that a sexual offence has been committed should be discontinued shall rest with the Attorney General [DPP].

11. I would respectfully agree with the DPP that the Sexual Offences regime being slightly different for the ordinary Criminal Procedure which allows withdrawal of complaints under section 204 of the Criminal Procedure Code the trial Court ought to have explained to the accused/applicant the different method of seeking discontinuance of a Sexual Offence charge is only by decision of the Attorney General [DPP] rather than the victim complainant, and then warn her of any attempt at interfering with witnesses, for which bail may properly then be denied or cancelled, if already granted.

12. In its order subject of this revision the trial Court, however, appeared to already find the applicant guilty of the offence of interfering with witnesses contrary to section 37 of the Sexual Offences Act, as follows:

“Court:

Section 37 and 40 of the Sexual Offences Act provide that the Attorney General is the only person with powers to discontinue a sexual offence and whatever the counsel has submitted amounts to interference with witness and a reason for bond cancellation.”

It is clearly a violation of the person’s fair trial rights if she were found guilty under the provision of the offence of interference without trial in accordance with the Constitution and the applicable law.

Conclusion

13. Accordingly, for the reasons set out above, in exercise of the Court’s power of revision under section 364 (1) (b) of the Criminal Procedure Code, I find that the trial Court’s order made on 24/1/19 cancelling the applicant’s bail on the ground of interference with witnesses was not properly taken as it may have punished a lawful act of seeking withdrawal of complainant, mistakenly pursued in accordance with regular trial procedure of section 204 of the Criminal Procedure Code, and following a finding of guilty for the offence of interference under section 37 of the Sexual Offences Act without trial in accordance with the law.

Orders

14. The Revision Court, therefore, orders that the applicant’s bond shall be restored upon the same terms as she had earlier been placed by trial Court, and, consequently, there shall be an order for her immediate release from custody on bail pending trial.

15. For avoidance of doubt, the bail conditions set by the trial Court and security deposited for the applicant remain valid and in force until further orders of the trial Court. The trial Court shall warn the applicant appropriately against interference with witnesses or evidence.

16. The matter shall proceed to hearing before the trial Court on 25/2/19 as scheduled, and for that reason the trial Court file shall be returned to Eldama Ravine Law Court forthwith.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Yogo for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent